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IN THE
CIRCUIT COURTS OF APPEALS AND
DISTRICT COURTS OF THE
UNITED STATES

WITH TABLE OF CASES IN WHICH REHEARINGS HAVE BEEN
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¹ Became Circuit Judge March 18, 1918.

² Appointed March 21, 1918.

³ Appointed April 12, 1913.

⁴ Resigned May 20, 1918.

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⁵ Appointed April 6, 1918.⁶ Died May 11, 1918.

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⁷ Appointed May 3, 1913.

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Nov. 14, 1917.
Samarinda, The, 244 F. 744. Rehearing denied Nov. 19, 1917.

EIGHTH CIRCUIT.

Smith v. Smith, 247 F. 461. Rehearing denied May 24, 1918.
248 F. (xv)†

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

COGGESHALL LAUNCH CO. v. EARLY.

(Circuit Court of Appeals, Ninth Circuit. February 4, 1918. Rehearing
Denied April 1, 1918.)

No. 2975.

1. SHIPPING Ⓒ209(3)—PETITION FOR LIMITATION OF LIABILITY—ANSWER—
SUFFICIENCY.

A petition for limitation of liability, filed by the operator of a vessel, alleged that it was used by petitioner in the business of transporting passengers and freight; that on one of its trips deceased was a passenger on the lower deck, on which deck there was a doorway, through which freight was loaded upon and discharged from the vessel; that, when the doorway was not being used for that purpose, it was closed by a heavy sliding door; that before departure the door was closed, and that on the voyage deceased, either by himself or in company of others, without the consent or knowledge of petitioner, and without any authority to do so, shoved back the sliding door, thus opening the doorway; that it was the custom of the launch company to protect the doorway by placing, about four feet from the floor of the deck, a heavy horizontal bar, but that on the occasion in question, the door having been pushed back without the knowledge of petitioner or any of its employes, the bar was not so placed, and the opening was thus unprotected. The answer of complainant, the mother of deceased, alleged that it was the custom of petitioner to permit the door to remain open when the vessel was on her voyage, and to place across the open space the heavy bar for the purpose of preventing passengers from falling into the water; that deceased, while a regular passenger on the boat, with his fare paid, and while the boat was making one of its regular trips, fell through the open door and was drowned, by reason of the negligence of petitioner in failing to place the bar or other safeguard across the doorway; and that petitioner was negligent in operating the vessel with an insufficient crew. *Held*, that the answer, which set forth that deceased was a regular passenger and, having always been accustomed to see the bar placed across the doorway, relied upon its being so placed for his protection, was sufficient to sustain a decree for the claimant.

2. SHIPPING Ⓒ209(3)—EVIDENCE—SUFFICIENCY.

In a proceeding to limit liability of the operator of a vessel for damages on account of the death of a passenger, who fell through an open doorway and was drowned, evidence *held* to establish the negligence of the operator of the vessel in failing to have the doorway guarded as was

its custom; it appearing that the vessel at the time was being operated with a crew short of that required by law.

3. SHIPPING Ⓒ209(3)—EVIDENCE—SUFFICIENCY.

In a proceeding to limit the liability of the operator of a vessel on account of the death of a passenger, who fell through an open doorway and was drowned, it appearing that the doorway had always previously been protected, evidence *held* not to require or justify a finding of contributory negligence on the part of the passenger.

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

Petition by the Coggeshall Launch Company, a corporation, for limitation of liability, in which the prosecution of an action brought by Eliza A. Early in the state court to recover damages growing out of the death of her son by reason of the alleged negligence of the Launch Company, operator of a vessel, and the owner, was enjoined. Eliza A. Early thereupon filed her claim in answer to petition for limitation of liability. From a decree limiting the liability, and awarding claimant as damages \$5,000 and costs, to be satisfied out of a stipulation given, the Launch Company appeals. Affirmed.

Clarence Coonan, of Eureka, Cal., and Nat Schmulowitz, of San Francisco, Cal., for appellants.

W. Ernest Dickson, of Eureka, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. It appears from the record that the claimant in the present case had brought an action in the superior court of Humboldt county, Cal., to recover damages growing out of the death of her son, George B. Early, by reason of the alleged negligence of the appellant launch company, operator, and the Hammond Lumber Company, owner, of the steam ferryboat Antelope. The launch company and the lumber company thereupon commenced a proceeding in the court below for the limitation of their liability, in which proceeding the prosecution of the action brought in the state court was enjoined, and the plaintiff in that action thereupon filed her claim and answer to the petition for the limitation of liability in the court below, upon the trial of which cause the court entered a decree limiting the liability as prayed for and awarding the claimant as damages \$5,000 and costs against the launch company, to be satisfied out of the stipulation that was given in the proceeding. The present appeal is by the launch company from that portion of the decree.

[1] It is insisted on behalf of the appellant that the answer filed by the claimant in support of her claim was fatally defective, but we cannot so regard it. The petition for the limitation of liability alleged, among other things, that the Antelope was at all of the times in question used and employed by the launch company in the business of transporting passengers and freight on Humboldt Bay, between the city of Eureka and the town of Samoa, and that on one of those trips, on the 15th day of January, 1915, the deceased was a passenger on the

lower deck of the boat, on which deck there was a doorway through which freight was loaded upon and discharged from the vessel; that when such doorway was not being used for that purpose it was closed by a heavy sliding door, and that before the departure of the boat from Samoa on the occasion in question the said doorway was closed by drawing to the sliding door, and that on the voyage the deceased, either by himself or in company with others, without the consent or knowledge of the petitioners, or either of them, and without any authority so to do, shoved back said sliding door, thus opening the said doorway; that it was the custom of the launch company to protect the doorway, when open, by placing, about 4 feet from the floor of the deck, a heavy horizontal bar across the opening, fitting the ends thereof into brackets fastened on either upright jamb, and locking the bar by inserting a pin in one end thereof; but that on the occasion in question, the door having been pushed back without the consent or knowledge or authority of the launch company or of any of its employés, the bar was not so placed and the opening was thus unprotected, resulting in the falling through it into the bay of the deceased, and his consequent drowning.

In her answer the claimant, after denying certain of the material allegations of the petition, alleged, among other things, that at the time in question and for a long time prior thereto it was the fixed habit and custom of the petitioners to negligently permit the door to remain open when the vessel was on her voyage, and its like custom to place across the open space the heavy bar for the purpose of preventing its passengers from falling through the open space into the water, and that at the time in question, while a regular passenger on the boat, with his fare paid and while the boat was making one of its regular trips, the deceased fell therefrom into the water, and that the drowning was caused by the negligence of the petitioners in neglecting to place the bar or other safeguard across the open doorway, and that the petitioners were further negligent at the time in question by operating the said boat with an insufficient crew, there then being one man short of the number required by the rules and regulations provided by the United States; that the employé whose duty and custom it had always been to place the said bar as a protection across the said doorway was not then on the boat, and no one had been employed to fill his place; that the deceased had been for a long time prior to the accident a regular passenger on the boat, going daily to and from his work at Samoa to and from his home in Eureka, and had always been accustomed to see the bar across the doorway, and relied upon its being in place for his protection; and that, relying upon the bar being in place as usual and upon the duty of the petitioners as common carriers to place either the said bar in its proper position or other proper protection, and by reason of there being no proper protection at the time in question, and not because of his own negligence, the deceased fell through the open doorway into the waters of the bay and was drowned.

We think the answer sufficient.

[2] On the trial of the case much testimony was given on behalf of both parties, some of which was inconsistent and conflicting, from which, together with other evidence introduced, the court found that

the launch company was guilty of the negligence alleged against it, and that the deceased was not guilty of contributory negligence. After a careful examination of the record, we are unable to hold that the court was wrong in either respect. By the certificate of inspection of the launch, she was required to carry as a complement of her officers and crew one licensed master and pilot, two deck hands, one licensed chief engineer, and one fireman. The case shows that a large number of the many passengers that the boat carried between Eureka and Samoa habitually, and on the occasion in question, traveled on the lower deck, which was entirely inclosed except for the sliding door, which was about 8 feet wide, intended for the taking on and carrying off of freight, which door, however, was often opened by the passengers during the respective trips, and the doorway used by them in leaving the boat. Recognizing the danger necessarily resulting from the opening of the door, the government inspectors, it appears, ordered the launch company to keep in place when the door was opened the bar that has been mentioned; and such, it appears from much of the testimony given on behalf of the claimant, was its invariable custom, except in the instant case.

The negligence of the launch company in that regard we think sufficiently appears from the testimony of the president, Coggeshall. It is undisputed that the deceased was a passenger on the boat that left Samoa for Eureka in the evening of January 15, 1915. The witness referred to was questioned and answered as follows:

"Q. Whose duty was it to close that door on leaving Samoa for Eureka? A. If it is not otherwise closed, it is No. 2 deckhand's duty. We have No. 1 and No. 2 deck hands. Q. On January 15th who was No. 2 deck hand? A. We had no No. 2 deck hand; No. 1 deck hand was sick, and so No. 2 deck hand was acting in his place. Q. Was it No. 1 or No. 2 deck hand's place to close the door? A. No. 2. Q. No. 1 acts as purser and takes the tickets? A. On her main deck; No. 2's business is to look out to see that the cargo port is closed, or the bar is put up. Q. On January 15, 1915, who was No. 2 deck hand? A. Mr. Knudsen. Q. Had it ever been the duty of Nick Muster to close that lower door? A. Not to my knowledge; he is No. 1 deck hand, or purser; his business is to look out for the tickets. No. 2 deck hand attends to the freight and things between-decks. Q. After the cargo port is closed, where does the duty of No. 2 deck hand next take him? A. No. 2 is down between-decks. After he has made her safe he goes upon her passenger deck; his next duty is to assist in the disembarkation of the passengers when they get on the Eureka side. Q. After the cargo port is closed, what is the next duty on the boat of No. 1 deckhand? No. 1—he stands by on deck. Both men are preparing, standing by, until such times as they shall go to Eureka; they are subject to any orders of the master of the boat; if he wants a deck hand, he whistles. Q. When you refer to the upper deck, you mean which deck? A. The passenger deck; the between-decks is the freight deck."

There was conflict of testimony as to which one of the two deck hands was charged with the duty of looking after the doorway—the witnesses for the claimant testifying that the one who was absent always put up the bar, whereas the witnesses for the petitioners testified that it was the duty of the other deck hand to do so; but that it was the duty of one or the other to see that the bar was in place when the door was opened we think beyond question, and that the only deck hand on the boat at the time in question was engaged in acting as purser and

taking the tickets of the passengers appears from the testimony of the president of the company. There was also positive testimony on behalf of the claimant that as the boat left Samoa on the evening in question with the deceased, among many other passengers, the door was open and the bar was not up.

We think it clear that there was obvious negligence on the part of the launch company, for it was certainly the duty of the company either to prevent the door from being opened by the passengers, or to have the bar in place to prevent just such accidents as happened in this instance, in the event the door should be opened. That it was the invariable habit of the passengers to open the door from time to time abundantly appears, although it further appears that the company made various efforts to stop such proceeding.

[3] We also agree with the court below that the facts and circumstances of the case were not such as to require or justify a finding of contributory negligence on the part of the deceased. "This contributory negligence," said the learned judge, "is said to have consisted in his assisting in opening the door, and in his failure to observe that the bar was not in place. Contributory negligence is an affirmative defense, is always relative, and the burden of establishing it is upon the party who asserts it. It must be observed in this connection that deceased did not open the door at all at the place where he fell through, so that what he did did not contribute in any degree to the lack of protection at that place occasioned by the absence of the bar. But the opening of the door in any event was not an unlawful act, nor was it one negligent per se, because it was never attended by danger when the bar was in place. Nor can it be said that the mere approach of deceased to the opening already made by others was negligent, as he had every reason to suppose that there was no danger in so doing, for at all times theretofore the bar had been in place. Nor was he bound under all the circumstances to assure himself that the bar was not in place at that time, because he was bound only to the exercise of such care as an ordinary prudent person would have exercised under the circumstances. He could not anticipate, and was not bound to anticipate that the vessel had left Samoa with this doorway unprotected. He, with the other passengers, had become so accustomed to the presence of the bar that he had no reason to suspect that it was not in place, as indeed there is no good reason for its not being in place. From all the surrounding circumstances I am compelled to the belief that, with his attention fixed on the door, which had stuck, he approached it with his side to the doorway, without observing or pausing to observe its unprotected condition, but relying on the fact that the bar had always been in place. It was between 5:30 and 6 o'clock in the evening of January 15th, and, while not yet dark, it was not wholly light; and, though an examination would have disclosed to him the absence of the protecting bar, his failure to make such examination, having in view all of the circumstances, can neither excuse such absence nor charge him with such degree of negligence as to relieve petitioners from responsibility."

The judgment is affirmed.

GRIFFIN v. UNITED STATES.

(Circuit Court of Appeals, First Circuit, January 31, 1918.)

No. 1280.

1. CRIMINAL LAW ⇨1036(1)—APPEAL AND ERROR—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

Defendant is not entitled to have objections to the admission of evidence considered on error, when they are not raised in the court below, particularly where the objections could have been obviated, if raised.

2. CRIMINAL LAW ⇨1036(1)—TRIAL—OBJECTIONS.

In a prosecution for depositing in the mails nonmailable matter, defendant, if not satisfied that the post cards and letter involved contained nonmailable communications when received, should have stated that as a ground for their rejection, or raised it by motion for directed verdict, and cannot for the first time raise it on writ of error.

3. POST OFFICE ⇨31—OFFENSES—STATUTE—CONSTRUCTION.

Under Penal Code (Act March 4, 1909, c. 321) § 211, 35 Stat. 1129 (Comp. St. 1916, § 10381), declaring that every obscene, lewd, or lascivious, and every filthy, letter, writing, or other publication of an indecent character, shall be nonmailable, a letter, the language of which was calculated to arouse, or implant in the minds of those into whose hands it might come, lewd or lascivious thoughts, or having a tendency to deprave or corrupt the morals, is nonmailable.

4. POST OFFICE ⇨33—OFFENSES—STATUTE—CONSTRUCTION.

Under Penal Code, § 212 (Comp. St. 1916, § 10382), declaring that any postal card upon which may be written any delineations, epithets, terms, or language of any lewd, lascivious, obscene, libelous, scurrilous, defamatory, or threatening character, or calculated and obviously intended to reflect injuriously upon the character or conduct of another party, is nonmailable, post cards tending to reflect injuriously upon the character and conduct of a woman to whom they were addressed, and which contained language of a scurrilous and defamatory character, are nonmailable.

5. POST OFFICE ⇨50—EVIDENCE—OFFERS—REJECTION.

In a prosecution for knowingly and willfully depositing in the mails nonmailable matter directed to a woman, the rejection of testimony that there were others who were angry at her and had more motive than defendant is not reviewable, where it was not offered in connection with other evidence showing an opportunity on the part of such persons to commit the crime; there being no evidence that such persons lived in the town where the letters and post cards were mailed.

In Error to the District Court of the United States for the District of Massachusetts; Jas. M. Morton, Jr., Judge.

Michael J. Griffin was convicted of unlawfully and knowingly depositing and causing to be deposited in the mails, in violation of Penal Code, §§ 211, 212, certain nonmailable matter, and he brings error. Affirmed.

Richard J. Talbot, of Springfield Mass. (Charles H. Moore, of Boston, Mass., on the brief), for plaintiff in error.

Lewis Goldberg, Asst. U. S. Atty., of Boston, Mass. (Thomas J. Boynton, U. S. Atty., of Boston, Mass., on the brief), for the United States.

Before DODGE, BINGHAM, and JOHNSON, Circuit Judges.

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

BINGHAM, Circuit Judge. This is a writ of error from judgments of the United States District Court for Massachusetts on two indictments, which were tried together and later consolidated for the purposes of this writ.

The first indictment was brought under section 211 of the Penal Code, and charged that the defendant "on or before the twenty-fifth day of November, in the year one thousand nine hundred and fifteen, at Springfield, did unlawfully and knowingly deposit and caused to be deposited in the mails of the United States of America for mailing and delivery certain nonmailable matter; that is to say, a certain obscene, lewd, lascivious, and filthy letter, inclosed in a certain envelope, then and there addressed and directed as follows"—setting out the name and residence of the addressee, a sufficient portion of the letter to identify it; and stating that the remainder was too obscene, lewd, lascivious, and filthy to spread upon the record.

The second indictment was brought under section 212 of the Penal Code, and contained eight counts; but only the second, fourth, fifth, sixth, seventh and eighth were submitted to the jury. In the second count it was alleged that the defendant "on or about the fifth day of November, in the year nineteen hundred and fifteen, at said Springfield, did unlawfully and knowingly deposit and cause to be deposited in the mails of the United States of America for mailing and delivery a certain postal card, upon which, to wit, upon the back thereof, delineations, epithets, terms, and language of a libelous, scurrilous and defamatory character, and calculated by the terms and manner and style of display, and obviously intended to reflect injuriously upon the character and conduct of another, to wit, one Daisy B., were then and there written and apparent, of the tenor following"—setting out the communication thereon and the name and address of the party to whom it was sent, that it was nonmailable matter, and that the defendant well knew that the delineations, epithets, terms, and language were upon the postal card. The remaining counts of the indictment were of the same tenor, except that they related to the sending of other postal cards bearing different communications, but addressed to the same person.

Upon each indictment the defendant was found guilty, and was sentenced to imprisonment "in the house of correction at Greenfield, in the district of Massachusetts, for a term of four months, * * * said sentences to take effect concurrently."

Various errors are assigned. In the first six assignments the defendant complains that the court erred in admitting in evidence the various postal cards relating to each of the six counts of the second indictment that were submitted to the jury. The seventh assignment relates to the admission of the letter which forms the subject-matter of the first indictment. The ground of exception, as disclosed by the record, was that the communications upon the postal cards did not constitute nonmailable matter within the provisions of section 212, and that the letter did not contain nonmailable matter within the provisions of section 211.

[1, 2] Under these assignments of error counsel for the defendant have undertaken to argue (1) that there was no evidence in the case from which it could be found that the communications, if nonmailable, were upon the letter and postal cards when they were received from the mail; (2) that the testimony of the government's handwriting expert that the defendant wrote the letter and the postal cards should not have been received; and (3) that the testimony of the expert being excluded, there was no evidence from which it could have been found that the defendant wrote them. The defendant, however, is not entitled to have these objections considered in this court, for they were not raised in the court below, and, if they had been, could have been readily obviated. The testimony of the expert for the government, if objection had been raised at the time, could have been stricken out and the witness required to state his opinion without incorporating in his answer the matter here complained of. Furthermore, there was other evidence than that of the expert from which the jury would have been warranted in finding that the defendant wrote the letter and the postal cards. The defendant himself testified that upon being charged in the presence of a police officer with having sent the letter and postal cards he remained silent and did not deny the accusation, and there was other evidence bearing upon the question which it is unnecessary to recount. As to whether the letter and postal cards contained the communications charged in the indictments at the time they were received from the mails, there was sufficient evidence to warrant the submission of the case to the jury. Mrs. B., the person to whom the letter and cards were addressed, was called as a witness, and testified that the letter which was produced and shown to her was the letter which she received through the mails, and each of the postal cards was likewise produced and testified to, being identified by reading a portion of the communication thereon. If the defendant was not satisfied with this proof, he should have specifically stated it as a ground of objection to the reception of the evidence, or raised the question by a motion for a directed verdict.

The only question properly raised by these assignments of error being whether the letter and postal cards constituted nonmailable matter within the provisions of the statutes above referred to, we will now proceed to consider it.

[3] Section 211 of the Penal Code, under which the indictment relating to the letter was drawn, reads as follows:

"Every obscene, lewd, or lascivious, and every filthy, * * * letter, writing, * * * or other publication of an indecent character, * * * is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivery from any post office or by any letter carrier. Whoever shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be nonmailable, * * * shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both." Comp. St. 1916, § 10381.

The courts, in construing this statute, have held that the rule by which to "determine whether a writing comes within the meaning of the statute is whether its language has a tendency to deprave and corrupt the morals of those whose minds are open to such influences, and

into whose hands it may fall, by arousing or implanting in such minds obscene, lewd, or lascivious thoughts or desires" (Knowles v. United States, 170 Fed. 409, 412, 95 C. C. A. 579, 582; Dunlop v. United States, 165 U. S. 486, 500, 17 Sup. Ct. 375, 41 L. Ed. 799; Rosen v. United States, 161 U. S. 29, 43, 16 Sup. Ct. 434, 40 L. Ed. 606), and that it is not essential to the commission of the offense that the entire contents of the communication be objectionable in character (Demolli v. United States, 144 Fed. 363, 366, 75 C. C. A. 365, 6 L. R. A. [N. S.] 424, 7 Ann. Cas. 121). We have no hesitation in saying that the communication contained in the letter, which is before us as an exhibit, falls within the terms of the statute and was nonmailable. Its language is calculated to arouse or implant in the minds of those into whose hands it may come and subject to such influences obscene, lewd or lascivious thoughts or desires.

[4] The section under which the six counts submitted to the jury on the second indictment was drawn provides:

"Sec. 212. * * * Any postal card upon which any delineations, epithets, terms, or language of an indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory, or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another, may be written or printed or otherwise impressed or apparent, are hereby declared nonmailable matter, and shall not be conveyed in the mails nor delivered from any post office nor by any letter carrier. * * * Whoever shall knowingly deposit or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable matter, * * * shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both." Comp. St. 1916, § 10382.

We have carefully examined the communications upon the postal cards and the pictures in connection therewith, and contained thereon, and are of the opinion that they were calculated by the terms and manner of display and obviously intended to reflect injuriously upon the character and conduct of the person to whom they were addressed, and that some of them also contain language of a scurrilous and defamatory character within the meaning of the provisions of the act in question.

The eighth assignment of error has not been argued. No reason has been suggested, and we see none, showing that the court erred or the defendant was harmed in not permitting counsel to pursue the inquiries set forth in this assignment.

[5] The ninth and tenth assignments present the same question. The defendant offered to prove that the relations of other persons to Mrs. B., the addressee of the letter and postal cards, "were such that they had a motive in sending these cards; that they were angry with her, and that they had animosity towards her because she threw one of them down, to use a figure of speech; that they had just as much, if not more, motive than the defendant had." This offer of proof was excluded on the ground that it was too remote, and the defendant accepted. The question whether such evidence is too remote to be of value on an issue in a case rests chiefly in the discretion of the presiding judge, and, unless offered in connection with other evidence showing an opportunity on the part of such other person or persons to com-

mit the crime charged, its exclusion on this ground is not error. In this case there was no evidence or offer of proof that other persons entertaining ill feeling against the addressee, Mrs. B., lived or were in Springfield at the various times on which the letter and postal cards were mailed, or that at the time the letter and cards were mailed they then entertained any ill feeling against her; nor was there any other evidence presented or proof offered so connecting them with the crime charged as to warrant the introduction of evidence tending to support the offer of proof in question. If such a ruling of a trial court is ever reviewable because of clear error, this is not such a case. *Commonwealth v. Abbott*, 130 Mass. 472; *Lane v. Moore*, 151 Mass. 87, 23 N. E. 828, 21 Am. St. Rep. 430; *Commonwealth v. Holmes*, 157 Mass. 233, 32 N. E. 6, 34 Am. St. Rep. 270; *Alexander v. United States*, 138 U. S. 353, 11 Sup. Ct. 350, 34 L. Ed. 954.

The judgment of the District Court is affirmed.

GRAHAM et al. v. O'FERRAL et al.

(Circuit Court of Appeals, First Circuit. January 24, 1918.)

No. 1149.

1. COURTS ⇔406(1)—CIRCUIT COURT OF APPEALS—REVIEW OF DECISIONS OF SUPREME COURT OF PORTO RICO

The Circuit Court of Appeals for the First Circuit, in reviewing a judgment of the Supreme Court of Porto Rico, will not, on a pure question of local law, disturb the judgment of the lower tribunal, except on conviction that clear error was committed.

2. COURTS ⇔406(1)—CIRCUIT COURT OF APPEALS—REVIEW OF DECISIONS OF SUPREME COURT OF PORTO RICO.

A determination by the Supreme Court of Porto Rico that plaintiffs by reason of prescription had lost their rights to maintain an action cannot be deemed so clearly erroneous as to warrant disturbance by the Circuit Court of Appeals of the First Circuit, where plaintiffs were over 21 years of age on December 18, 1899, when the age of majority in the island was by the United States military government declared to be 21, which age was continued in Civ. Code, § 317, effective in March, 1902; this being particularly true, as there was more than 4 years' unexplained delay, if the age of majority should be deemed 25, as fixed by the Spanish law.

3. COURTS ⇔406(1)—CIRCUIT COURT OF APPEALS—REVIEW OF DECISIONS OF SUPREME COURT OF PORTO RICO.

Where one of the plaintiffs, the widow of a Porto Rican, granted a resident of Porto Rico authority to take in her name all steps necessary for the settlement of the estate of her deceased husband, and to perform all and every act inherent to his power until the final termination of the testamentary proceedings, determination by the Porto Rico Supreme Court that such attorney had authority to represent the widow, whether the estate was settled judicially or extrajudicially, cannot, in view of the widow's approval of the accounts based on the settlement, be deemed clearly erroneous.

4. INFANTS ⇔77—PARTIES—GUARDIAN AD LITEM.

Where the guardian ad bona of infants suggested to the court the necessity of the appointment of a guardian ad litem to represent them in the settlement of the estate of their father, and the courts of Porto

Rico, in accordance with the requirements of law, appointed a guardian ad litem before settling the estate, the infants were properly before the court; it having jurisdiction of the estate.

5. INFANTS ⇨80(1)—GUARDIANS AD LITEM—APPOINTMENT—PETITION.
Where an infant's minority and the disqualification of her nearest relatives were truly represented to the Porto Rico court in a suggestion for the necessity of the appointment of a guardian ad litem, the fact that the suggestion was made by one who, without authority, was purporting to act as guardian ad bona for the infant, does not invalidate the appointment of the guardian ad litem.
6. INFANTS ⇨80(3)—GUARDIANS AD LITEM—APPOINTMENT—OBJECTIONS.
Where the mother of infants made no objection to the appointment of a guardian ad litem by the Porto Rico court pursuant to the suggestion of one purporting to act as guardian ad bona, and she approved and accepted a settlement of the estate of her deceased husband, such mother cannot thereafter assert that the appointment of the guardian ad litem was invalid.
7. INFANTS ⇨80(3)—GUARDIANS AD LITEM—APPOINTMENT—OBJECTIONS.
Where a grandmother of infants, who resided in Porto Rico, though the next nearest relative after disqualification of their mother, did not object to appointment of a guardian ad litem to represent them in the settlement of the estate of their father, and did not until after the settlement renounce in favor of the infants and their mother, such grandmother cannot attack the validity of the appointment.
8. INFANTS ⇨77—GUARDIAN AD LITEM—COLLATERAL ATTACK.
Where the appointment of a guardian ad litem to represent infants in proceeding for the settlement of the estate of their deceased father by the Porto Rico courts was valid, the infants were before the court, and were not entitled to claim any new and independent accounting in partition of the estate.
9. COURTS ⇨406(1)—CIRCUIT COURT OF APPEALS—REVIEW OF DECISIONS OF SUPREME COURT OF PORTO RICO—MATTERS FOR DETERMINATION.
Where determination of the Supreme Court of Porto Rico, affirming a judgment of the district court in favor of defendants, was affirmed on the merits, the question whether the appeal should be dismissed, because one of the defendants was not made a party to the appeal, need not be disposed of.

Appeal from the Supreme Court of Porto Rico.

Suit by Andres B. Crosas Graham and others against Andres Crosas O'Ferral and another. From a judgment of the Supreme Court of Porto Rico, affirming a judgment of the district court for defendants, plaintiffs appeal. Affirmed:

S. Mallet-Prevost, of New York City (Curtis, Mallet-Prevost & Colt, of New York City, on the brief), for appellants.

Howard Thayer Kingsbury, of New York City (Frederic R. Coudert, of New York City, on the brief), for appellees.

Before DODGE, BINGHAM, and JOHNSON, Circuit Judges.

DODGE, Circuit Judge. This is an appeal from a judgment of the Supreme Court of Porto Rico rendered March 5, 1913, affirming a judgment rendered by the district court of San Juan on May 24, 1910. The opinion of the Supreme Court is reported 19 P. R. R. 184.

There are three appellants, namely, Elena Graham O'Brien and Andres B. and Eduarda Crosas Graham, composing the succession of

Eduardo E. Crosas O'Ferral, who died November 8, 1877. The first-named appellant is his widow. The other two are his children. Andres B. was born April 4, 1877; Eduarda was born June 14, 1878, after her father's death.

The appellants brought the suit in the district court, which resulted in the above judgment, now appealed from, on November 14, 1908. It was entitled:

"Action for nullity of acts and contracts, cancellation of inscriptions, dissolution of community, accounting of executorship and demand for inheritance."

The defendants named were Andres Crosas O'Ferral, the present appellee, and Rafael Margari. The court was asked to declare null and void certain conveyances, by Margari to the present appellee, of property wherein such succession claimed an interest; to declare null and void a subsequent partition, inventory, and assessment of the estate of said Eduardo E. Crosas O'Ferral, made by said appellee, and approved June 7, 1877, by the judge of first instance for the Cathedral district in San Juan, together with certain transactions by said appellee involved in or connected therewith; and also to require an accounting by the appellee of said decedent's estate in his charge as executor. The district court decided in favor of the defendants and dismissed the complaint.

When the above suit was brought, the partition proceedings referred to had stood approved for 21 years. The conveyances by Margari to the appellee had stood unquestioned for a still longer period. The two children above named were then, respectively, 31 years and 7 months and 30 years and 5 months old. It does not appear that their mother was not of full legal capacity, either when said conveyances were made or when said partition proceedings were approved. It appeared without question that she had been represented in said proceedings by one Miguel Sainz, under a power duly executed by her, and her own testimony was that she had herself accepted at the time, as satisfactory, accounts based thereon, as approved by said court, subsequently submitted to her by the appellee.

[1 2] 1. The first question is whether the appellants had not lost by lapse of time, before February 14, 1908, all right to attempt the avoidance of the conveyances, proceedings, and transactions set forth in their complaint. Four judges of the Supreme Court were of opinion that they had. The court nevertheless dealt with the case on its merits, as had the district court, and, having done so, approved the judgment below. One of the five judges, however, while concurring in this result, did so "except as to the discussion of prescription." In the district court, though prescription had been set up as a defense, it was not expressly discussed or passed upon in the court's opinion.

Whatever may have been the age at which majority began under the Spanish law previously in force in Porto Rico, it has been 21 years ever since it was so fixed by an order of the United States military government dated December 18, 1899. The present Civil Code, which went into effect March 1, 1902, has since that date so provided in section 317. See *Aguilar v. Vasquez*, 6 P. R. 1; 9. Both the above

minors had reached the age of 21 before the date of the above order of 1899. This suit was not begun, therefore, until more than 9 years had passed since the younger of them had become qualified to bring it.

The Supreme Court held (19 P. R. 233) that there could be—
“no doubt that the action to secure nullity of the contracts and stipulations above referred to, if proper, had prescribed by the expiration of the four years which the law provides for its commencement, which period of time is the same as that fixed for the rescission of partitions.”

This determination of a pure question of local law is one which this court will not disturb, but, on the contrary, will uphold, except on conviction on its part of clear error committed. *Cardona v. Quinones*, 240 U. S. 83, 88, 36 Sup. Ct. 346, 60 L. Ed. 538. These two appellants fail entirely to convince us that clear error was committed. There is no attempt on their part to explain or excuse the delay of 9 years. On the theory that they did not become qualified to sue until they were 25 years old, according to the Spanish law before 1899, there is still a delay of more than 4 years left without explanation or excuse.

[3] 2. Nor do the appellants satisfy us that clear error was committed by the Supreme Court in any of the results at which it arrived upon an examination of the merits of their petition, into which examination it entered, notwithstanding its above rulings upon the question of prescription. It has set forth those results in a thorough and careful opinion. Here, also, the matters involved concern purely local law.

The appellants relied mainly upon a contention that the accounting and partition proceedings of 1887 were void, because they were not properly made parties thereto—in the cases of the two minors, because the appointment of a guardian ad litem for them, as shown by the record, was not in accordance with law, and in the case of their mother, represented, according to the record, by an attorney under a power executed by her, because said power authorized the attorney to act only in a “judicial settlement” of the estate to which the proceedings related. The proceedings, though before, and approved, as has been stated, by, a judge of first instance, did not, it is said, constitute a “judicial settlement” within the meaning of the power.

As to the power of attorney in question, under which Elena Graham appears to have been represented in the proceedings of 1887, its due execution by her in New York, on December 13, 1886, is not disputed. By it she granted to Miguel Sainz, of Porto Rico, “authority to take in her name all legal steps necessary for the settlement of the estate of her deceased husband,” and, after giving him authority to take various steps specifically mentioned, “to perform all and every act inherent to his power until the final termination of the testamentary proceedings.” We cannot treat as clearly erroneous the conclusions of the Supreme Court that Sainz had authority under said power to represent her, whether the estate was settled “judicially” or “extrajudicially,” and that her intent, as manifested by the power, was that the settlement should be “judicial” only in case settlement of that character should be found necessary. Accepting said conclusions, we must hold that she became a party to said proceedings, and is bound by their result. Her subsequent approval of the appellee’s accounts based upon

them, never withdrawn before she joined in the present suit, affords further support for the above result. Allegations in the complaint that Sainz obtained said power of attorney from her by fraudulent representations are unsupported by any evidence in the record.

[4] The two minors were represented in said proceedings by a guardian (or curator) ad litem, appointed by the court. They now contend that the appointment made was void for want of jurisdiction in the court to make it; that the proceedings were therefore wholly without effect as to them; and that they are at liberty to act without regard to said proceedings, at whatever interval of time, because no prescriptive period has ever begun to run as against them.

The will involved in the proceedings was made under a power of attorney, executed by the testator before his death, and authorizing the appellee to make it thereafter according to directions in the power—a method of testamentary disposition recognized by Porto Rican law. By this power the testator also appointed the appellee tutor and guardian ad bona of his son, the only legitimate child then born to him. The will afterward made by the appellee under said power purported to extend his appointment as tutor and guardian ad bona to the daughter also, who had meanwhile been born, two months after her father's death.

In his petition, whereby the proceedings of 1887 were instituted, the appellee represented that he was guardian ad bona of both children, that he could not legally represent them as guardian ad litem, that appointment of such a guardian to represent them was necessary, that their mother, being interested in the estate as legatee, could not legally so represent them, and that they had no near relatives who could do so. He therefore asked the court to appoint a guardian ad litem for the purpose. The court appointed Benigno Trueba to act in that capacity for both minors. He did so act, and with the approval of their mother, given through her attorney above mentioned, by joining on her behalf in the appellee's petition for approval of the accounting and partition approved as above by the court.

No doubt is suggested that the court of first instance had jurisdiction of the subject-matter of the proceedings, or of the appellee by whose petition they were commenced. Elena Graham had subjected herself to said jurisdiction by her appearance through her attorney, as above held. The necessity for appointing a guardian ad litem to represent the two minor children being suggested to it, we find no reason to doubt that the court had jurisdiction to make such appointment, provided only that in doing so it observed all the applicable requirements of law. These are found in articles 1851–1859 of the Spanish Code of Civil Procedure, then in force, which are quoted in the Supreme Court's opinion. If they were observed in appointing Trueba, the minors were properly before the court, and its jurisdiction to act upon the appellee's petition and approve the accounting and partition submitted, which were accepted by their mother and on their behalf by Trueba, cannot now be questioned by them.

[5, 6] The Supreme Court held that, because his power from his deceased brother had not expressly directed the appellee's appointment.

as guardian ad bona for the daughter, the will executed under said power, though purporting to do so, had not in fact made him her guardian. It is said, in view of this, that she at least was not before the court in the matter of appointment of a guardian ad litem for her, because the appellee could not represent her, and no one else did. We find no force in this objection. If her minority and the disqualification of her nearest relatives were truly represented to the court, it can make no difference by whom they were so represented. No request to be appointed was made by her natural guardian, her mother, who was before the court and had the first right to appointment, nor any objection to the proposed appointment by the court on the ground that she was herself disqualified. After approving and accepting, as she has, the result of the proceedings begun by the appellee's petition, she is in no position to assert that the appointment of Trueba was invalid, and the Supreme Court rightly so held.

[7] It is said that, if the mother was disqualified, the law required the appointment of the grandmother of the two minors, then living in Porto Rico, as the next nearest relative. But the grandmother was also a legatee under the will, and having also consented to and approved the accounting and partition, she must also be regarded as having acquiesced in Trueba's appointment. It is true that, in so accepting the accounting and partition, the grandmother renounced her interest in the property in favor of the widow and these minors; but this she did not do until after Trueba had been appointed and had acted, as his appointment required, on the minors' behalf. The Supreme Court found no force in this objection, nor can we find any.

It is said that, if both mother and grandmother were disqualified, the "procurator fiscal" should have been notified and heard upon the question of appointing a guardian ad litem. Articles 1814 and 1823 of the Civil Code of Procedure then in force are relied on. It is certainly far from clear that these articles require any such notice, under the circumstances supposed. If this contention was made before the Supreme Court, which does not appear, it was not regarded as having any claim to consideration requiring its mention in the opinion. The appellants fail to satisfy us that it has any merit.

[8] 3. If, as we think, the Supreme Court rightly refused to declare Trueba's appointment void, both minors were sufficiently represented in the proceedings of 1887, and neither had any right to the new and independent accounting and partition prayed for in the complaint.

The Porto Rican courts, as has been stated, appear to have considered the various allegations made in the complaint charging that in one way or another the defendant had wronged the plaintiffs in the accounting and partition, or in the conveyances which they sought to avoid, or in matters connected therewith. As to some of the questions thus raised, the Supreme Court was uncertain as to the facts, because of the obscurity and doubt in which it found them left by the records of transactions so many years before; and it therefore held that the plaintiffs had failed to sustain the burden of proof. Upon all the questions raised by the allegations referred to, its decision was in the appellee's favor. The plaintiffs fail to satisfy us that, under such

circumstances, we should be justified in holding any of the conclusions adopted by said court to be clearly erroneous.

[9] Only one of the two appellees in the Supreme Court is a party to this appeal. In the view we take of the case, it is unnecessary to consider whether the appeal should be dismissed because Margari, the other appellee, is not a party here.

The judgment of the Supreme Court appealed from is affirmed, and the appellee recovers his costs of appeal.

FIRST NAT. BANK OF SAN FRANCISCO et al. v. DETROIT
TRUST CO. et al.

(Circuit Court of Appeals, Ninth Circuit. February 4, 1918.)

No. 2912.

1. MORTGAGES ⇔468(1)—FORECLOSURE—APPOINTMENT OF RECEIVER.

The power of a court of equity to appoint a receiver in foreclosure proceedings, with authority to continue the business of the mortgagor is one which is cautiously exercised; but the court in its discretion may grant such relief when such a course seems necessary to preserve the property or secure a more advantageous disposition; hence, on a bill to foreclose a mortgage on the property of a lumber company, where it appeared that if the property was ordered sold on foreclosure its full value would not be realized, and the proceeds would be entirely absorbed by the first mortgage, and the first and second mortgagees and a majority of those secured by the third mortgage all requested or assented to the appointment of receiver, with authority to continue the business, such an order was proper; continuance of operation being necessary to preserve the property.

2. APPEAL AND ERROR ⇔955—REVIEW—DISCRETION OF TRIAL COURT—RECEIVER.

An order of the trial court on a bill to foreclose a mortgage, directing the appointment of receiver and operation of the property, will not be disturbed on appeal, unless so improvident and improper as to be an abuse of power.

3. MORTGAGES ⇔473—FORECLOSURE—RECEIVER.

Where a receiver was appointed and operation of the mortgaged premises ordered upon a bill to foreclose the first mortgage, those secured by a third mortgage cannot complain that they were deprived of their right of redemption in a portion of the property by reason of the approval of the receiver's logging contract, for they might at any time exercise that right by satisfying prior incumbrances, in which event the receiver would necessarily be discharged and cancellation of his contracts directed.

4. MORTGAGES ⇔159—PRIORITIES—CONDITIONS.

Where the first mortgage on timber lands and other property of a lumber company authorized the cutting and removal of timber on payment to the trustee of a fixed sum per thousand feet, those accepting a third mortgage subject to the conditions of the first cannot complain of the cutting and removal of timber pursuant to that provision.

Appeal from the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

Bill by the Detroit Trust Company and Alexander McPherson, as trustees, against the S. E. Slade Lumber Company and others, on

which a receiver was appointed. Thereafter the First National Bank of San Francisco and others intervened by petition, seeking modification of the order allowing the receiver to operate the property of the principal defendant and to enter into a logging contract. From an order denying the petition, petitioners appeal. Affirmed.

On September 1, 1910, the S. E. Slade Lumber Company mortgaged a large tract of timber lands in Grays Harbor county, Wash., and a sawmill plant in the city of Aberdeen, Wash., to the Detroit Trust Company and Alexander McPherson, as trustees, to secure an indebtedness of \$1,000,000. On March 1, 1915, the Lumber Company made a second mortgage to the Detroit Trust Company to secure an indebtedness of \$69,000. On April 30, 1915, certain creditors of the Lumber Company, to wit, the American National Bank of San Francisco, Welch & Co., the United States National Bank of Portland, the Slade-Wells Logging Company, the Humptulips Logging Company, the First National Bank of San Francisco, the Coats-Fordney Logging Company, the Saginaw Timber Company, and the Sudden Estate Company, entered into an agreement for the purpose of securing their claims and providing for the advancement for a period of one year, and optionally for two years, of money sufficient to pay the interest on the first mortgage bonds, the interest on the second mortgage, and the taxes and insurance premiums on the property, on condition that the first mortgagee would for one year, and provisionally for two years, waive the collection of the principal of the maturing bonds secured by the first mortgage. Thereupon, to protect said unsecured creditors, the Lumber Company executed to the First Federal Trust Company and to Milton R. Clark, as trustees, a mortgage on the property covered by the first and second mortgages and on other property. Said creditors' agreement provided that the parties thereto should be represented by a committee consisting of Kennedy, representing the First National Bank of San Francisco, Bowles, representing the American National Bank of San Francisco, and Welch, representing Welch & Co., which committee was given power to act unanimously only, and not by a majority, and the third mortgage provided that the trustees therein should be under no obligation or duty to perform any act thereunder, unless requested in writing by the representatives so appointed, and that the trustees should have the exclusive right of action under the mortgage, and that none of the beneficiaries should be entitled to commence any action, unless the trustees should refuse or fail so to do when properly requested.

On August 3, 1916, the appellees herein commenced their suit to foreclose the first and second mortgages. Thereafter they filed a petition for the appointment of a receiver, with power to take possession of the mortgaged property and to manage and operate the same by logging contract or otherwise. To this petition the Humptulips Logging Company and Slade-Wells Logging Company assented, and Bowles and Welch, two of the three members representing the creditors, requested the appointment of a receiver as prayed for, as did also the American National Bank of San Francisco and Welch & Co. The receiver was appointed and, with the approval of the court, entered into a logging contract with the Humptulips Logging Company. Thereafter the appellants herein petitioned the court to vacate the order appointing the receiver with power to operate, alleging that the trustees of the third mortgage were under no obligation to perform any duty under that mortgage, unless requested so to do in writing, by the duly appointed representatives, and had not appeared in or taken any action in the premises; that the American National Bank of San Francisco and Welch & Co., which had joined in a request for the appointment of a receiver, had refused to join with the petitioners or to request the trustees to act in the premises. The trustees under the third mortgage made no appearance in the suit. They, however, brought an independent suit against all the beneficiaries under that mortgage for instructions as to their powers and duties, and after hearing the court decreed in that suit that, in the absence of unanimous instructions from Kennedy, Bowles, and Welch, the trustees were under no ob-

litation to appear in the foreclosure suit, and the court by its order authorized all of the beneficiaries under the third mortgage to appear in the suit and take such action as they might deem proper. Thereupon the American National Bank of San Francisco, Welch & Co., United States National Bank of Portland, Slade-Wells Logging Company, and Humptulips Logging Company, being a majority in number and amount of the beneficiaries under the third mortgage, filed an answer in the foreclosure suit, alleging that, under the terms of the creditors' agreement and the third mortgage, the appellants had no right to appear and contest the appointment of a receiver with power to operate, and alleging that, if the beneficiaries under the third mortgage are proper parties defendant, then the order of the court appointing a receiver with power to operate and enter into a contract with the Humptulips Logging Company should be continued in force.

In support of the appointment of the receiver, with authority to enter into the logging contract, affidavits were presented, the substance of which is as follows: That owing to the condition of the timber market the Lumber Company was unable to sell its timber lands or to pay its debts as they matured, and that if the Lumber Company's property were forced to sale it would not bring enough to pay the debts of the company; that it was absolutely necessary, for the preservation of the property and to prevent its waste and deterioration, that a receiver be appointed to log the timber lands and apply the proceeds to the payment of taxes, insurance, and other incidental charges, and to the extinguishment of the company's debts; that in no other way than by logging operations could moneys be raised sufficient to pay the Lumber Company's debts; that, if such operations were not immediately commenced and continued, the property would seriously deteriorate in value and the company would incur very decided danger of loss to the timber from forest fires, which danger might be greatly reduced by the employment on the property of a force of men engaged in logging; that there were then about 12,000,000 feet of fir logs, of the value of \$70,000, which had been cut and were still lying in the woods, which would deteriorate in value unless soon removed and sold; and that it would be for the best interests of all the creditors of the Lumber Company, and more particularly for the interests of those secured by the third mortgage, that the timber lands be cut and logged and the logging contract be carried out. It was further shown by several affidavits that, by conducting logging operations under the logging contract for a period of two or three years, the indebtedness of the Lumber Company would be so reduced that it would be possible for it either to refinance its obligations, or to sell its properties at a price more than sufficient to pay all its indebtedness. The showing was that the total indebtedness of the Lumber Company was about \$1,200,000, and that the creditors, aggregating five-sixths of the total thereof, asked for the continuance of the receiver under the order of the court.

The logging contract which the court authorized the receiver to make gave the Logging Company the right to cut and remove not less than 50,000,000 feet of timber per annum, to market and sell the same, with all possible dispatch and at the highest market price obtainable, the proceeds to be applied, first, to the cost of driving, booming, and towing the logs to market, not exceeding \$1.30 per thousand feet, to be paid to the Logging Company; second, \$3 per thousand feet was to be paid to the receiver; third, the actual logging expense was to be paid to the Logging Company; fourth, the remainder, up to \$1 per thousand feet, was to be paid to the Logging Company as its profit; and, fifth, any balance remaining thereafter was to be paid to the receiver. The receiver reserved the right to sell the logs on paying the Logging Company the cost of logging and its profit of \$1 per thousand feet, but this was not to be done unless the receiver realized at least \$3 per thousand feet and the Logging Company its expenses and profit. It was further provided that the contract should remain in force until the lands should be completely logged and lumbered, but that it might be canceled by either party at any time, for any reason satisfactory to itself, upon 60 days' written notice of cancellation to the other party.

Upon the hearing had on the appellants' petition it was ordered that the contract with the Humptulips Logging Company be ratified and approved, and that the appellants' petition be dismissed. From that order the present appeal is taken.

John C. Hogan, of Aberdeen, Wash., C. S. Cushing and Cushing & Cushing, all of San Francisco, Cal., and Hughes, McMicken, Dovell & Ramsey, of Seattle, Wash., for appellants.

MacCormac Snow, of Portland, Or., for appellee Detroit Trust Co., and others.

Snow, McCamant & Bronaugh, of Portland, Or., and J. B. Bridges and Theo. B. Bruener, both of Aberdeen, Wash., for other appellees.

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

GILBERT, Circuit Judge (after stating the facts as above). [1] The question which the appeal presents is whether or not the court below abused the discretion which was vested in it, in authorizing the receiver to operate the mortgaged property and to make the logging contract which he did. The court had before it these facts: The mortgagor, the mortgagee of the first and second mortgages, and the representatives of the majority of the claims secured by the third mortgage, all requested or assented to the appointment of the receiver with the authority to operate, and approved the logging contract which he made. If the mortgaged property were ordered sold at foreclosure sale, its full value would not be realized, and the proceeds thereof would be absorbed by the first mortgage. If properly conserved and operated, the properties would probably be sufficient to pay all the mortgages, and it was probable that within two years the Lumber Company would be enabled to refinance its indebtedness. The mortgagor was without available resources with which to meet the expense of caring for its properties or to pay the taxes thereon, and was in danger of having its properties sold for delinquent taxes, and there was danger of loss and destruction of the property by fire, if a force of operatives were not on hand to protect it.

The power of a court of equity to appoint a receiver in a foreclosure proceeding, with authority to continue the business of the mortgagor, is one which is cautiously and sparingly exercised, and only in cases where the interests of the parties require it, and usually the receiver will not be authorized to conduct a business permanently. In 34 Cyc. 284, it is said of the power of the court:

"It has the power, however, in the exercise of a wise discretion, to direct a continuance of a business, and to authorize its receiver to make expenditures and contract debts in that connection, when such a course seems necessary to preserve the property and to secure a more advantageous disposition of it."

The same doctrine is affirmed as to the court's power in foreclosure proceedings in 27 Cyc. 1631. Among the cases applying the doctrine are *Cake v. Mohun*, 164 U. S. 311, 17 Sup. Ct. 100, 41 L. Ed. 447; *American Pig Iron Storage Warrant Co. v. German*, 126 Ala. 194, 28 South. 603, 85 Am. St. Rep. 21; *Makeel v. Hotchkiss*, 190 Ill. 311, 60 N. E. 524, 83 Am. St. Rep. 131; *Leader Pub. Co. v. Grant Trust Co.*,

182 Ind. 651, 663, 108 N. E. 121; Pacific Northwest Packing Co. v. Allen, 109 Fed. 515, 48 C. C. A. 521.

The appellants rely upon *Couper v. Shirley*, 75 Fed. 168, 21 C. C. A. 288, in which this court, in view of the statute of Oregon providing that a mortgage of real property shall not be deemed a conveyance, so as to enable the owner of the mortgage to recover possession of the real property without foreclosure and sale according to law, held void the appointment of a receiver which was made solely upon the authority of a stipulation contained in the mortgage. But in that case we distinctly pointed out that the appointment had not been made by virtue of any of the established general principles of equity, which when alleged to exist, would authorize a court of equity to appoint a receiver, but was made solely in pursuance of the stipulation contained in the mortgage. We said:

"The sole question for our consideration is whether such a stipulation, of itself, authorized the court to make the appointment, under the laws of Oregon."

It seems unnecessary to say that in that decision there was no denial of the power of a court of equity to appoint a receiver under circumstances such as those disclosed in the case at bar.

[2] Again, it is to be observed that an appellate court will not reverse such an order as that which is here appealed from unless it appears that the discretionary power of the court "has been so improvidently and improperly exercised as to bring its action clearly within the meaning of the term 'abuse of power.'" *Heinze v. Butte & Boston Consolidated Min. Co.*, 126 Fed. 1, 11, 61 C. C. A. 63, 73; *United States Shipbuilding Co. v. Conklin*, 126 Fed. 132, 60 C. C. A. 680; *Briggs v. Neal*, 120 Fed. 224, 56 C. C. A. 572. We discover no abuse of discretion in the case at bar, and we are of the opinion that the order of the court below, in view of all the facts, was made in the proper exercise of the court's discretion.

[3, 4] We are not impressed with the appellants' objection that the logging contract operates to deprive the mortgagees of the third mortgage of their right of redemption in a portion of the mortgaged property. They have as full opportunity to exercise that right as they would have under a foreclosure of the first mortgage, and they are free to exercise it at any time by satisfying the prior incumbrances, in which event the court below would necessarily direct the cancellation of the logging contract, and the discharge of the receiver. Moreover, the third mortgagees, by taking their mortgage subject to the first mortgage assented to the provision, therein contained, that the mortgagor might cut and remove timber on paying to the trustee of that mortgage the sum of \$3 per thousand feet, the same sum which is realized therefor by the receiver under the logging contract authorized by the court below.

The order is affirmed.

THE COLUSA.

(Circuit Court of Appeals, Ninth Circuit. February 4, 1918.)

No. 3043.

1. DEPOSITIONS ⇨90—OBJECTIONS—WAIVER—“COMPETENT EVIDENCE.”

While the deposition of a witness will not ordinarily be admitted when he is present, a deposition taken under a stipulation that it might be read in evidence by either party, and that all objections were waived unless made at the time of taking the deposition, but that objections to materiality and competency were reserved, is admissible, without any showing that the witness was not within the jurisdiction, for the reservation of objections to the materiality and competency of the testimony was not a reservation of objections to the deposition as a whole; “competent evidence” being that which the very nature of the thing to be proved requires as the fit and appropriate proof in the particular case.

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

2. SEAMEN ⇨29(5)—INJURIES—EVIDENCE—SUFFICIENCY.

In an action by a seaman, injured while setting up the lashings to secure a deckload of lumber, evidence *held* to show that the injury resulted from a defective turnbuckle hook, which opened when the link encircling its shank slipped off as the result of the falling out of a nail used to close it.

3. SEAMEN ⇨29(3)—“SEAMAN HAVING COMMAND”—“FELLOW SERVANT.”

Under Seamen's Act March 4, 1915, c. 153, § 20, 38 Stat. 1185 (Comp. St. 1916, § 8337a), declaring that, in any suit to recover damages for any injuries sustained on board a vessel, or in its service, seamen having command shall not be held fellow servants with those under their authority, a boatswain, who directed a seaman to set up deck lashings to secure a deckload of lumber, and under whose orders the seaman was acting, must be deemed a “seaman having command” and not a “fellow servant.”

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

4. SEAMEN ⇨29(2)—INJURIES—DEFECTIVE APPLIANCES.

Both the vessel and the owner are liable to an indemnity for injury received by a seaman in consequence of the unseaworthiness of the vessel, or failure to supply and keep in order proper appliances appurtenant thereto; therefore a vessel and its owners are liable to a seaman who suffered injuries as the result of a defective turnbuckle hook, which was part of the deck lashings, and which opened while the lashings were being tightened.

5. SEAMEN ⇨29(4)—RISKS—ASSUMPTION OF RISK.

As a seaman, after a vessel leaves port, cannot, as can an ordinary workman on shore, leave his work if he apprehends injury, a seaman does not assume the risk resulting from a defective appliance, which the owners, in the exercise of high diligence and care, might have discovered.

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

Libel by George I. Dunwoody against the American Steamship Colusa and another. From a decree for libellant (241 Fed. 968), respondents appeal. Affirmed.

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

Goodfellow, Eells, Moore & Orrick, of San Francisco, Cal., for appellants.

F. R. Wall, of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The appellee, a seaman on the steamship Colusa, as the steamship was leaving port, was directed by the chief mate to set up the deck lashings to secure a deckload of lumber. The lashings consisted of two chains, each with one end fastened to one of the sides of the ship, and brought together in the center of the deckload by means of a turnbuckle, an appliance about five feet long, which was attached to one of the chains and had at the other end a hinged hook, in which the end of the opposite chain was inserted; the hook being prevented from opening by means of a slip link or ring, which encircled the shank of the hook and the hinged portion thereof, and was prevented from slipping off the end thereof by means of a nail, which was inserted through a hole bored through its outer end. The rod of the turnbuckle was threaded at each end, and by means of a pipe wrench it was turned for the purpose of drawing the chains tightly together, to secure the deckload to the ship. The hook had been adjusted by the boatswain, who was directing the operations, and under his direction the appellee was engaged in turning the rod, when the nail fell out of the hole, and the ring being thereby released, slipped off the hook, and the hook opened, releasing the chains, and the recoil thereof threw the appellee from the top of the lumber through an open hatchway and into the hold, whereby he sustained serious injuries.

The court below found that the accident was due to the negligence of the boatswain in placing in the hole a nail, which might slip out, instead of a split pin, which would not, and then directing the libellant to tighten the lashings, and that the boatswain, under the circumstances, was a seaman having command within the meaning of the Act of March 4, 1915, known as the Seamen's Law, that the negligence was not wholly that of the boatswain, because he testified that there were no pins provided, and that it was consequently necessary to use nails.

[1] We find no merit in the contention that the trial court erred in admitting in evidence the deposition of the appellee's witness Dallman. The deposition was taken on December 29, 1916, and it was offered in evidence before the conclusion of the trial some three months later. The objection made to its admission was, first, that there was absence of showing that at the time when it was offered, the witness was not within the jurisdiction of the court; and, second, that from the face of the deposition it appeared that it was contemplated by both parties to the suit that the witness should be produced at the trial if he were not then at sea. It is true that there was no showing that the witness was not within the reach of the process of the court at the time of the trial, and that the rule is as stated in 13 Cyc. 986:

"In general, in the absence of agreement or waiver, the deposition of a witness will not be admitted when he is present and capable of being examined," to which are cited, among other authorities, *Whitford v. Clark County*, 119

U. S. 522, 7 Sup. Ct. 306, 30 L. Ed. 500, and Texas & P. Ry. Co. v. Watson, 112 Fed. 402, 50 C. C. A. 230.

But in 13 Cyc. 987, it is said that the preliminary proof of the absence of the witness must be made before the deposition can be used, "unless the adverse party has dispensed with the necessity of such proof by expressly or impliedly waiving it."

In this case the deposition was taken upon a stipulation which recited that, when written up, it "may be read in evidence by either party on the trial of the cause," and that all objections to the form of questions are waived, unless objected to at the time of taking the deposition, but that "all objections to the materiality and competency of the testimony are reserved to all parties." This was an express waiver on the part of the appellant of its right to object to the admission of the deposition for failure to show that the witness was not within reach at the time of the trial. The reservation of a right to object to the "materiality and competency" reserved the right to object only to the materiality and competency of any item of the testimony contained in the deposition, and not to the admissibility of the deposition as a whole. "Competent evidence is that which the very nature of the thing to be proved requires as the fit and appropriate proof in the particular case, such as the production of a writing where its contents are the subject of inquiry," etc. 12 C. J. 235.

While counsel for the appellant on the taking the deposition expressed a desire to have Dallman present on the trial of the cause for the purpose of identifying the turnbuckle, there was no promise on the part of appellee's counsel to produce him, and the appellant took no means, by subpoena or otherwise, to secure his presence on the trial.

[2] Also without merit is the contention that the evidence failed to show negligence on the part of the appellants, and that there was no proof of the cause of the accident. There was ample proof that at the time when the accident occurred the turnbuckle hook had been closed over the end of the chain, and the ring had been slipped over the end of the hook, and a nail inserted through the same. The boatswain testified that he put the nail in place, and another witness testified that he saw it after it had been inserted. The testimony was that the nail fitted loosely in the hole, and would drop out when the hook was reversed by turning the rod, and that there was no appliance that could be used other than the nail. The chief officer testified that he was standing on the chain on the port side, when all of a sudden he felt the chain give way, looked back, and Dunwoody had disappeared. It was not disputed that after the accident the turnbuckle hook was found open; the nail having fallen out, and the ring having slipped off. Dallman testified that he had complained to the mate of the turnbuckle that was used, and that the mate had said that it was not fit to be there.

[3, 4] It is contended that the negligence, if any, was that of a fellow servant of the appellee, that the officer in charge and control of the appellee was the mate, and not the boatswain, and that the boatswain was not a seaman having command within the meaning of the Act of March 4, 1913, known as the Seamen's Act. The court below found, and the evidence sustained the finding, that the appellee at the time of his in-

jury was acting under the orders of the boatswain. The boatswain testified that he was in charge of the work, and that all the sailors in the group or gang that were working there were under his authority, and that he told the appellee to tighten up the turnbuckle; that he was in charge of the men, and that when he gave them orders they had to obey. This, we think, was sufficient to constitute the boatswain a seaman having the command; but, as we view the case, it is not material whether he was such officer or not. The primary cause of the accident was not the act of the boatswain in inserting the nail in the turnbuckle, but was the fact that the turnbuckle so used was defective, and known by the chief officer to be defective, and was the appliance which the appellee was required to use in his work. The evidence was that a nail loosely inserted through the hook was the only appliance that ever had been used in connection with the hook, and that there was no split bolt available for that purpose.

Section 20 of the Seamen's Act of March 4, 1915 provides:

"That in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow servants with those under their authority." Comp. St. 1916, § 8337a.

In *Chelentis v. Luckenbach S. S. Co.*, 243 Fed. 536, 156 C. C. A. 234, a case in which the injury to the seaman resulted from the improvident order of an inferior officer in the course of navigation, the Circuit Court of Appeals for the Second Circuit held that section 20 of the act did not change the rule, affirmed in *The Osceola*, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760, that seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure; and the court in that case, while reserving the question whether the master and seamen were fellow servants, held that it made no difference whatever in respect to the liability of the shipowners for an improvident order of the master which resulted in personal injuries to the seaman. But for the purposes of the present case we need only to refer to the rule which in the *Osceola* Case was declared to be settled law:

"That the vessel and her owner are, both by English and American law, liable to an indemnity for injury received by seamen in consequence of the unseaworthiness of the ship, or of failure to supply and keep in order the proper appliances appurtenant to the ship."

That rule, we think, is applicable here. The defect in the turnbuckle, if not obvious, was discernible by the exercise of reasonable care.

[5] It is contended that the appellee assumed the risk of the injury. But the ordinary rule which applies to assumption of risk by a workman is not applicable to the case of a seaman on board ship. In *The Edith Godden* (D. C.) 23 Fed. 43, Judge Brown said:

"A seaman on board ship has not the privilege of using his own judgment, or of quitting the ship's service if he apprehends danger, like an ordinary workman on shore. If owners cannot be held as insurers of the appliances furnished to the ship for the safety of seamen, they ought, at least, to be held to the strictest rule of diligence and care."

So in *Lafourche Packet Co. v. Henderson*, 94 Fed. 871, 36 C. C. A. 519, the Circuit Court of Appeals for the Fifth Circuit held that a sea-

man does not assume the risk involved in the use, under orders, of patently defective appliances furnished him by the master. And the same was held by this court in *The Fullerton*, 167 Fed. 1, 92 C. C. A. 463.

The appellant cites the case of *The Scandinavia* (D. C.) 156 Fed. 403, in which it was held that the doctrine of assumption of risk is applied in admiralty as fully as in other branches of jurisprudence. But in that case the libellant was injured, not as a seaman at sea, but while engaged in assisting in the repair of a vessel while she lay at a wharf for repairs. There was nothing to prevent him from leaving his employment. The court said:

"If the ship, or any of its tackle and apparel, did not suit him, he was at liberty to leave at any moment. The familiar law with respect to the duty of a seaman to obey the orders of the master has no application here; for the libellant was not at sea. He was under no captain."

The decree is affirmed.

In re TURPIN HOTEL CO.

POWELL STREET INV. CO. v. SCOOFFY.

(Circuit Court of Appeals, Ninth Circuit. February 4, 1918.)

No. 3041.

1. BANKRUPTCY ⇨467—APPEAL—REVIEW—MATTERS SUBJECT TO REVIEW.

A finding of fact by the referee in bankruptcy, amply sustained by the evidence and affirmed by the District Court, will not be disturbed.

2. FRAUDS, STATUTE OF ⇨131(1)—LEASE CONTRACTS—MODIFICATION—STATUTE—"EXECUTED ORAL AGREEMENT."

A corporate lessee, in arrears, paid a portion of the rent in arrears and for the remainder executed notes, secured by indorsement; such notes ultimately being discharged by the indorser. The landlord orally agreed to accept a reduced rent, and for a considerable period accepted reduced payments in full discharge of the lessee's obligation. The agreement for reduction of the rent contemplated the lessee's execution of a new chattel mortgage. *Held* that, under Civ. Code Cal. § 1698, declaring that a written contract may be modified by an executed oral agreement, the agreement to reduce the rent must be deemed an executed oral agreement, precluding the lessor's subsequent recovery of the full rent reserved, notwithstanding the lessee's delay in the execution of the chattel mortgage contemplated, for the true consideration was the payment and securing of the rent in arrears.

3. FRAUDS, STATUTE OF ⇨131(1)—LEASE CONTRACTS—MODIFICATION—STATUTE.

Though the consideration for the modification of the oral agreement was a third person's indorsement of the lessee's notes, the validity of the agreement is not subject to attack on the ground that the Civil Code applies only to written contracts which are not required by the statute of frauds to be in writing.

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

In the matter of the bankruptcy of the Turpin Hotel Company, a corporation. From an order of the District Court, affirming an order

of the referee in bankruptcy, disallowing the claim of the Powell Street Investment Company, opposed by L. J. Scooffy, as trustee in bankruptcy, the Investment Company appeals. Affirmed.

W. S. Andrews and M. E. Harrison, both of San Francisco, Cal., for appellant.

I. I. Brown, Milton J. Green, Edwin J. Hanson, and Jerome B. Politzer, all of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. This is an appeal from an order of the District Court, affirming an order of the referee in bankruptcy in disallowing the claim of the Powell Street Investment Company against the Turpin Hotel Company, bankrupt, for any sum in excess of \$5,500. The claim out of which the controversy arises is for rent of certain premises in San Francisco leased by the bankrupt, Turpin Hotel Company, from the Powell Street Investment Company. The findings of the referee are substantially as follows:

The Powell Street Investment Company leased the Hotel Turpin for a period of 10 years, expiring January 31, 1920, at a stipulated monthly rental of \$2,500. On July 31, 1915, the Hotel Company was \$14,000 in arrears on the rent. An adjustment of the indebtedness was then made by the Hotel Company, which paid to the Investment Company \$5,000 in cash and gave six notes, of \$1,500 each, payable at intervals of 30 days, indorsed by William Wilsie. Wilsie paid the first note, but, having failed to pay subsequent notes as they fell due, on January 16, 1917; the landlord, Investment Company, accepted a chattel mortgage on certain property belonging to Wilsie and surrendered to Wilsie all the unpaid notes. The Hotel Company paid to the landlord, Investment Company, \$1,600 a month from August 1, 1916, to January 31, 1917. The receipts, which were given by the Investment Company, landlord, for such rentals, to the Hotel Company, read: "Received from Turpin Hotel Company \$——, payment for rent on account." On April 4, 1917, the Hotel Company filed its petition in bankruptcy. No part of the rent for February and March, and up to April 4, 1917, was paid. The referee allowed \$5,500 for rental of February and March, and up to April 6, 1917, inclusive, at the rate of \$2,500. In December, 1916, the Powell Street Investment Company made a new inventory of the furniture and personal property in the hotel, and papers embodying a new agreement were to be drawn in December, 1916, providing the Hotel Company had paid in full the reduced rental of \$1,600 per month up to that time.

The referee found that the rent receipts heretofore referred to, which were given by the landlord for rentals from August 1, 1916, to January 31, 1917, were not receipts "upon account," but were in full for rental for said months, and that the lease in question between the parties was modified as to monthly rentals, in that the monthly rental was reduced from \$2,500 to \$1,600 for the months from August, 1916, to January, 1917, inclusive, by an executed oral agreement.

These findings are made clearer by reference to the evidence, which

is included in the record, from which it appears that, just before the adjustment between the landlord and the tenant, the landlord had sued the tenant to foreclose a chattel mortgage made by the tenant to the landlord as security, and that there also seems to have been a suit brought by the landlord against the tenant, wherein the landlord attached certain property belonging to the tenant. Mr. Turpin, president of the Hotel Company, told him that the best that the directors could do for him was to reduce the rent to \$1,600 a month up to the 1st of June, 1917, and \$2,000 thereafter, and said that Savage told him that the receipt would read as "rent on account," because he did not wish other tenants, who were asking for reductions, to know the basis of the settlement being made; that Savage said he had the same agreement with another tenant; that he said to him, "My word is as good as my bond; you will find that I am all right." Savage also told him that he would have to have a new chattel mortgage and a new inventory, which would have to be paid for by the tenant; that in accordance with that understanding he (Turpin) proceeded within 20 days to take a new inventory, and paid for it, and turned it over to the Investment Company, but that no chattel mortgage was prepared and presented to him until about the latter part of December, 1916, and that he then objected to signing the mortgage, because it included property that did not belong to him; that he kept the mortgage submitted to him; that the representative of the Investment Company said that the papers would be corrected, but that no correction was made and that no new mortgage was ever executed; that it was understood that there was to be a rider to the lease pertaining to the reduction which had been agreed upon, but that the secretary of the Investment Company told him that the duplicate lease had been taken to the office of counsel for the Investment Company and had been lost.

The testimony of Savage of the Investment Company was that he told Turpin the Investment Company would give receipts on account for rent until the end of May, and that he said to Turpin, "We will then execute a chattel mortgage; we will then execute a modification to the lease, which will have a new chattel mortgage attached to it," the mortgage to be paid some time in January; that the receipts on account for rent would be given until the end of May, when Turpin was to get a receipt in full for rents from August 1st to May 31st; that the lease would then call for \$2,000 a month; that the understanding was that the reduction of \$900 a month was merely a contingent one upon Turpin completing his payments until May 31, 1917, and that on the 31st of May, 1917, he (Savage) was to give Turpin a written modification of the lease carrying a reduced rent to the end of the term at the rate of \$2,000 a month, and that there was to be attached to the writing a chattel mortgage dated of that date, May 31, 1917, to secure the rentals for the balance of the lease; that this modified lease and mortgage were not to be executed "unless he (Turpin) kept good faith in our oral agreement"; that the mortgage contemplated was being prepared in November or December, 1916, but that as soon as Turpin "fell down in his agreement" the mortgage was "held up."

The notes indorsed by Mr. Wilsie were all paid about January or February, 1917, by the substitution of a mortgage executed by Wilsie and wife and accepted by the Investment Company. Mr. Wilsie in his testimony said that, in one of his conversations (in February, 1917) concerning documents which were to be drawn up, he was told by counsel for the Investment Company that Turpin's rent had been reduced to \$1,600 a month, and that the arrangements were being made with that understanding. He said that he indorsed the notes with the understanding that the Hotel Company owed the Investment Company \$9,000 as back rent, and that the rent had been cut to \$1,600 a month for the future, and that there was no other indebtedness due the Investment Company by the Hotel Company. It appears that the Hotel Company paid \$1,600 for rental during September and a like amount during October, but that it did not pay the rental for November until the latter part of December, 1916, and that it was in arrears in January, 1917. There is also evidence that the Investment Company, in December, 1916, was taking an inventory of the furniture in the hotel, with the intention of making a new chattel mortgage, which, Savage testified, was not to be executed until about May 31, 1917. Turpin testified that there was no conversation concerning the execution of such a chattel mortgage as on the particular date of May 31st; that he had directed the persons in charge of the inventory to proceed to prepare the same for use in the chattel mortgage.

The contention of the appellant is that the actual oral agreement between the landlord and the tenant had not been executed. This contention is, of course, predicated upon the assumption that the parties agreed that a chattel mortgage would be executed and delivered, and that because of failure by the Hotel Company to execute and deliver a chattel mortgage as security for the payment of future rent, as called for under the modified lease, there never was an execution and full performance of the agreement made. The appellee, on the other hand, argues that the lessor accepted for a consideration \$1,600 for each of the months from August, 1916, to January, 1917, in full payment, and that the rental reduction was not conditioned upon the payment of the reduced monthly rent up to May 31, 1917, but that the lower rent was granted in consideration of the agreed new adjustment and settlement of arrears of rentals, and that the agreements to make in the future a new chattel mortgage and lease rider were not essential to the allowance of any past concession of monthly rental.

[1, 2] The finding of the referee that the amount paid each month was accepted as payment in full for the month's rental is amply sustained, and, having been affirmed by the District Court, will not be disturbed by this court. In *re Dorr*, 196 Fed. 292, 116 C. C. A. 112. There is left the inquiry whether or not the reduction of \$1,600 a month was conditioned upon the Hotel Company actually paying the reduced rent up to May 31, 1917. The referee in his certificate has stated the point, and after commenting upon the testimony of Mr. Savage, to the effect that the papers embodying the new agreement were not to be effective until June 1, 1917, and then only if the Hotel Company had paid the reduced rental in full up to that date, has not only expressly declined to accept Mr. Savage's version, but has stated that

the evidence of the taking of the inventory and the preparation of the papers supports Turpin's explanation of why the papers embodying the new agreement were not executed at the time the reduction in rent was agreed upon.

To this finding, supported by substantial evidence, and to the whole case upon its facts, there should be applied the principle recognized by section 1698, California Civil Code, that a contract in writing may be altered, either by a contract in writing or, as we have in the present instance, by an executed oral agreement. When the payments were accepted as rent in full for the month specified in the receipts, there was an execution of the essence of the oral adjustment of rental between the landlord and tenant. The agreement of the tenant to give at some subsequent time a new mortgage security was not a condition precedent to the reductions conceded and recognized, nor was it such an essential thing in the adjustment agreement that the omission on the part of the tenant to make such a mortgage and to deliver it to the lessor should be construed as failure in the execution of the oral agreement. The evidence of the circumstances connected with the delay in making the proposed new mortgage and lease rider, when considered with the acceptance of the payments of rentals in the reduced sums, strengthen the opinion that the matter of the giving of the mortgage was neither of the essence of the adjustment nor the consideration for the promise of the lessor to reduce the rental. The real consideration for the oral agreement was the settlement by obligation of Wilsie to pay \$9,000 of back rent, which he agreed to do, with the understanding that rentals had been reduced. This was at least presumably a valuable consideration for the oral modification. The obligation by way of indorsement of notes was made for the benefit of the tenant, the maker of the notes, in favor of the landlord, payee. It would seem that under the rule of the California decisions the Hotel Company could maintain action for the breach of the engagement of Wilsie. *Hendrick v. Lindsay*, 93 U. S. 143, 23 L. Ed. 855; *Austin v. Seligman (C. C.)* 18 Fed. 519; *Washer v. Independent M. & D. Co.*, 142 Cal. 702, 76 Pac. 654.

[3] Appellant argues that section 1698 of the Civil Code of California, already cited, only applies to written contracts which are not required by the statute of frauds to be in writing. But, as we accept it as a fact that the receipts were for full payments of the months specified in them, and that the agreement of modification was as interpreted by the lower court, we do not think that the position is well taken. As bearing upon the point, *Sinnige v. Oswald*, 170 Cal. 55, 148 Pac. 203, *McKenzie v. Harrison*, 120 N. Y. 260, 24 N. E. 458, 8 L. R. A. 257, 17 Am. St. Rep. 638, *Doherty v. Doe*, 18 Colo. 456, 33 Pac. 165, and *Jones on Landlord and Tenant*, may be cited. *Boyd v. Big Three Ranch Co.*, 22 Cal. App. 108, 133 Pac. 623, was upon such a materially different state of facts that it cannot be regarded as upholding appellant's contention herein.

In conclusion, our opinion is that the referee and District Court were right in their understanding of the evidence and of the legal effect thereof.

Affirmed.

UNITED STATES v. KIRK.

(Circuit Court of Appeals, Eighth Circuit. December 31, 1917.)

Nos. 4975-4978.

1. PUBLIC LANDS ⇨120—SUITS TO CANCEL PATENTS—DEFENSE OF BONA FIDE PURCHASER.

In a suit by the United States to cancel a patent to public lands, the burden of pleading and proving the defense of bona fide purchaser is upon the defendants.

2. MINES AND MINERALS ⇨35—COAL LANDS—SUITS TO CANCEL PATENTS—BONA FIDE PURCHASERS.

Where defendants were members of an association, the purpose of which was to acquire coal lands of the United States in excess of the amount authorized by law, or paid their money for such lands with knowledge of facts which, if investigated, would have led to a knowledge of the fraudulent character of the entries, the defense of bona fide purchaser is not open.

3. MINES AND MINERALS ⇨45—COAL LANDS—PATENTS—CANCELLATION—EVIDENCE.

Evidence *held* to show that entries on which patents were based were made pursuant to a scheme to enable individuals or an association to obtain coal lands in excess of the amount authorized by law.

4. MINES AND MINERALS ⇨11—COAL LANDS—PATENTS—CANCELLATION.

Under Rev. St. §§ 2347-2351 (Comp. St. 1916, §§ 4659-4663), imposing restrictions in regard to filing on public coal lands, and forbidding more than one entry by the same person or association of persons, entries cannot lawfully be made in the interest of persons or associations who have exercised their own right of entry, and patents based on entries by persons who had not exercised their pre-emption rights pursuant to a scheme to enable a person or association to obtain lands in excess of the amount allowed are fraudulent and subject to cancellation.

5. MINES AND MINERALS ⇨42—COAL LANDS—PATENTS—SUITS FOR CANCELLATION—CONSIDERATION OF PATENT.

In determining the validity of patents to coal lands, where it appeared that the entries were all made in pursuance of a scheme by an association of persons to obtain more lands than allowed by law, the validity of the several patents cannot be determined apart from the general scheme.

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Suits by the United States of America against Lillian Kirk, against Eugene A. Austin and others, against Eugene Wilder and others, and against De Witt C. Bryant. The several suits being dismissed, the United States appeals; the causes being consolidated on appeal. Reversed and remanded.

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

George L. Hodges, of Denver, Colo. (D. Edgar Wilson, of Denver, Colo., on the brief), for appellees.

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

CARLAND, Circuit Judge. The above-entitled actions were commenced by the United States for the purpose of having canceled for fraud certain land patents conveying coal land in Routt county, Colo. After a hearing on pleadings and proofs the actions were dismissed, and the United States appealed. The appeals have been submitted upon one brief and argument on both sides.

Case No. 4975 involves a coal land entry made April 11, 1903, in the name of W. L. Beach for which patent issued July 23, 1903, conveying 155.75 acres. The entryman by quitclaim deed conveyed the land to appellee on April 13, 1903. The complaint in this case as amended alleged that on or about March 21, 1902, appellee unlawfully and fraudulently entered into a combination and conspiracy with Frank V. Kirk, W. L. Beach, Henry Stevens, Eugene Wilder, Addison F. Orr, and Walter H. Nichols for the purpose of fraudulently purchasing and entering the land described in the above land patent in the name of and ostensibly for Beach, but in reality for appellee and her associates, in order to cheat and defraud the United States out of said land, and thereby procure for said appellee and her associates more than 160 acres of coal land in violation of the statutes of the United States in such case made and provided and in violation of the rules and regulations issued by the Commissioner of the General Land Office, relating to the entry and purchase of public vacant coal land; that in order to effect the object of said conspiracy appellee and her said associates caused and procured Beach to prepare, sign, and file with the register and receiver of the United States land office at Glenwood Springs, Colo., ostensibly for himself, but in reality for appellee and her said associates, all the necessary and proper applications, affidavits, proofs, and papers required by law or regulation to be signed and filed to obtain title from the United States to the vacant public coal land described in the above patent; that the coal "declaratory statement" filed by Beach was false in this, that it was not the intention of declarant to purchase said coal land for himself, but for appellee and her associates, and it was not true that said declarant had taken possession of any of said land, or had expended money upon any mine thereon; that the "affidavit at purchase" filed by Beach was false in this, that it was not true that he had expended any money in developing a coal mine upon said land; that it was not true that he had ever been in the actual possession of a coal mine on said land; that it was not true that he had made said coal land entry for his own use and benefit, and not directly or indirectly for the use or benefit of any other person; that in the purchase of said coal land Beach used the money of appellee to purchase the same for the sole use and benefit of appellee and her associates in order that she or they might make more than one coal cash entry of coal land; that at the time of said conspiracy, and the entry of said land by Beach, appellee and Frank V. Kirk, her husband, were and had been for many years prior thereto disqualified to enter or purchase either directly or indirectly public coal lands for the reason that they had exercised and exhausted all their rights so to do under the law; that at the time of the entry of said land by Beach appellee and her husband, Frank V. Kirk, were members of an association of persons who were seeking to

acquire a greater quantity of public coal land than lawfully could be acquired by said associates.

The answer of appellee denied all fraud, and alleged that Beach, appellee, and Frank V. Kirk, were all qualified to enter and purchase public coal land; that Beach entered the land in question for the benefit of Frank V. Kirk, the purchase money being borrowed by appellee from one L. S. Young, and turned over to her husband Frank V. Kirk; that Beach, at Frank V. Kirk's request, conveyed the land to appellee to be held by her in trust for Kirk as security for the repayment of the purchase money borrowed as aforesaid. The answer also denied that Beach, appellee, or Kirk belonged to an association, the members of which were seeking to acquire more coal land than they were entitled to under the laws of the United States. We have carefully read the evidence which is applicable generally to all the cases now being considered, and find that the statement of facts set forth in the brief of counsel for the United States is a fair statement of what the evidence shows. That statement is as follows:

"In about the year 1890 a number of residents of Boulder, Colo., and their friends, among them being Henry Stevens, Addison F. Orr, Eugene Wilder, Marie Wilder, Samuel S. Eddy, Frank V. Kirk, Lillian Kirk, Jacob Switzer, De Witt C. Bryant, and perhaps others, conceived the idea of acquiring a large tract of public coal lands situate in the vicinity of Pilot Knob Mountain, in Routt county, Colo. For this purpose each of these persons contributed a small amount and had survey made of the lands, so that the same could be designated by legal descriptions. About 4,000 acres of these lands were surveyed and coal declaratory filings in the name of the respective interested persons made on respective quarter sections of said lands. At the end of a year from the date of these initial coal declaratory filings these persons, not being able or willing to purchase the lands from the government, or any tract thereof, in order to continue to control these lands, placed accommodation coal declaratory filings on the lands in the names of friends and acquaintances, who for this purpose signed proper papers and permitted the use of their respective names, the original group of persons paying all the expenses attendant upon the making of this second group of filings. In this manner successive filings were made upon the lands originally filed upon, or a part thereof, from year to year, up to and including the year 1902. During this period certain of the original filers dropped out, while certain other persons became interested in the holding of these lands, and it transpired that in January, 1903, certain of the lands originally filed upon by these original associates were being held under filings controlled by certain of these associates, namely, Stevens, Orr, Wilder, Marie Wilder, Eddy, Frank V. Kirk, Lillian Kirk, and Bryant. During January and February, 1903, Stevens, Orr, Wilder, and Kirk interested one Walter H. Nichols in the deal, explaining to Nichols that Stevens represented a number of persons who had made coal filings on coal lands in Routt county, which were about to expire, and that such persons were desirous of purchasing such lands from the government, but did not have the money with which to pay for the same; that, if Nichols would advance money with which to pay the government for these lands, each of such filers, for whom Stevens was represented to be acting, would give Nichols an undivided one-half interest in each of such tracts of land for which Nichols furnished the money to pay the government. Nichols had several interviews with Stevens, Orr, Wilder, and Kirk, during which this matter was discussed, and during which certain maps were exhibited to Nichols, showing the location of the lands under consideration, which were indicated upon one of such maps as 'Stevens & Company' lands, which group embraces all of the lands here under consideration. Nichols thereupon agreed to furnish the money with which to pay for part of these entries, and did furnish

for that purpose more than \$20,000 during March and April, 1903. Furthermore, Nichols interested his cousin, one Henry M. Hubbard, of Chicago, Ill., who advanced for the same purpose \$11,200. The funds furnished by Nichols (part of which was by Nichols, secured from Hubbard) to pay for entries under this arrangement were in the form of drafts payable to J. W. Ross, receiver of the United States land office at Glenwood Springs, Colo., in which district the lands are situated. The selection of the particular entries to be paid for with such funds was by Nichols left to Stevens, Wilder, and associates; the only condition being that for every \$20 advanced by Nichols to be paid at the land office for coal lands, Nichols was to have one acre of the lands so paid for, the price to be paid to the government being \$10 an acre. In this manner, and by means of the funds thus secured, a part of the filings controlled by Stevens and associates were perfected. At the time the money thus furnished by Nichols was used to purchase these lands from the government, it was understood between Nichols and Stevens and associates that Nichols was to have an undivided one-half interest in each of such filings so paid for. After the entries had been made, however, owing to a disagreement between Nichols and Stevens and associates, it was decided that Nichols should be given full title to certain of the lands, instead of an undivided one-half interest in double the amount of the lands. Stevens was in position to make such arrangements concerning, or conveyance of, the lands thus being entered, as he and his associates saw fit, as he had taken the precaution to secure from each of these various accommodation filers a power of attorney constituting Stevens attorney in fact for such filers, with power to convey.

"At the time the money was being forwarded to the local land office to pay for the entry of these lands, certain of the associates, who with Stevens controlled the coal filings under which these so-called 'Stevens & Company' lands were then being held, namely, Frank V. Kirk and De Witt C. Bryant, each contributed \$1,600 with which to pay for two of such entries. After the entries were made, the lands entered in the name of W. L. Beach were awarded to Frank V. Kirk, but conveyed to Lillian Kirk at his request, and the lands entered in the name of C. C. Cook were awarded to and conveyed to Bryant, defendant in case No. 4978. Furthermore, \$1,588.20 was procured by Stevens from Eugene A. Austin for the purpose of paying for one of these entries, namely, the entry made in the name of F. L. Cheney; an undivided one-half interest in the Cheney entry being conveyed by Stevens, under his power of attorney, each to Eugene A. Austin and Lillian Kirk."

In case No. 4975 now under consideration the evidence further shows that no consideration passed to Beach either from appellee or her husband, Frank V. Kirk, at the time of the execution and delivery of the quitclaim deed or at any other time; that Beach had no interest in the land, and that he made the coal land entry which resulted in the issuance of the patent to him, for Frank V. Kirk. Kirk testified that he borrowed the \$1,600, which he paid upon the Beach entry, from L. S. Young or Young's father. Young testifies that Kirk is mistaken when he says that this \$1,600 so borrowed was to pay for the Beach entry. Kirk also testified that he took the money down and passed it over into the fund that was being sent down to pay on these entries—took it over to the courthouse, either to Mr. Wilder or Mr. Stevens, he did not remember which. The evidence also shows that not only Beach, but Strawn, Gilbert, and Young each made coal land filings for Frank V. Kirk, and that appellee did not know much about the transaction, having acted throughout in obedience to the requests of her husband; that the \$1,600 borrowed by Kirk was not used to pay for the Beach entry any more than any other entry, but went into the general fund raised to pay for the entries made in the interest of the association of persons herein specified; that Kirk had made a coal land

filing which was not carried to entry and so had appellee prior to the Beach entry.

Case No. 4976 involves coal land entry made April 29, 1903, by Charles S. Lee for 162.15 acres for which a patent issued August 17, 1903. This land was conveyed by the entryman Lee, by Henry Stevens, his attorney in fact, to Walter H. Nichols, in trust for moneys advanced by Nichols under his arrangement with Stevens and associates. Nichols for the purpose of getting his land in one body conveyed the land embraced in the Lee entry to appellees Austin and Lillian Kirk in exchange for lands embraced in what is called the Cheney entry. The lands entered in the name of Cheney had been conveyed by the entryman by Henry Stevens, his attorney in fact, to appellees Austin and Lillian Kirk, the Cheney entry having been purchased with money furnished to Stevens by Austin to pay for one of the numerous entries. The only consideration flowing from Austin and Lillian Kirk for the Cheney entry was the purchase money advanced by Austin to Stevens to pay the government for an entry, and as to Lillian Kirk the interest of Lillian Kirk and her husband, in the group of filings generally. The evidence further shows that Lee signed the filing and entry papers at the request of one C. C. Welch, and never expected to have any interest in the land.

Case No. 4977 involves the coal land entry of H. P. Battey, made May 9, 1903, for 159.07 acres. The entryman conveyed the land to the appellee Eugene Wilder, who it is claimed took and holds the title thereto in trust for the appellees Eddy and Harriet Wilder. Wilder and wife on November 1, 1904, executed a deed of trust on the land to the public trustee of Routt county, Colo., to secure the payment of a promissory note in favor of Mary S. Stoddard for \$550. The only consideration flowing from either appellees Wilder, Eddy, or Harriet Wilder being their general interest in the group of filings. Wilder testified that he took and holds the title to the lands for appellees Eddy and Harriet Wilder, but in his ex parte affidavit he stated:

"I still hold the entire interest in this Battey tract, but I hold one-half of it in trust for Mr. S. S. Eddy, who was one of the persons interested in the deal with us, and I hold the other half for myself, as my part of the land to which I was entitled for securing the filers and assisting in carrying the deal to a successful conclusion."

Case No. 4978 involves coal land entry made November 24, 1903, in the name of C. C. Cook to which patent issued April 8, 1904, for 146.70 acres. By quitclaim deed dated November 27, 1905, the entryman conveyed the land to appellee De Witt C. Bryant. The only consideration flowing from Bryant for this land was his interest in these filings generally and the \$1,600 which he furnished Wilder to pay for one of these filings. No consideration whatever is shown to have passed from Bryant to the entryman C. C. Cook. On the contrary, it is shown that Cook was merely an accommodation entryman who received nothing for the land.

[1, 2] The pleadings in Nos. 4976, 4977, and 4978 are substantially the same as above recited in case No. 4975, except that the defense of innocent purchaser is attempted to be set up. The alleged innocent

purchasers in case No. 4976 are appellees Eugene A. Austin and Lillian Kirk, or Frank V. Kirk, for whom it is claimed appellee Lillian Kirk holds title. In case No. 4977, appellee Samuel S. Eddy attempts to set up the defense of innocent purchaser. Mary S. Stoddard also sets up the plea of innocent purchaser for value under the deed of trust from Eugene Wilder and Marie Wilder, his wife, to the public trustee of Routt county, Colo., hereinbefore mentioned. In case No. 4978 appellee Bryant sets up the defense of innocent purchaser. With the exception of appellee Mary S. Stoddard, the evidence does not show the appellees to have been innocent purchasers. The burden of pleading and proving such a defense rested upon appellees. The evidence shows, however, that said appellees were either members of the association hereinbefore described, or that they paid their money, if any, with knowledge of facts which, if investigated, would have led to a knowledge of the fraudulent character of the entries. *Wright-Bloodgett Co. v. United States*, 236 U. S. 397, 35 Sup. Ct. 339, 59 L. Ed. 637; *Northern Colorado Coal Co. v. United States*, 234 Fed. 34, 148 C. C. A. 50; *United States v. Krueger*, 228 Fed. 97, 142 C. C. A. 503; *Hill v. United States*, 234 Fed. 39, 148 C. C. A. 55. In regard to the plea of Mary S. Stoddard we are of the opinion that she has made her plea good.

[3-5] We further find from the evidence that each coal land entry involved herein was not made in the interest of the entrymen, but, on the contrary, either in the interest of an association of persons who were seeking to obtain from the United States more coal land than they were entitled to, or in the interest of individuals who were seeking to obtain more coal land than they were entitled to. The restrictions in regard to filing upon the public coal lands of the United States as contained in sections 2347, 2348, 2349, 2350, and 2351 of the Revised Statutes of the United States (Comp. St. 1916, §§ 4659-4663), are stated in the case of *United States v. Colorado Anthracite Coal Co.*, 225 U. S. 219, at page 225, 32 Sup. Ct. 617, 619 (56 L. Ed. 1063) as follows:

"These restrictions, as this court has held, forbid individuals and associations from acquiring public coal land in excess of the quantities prescribed, whether directly by entries in their own names or indirectly by entries made for their benefit in the names of others. And so, one person cannot lawfully make an entry in the interest of another who has had the benefit of the law, or in the interest of an association where it or any of its members has had the benefit thereof, or in the interest of a person or an association where he or it has not had such benefit but is seeking, through entries made or to be made by others in his or its interest, to acquire a greater quantity of land than is permitted by the law. *U. S. v. Trinidad Coal & Coking Co.*, 137 U. S. 160 [11 Sup. Ct. 57, 34 L. Ed. 640]; *U. S. v. Keitel*, 211 U. S. 370 [29 Sup. Ct. 123, 53 L. Ed. 230]; *U. S. v. Forrester*, 211 U. S. 399 [29 Sup. Ct. 132, 53 L. Ed. 245]; *U. S. v. Munday*, 222 U. S. 175 [32 Sup. Ct. 53, 56 L. Ed. 149]."

See, also, *Wilson Coal Company v. United States et al.*, 188 Fed. 545, 110 C. C. A. 343.

We are of the opinion that it is not permissible to consider the coal entries herein involved separately and apart from the whole scheme portrayed by the evidence which had in view the acquiring of the public coal lands of the United States in the manner shown. We there-

fore decide that the decrees entered in Nos. 4975, 4976, 4977, and 4978 must be reversed, and the cases remanded, with instructions to enter a decree in each case canceling the patent and other mesne conveyances therein mentioned, except the conveyance made by Eugene Wilder and Marie Wilder to the public trustee of Routt county, Colo., securing the payment of a note for \$550 in favor of the appellee Mary S. Stoddard in case No. 4977, which said conveyance is adjudged to be a valid lien to secure the payment of said note; and it is so ordered.

MISSOURI, K. & T. RY. CO. v. DANCIGER et al.

(Circuit Court of Appeals, Eighth Circuit. December 27, 1918.)

No. 4522.

1. COMMERCE ↔14—INTERSTATE COMMERCE.

Act Cong. June 16, 1906, c. 3335, 34 Stat. 267, providing for the admission into the Union of the then territory of Oklahoma and Indian Territory as the state of Oklahoma, declared in section 3 that the Constitution to be formed should contain a provision that the manufacture, sale, barter, or otherwise furnishing of intoxicating liquors within those parts of the new state known as the Indian Territory and the Osage and other Indian reservations should be prohibited for a period of 21 years from the date of the admission. Const. Okl. art. 1, § 7, forbids the manufacture and sale of intoxicating liquors in the state, and Rev. Laws Okl. 1910, § 3605, contains a similar provision. Webb-Kenyon Act March 1, 1913, c. 90, 37 Stat. 699 (Comp. St. 1916, § 8739), declares that the shipment or transportation in any manner or by any means whatsoever of any intoxicating liquors from one state, territory, or district of the United States to any other state, territory, or district, which liquor is intended by any person to be received, possessed, or sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state, territory, or district, is prohibited. *Held* that, as the purpose of the act was to remove from the protection of interstate commerce liquor shipments into those states, territories, or districts where the manufacture or sale thereof is unlawful, and to render the state law applicable, the interstate shipment of intoxicating liquor into the state of Oklahoma is unlawful, and a common carrier cannot be enjoined from refusing to receive shipments for delivery into that state.

2. COMMERCE ↔14—INTERSTATE COMMERCE—INDIAN TERRITORY.

As the Oklahoma laws forbid the manufacture and sale of intoxicating liquors therein, interstate shipments of intoxicating liquor into portions of Oklahoma which formerly were comprised in an Indian reservation are not authorized, because the Indian titles have been extinguished; the Webb-Kenyon Act having deprived such shipments of the protection arising out of their interstate character.

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Suit by Dan Danciger and others against the Missouri, Kansas & Texas Railway Company. From a decree for complainant, granting the injunction prayed for, defendant appeals. Reversed and remanded, with directions to dissolve the injunction and dismiss the bill.

James W. Reid, of Parsons, Kan. (W. W. Brown, Joseph M. Bryson, of St. Louis, Mo., and Clifford L. Jackson, of Muskogee, Okl., on the brief), for appellant.

I. J. Ringolsky, of Kansas City, Mo. (Ringolsky & Friedman and Harry L. Jacobs, all of Kansas City, Mo., on the brief), for appellees.

Before HOOK and SMITH, Circuit Judges, and REED, District Judge.

REED, District Judge. The parties will be referred to as they were named in the court below. The plaintiffs, Dan Danciger, A. Danciger, and others, citizens of Missouri, brought this suit in the court below against the Missouri, Kansas & Texas Railway Company, a Kansas railway corporation, engaged as a common carrier in interstate commerce between the states of Missouri, Kansas, Oklahoma, and other states, to permanently enjoin it from refusing to receive from the plaintiffs at Kansas City, Mo., and carry and deliver to persons in Osage county, Okl., intoxicating liquors that they had sold or may thereafter sell in Kansas City, Mo., to persons in said Osage county. The matter was heard in the trial court upon the bill and a stipulation of facts, resulting in a decree for the plaintiffs, permanently restraining the railway company as prayed, and it appeals. ○

The plaintiffs are copartners engaged in selling whisky and other intoxicating liquors under the name of Danciger Bros. and other names in Kansas City, Mo., upon mail orders and otherwise. The defendant railway company operates a line of railroad from Kansas City, Mo., to various points in Kansas and Oklahoma, including Osage county in the latter named state, and is engaged as a common carrier of property in interstate commerce from Kansas City, Mo., to points on the line of its railroad in Oklahoma, including Osage county, and for some time prior to the commencement of this suit had accepted from the plaintiffs at Kansas City, Mo., and transported into said Osage county, goods and merchandise consigned to persons residing in said county on defendant's line of road, or on the line of a connecting carrier, to whom it delivered the goods for carriage to their destination in said county, but had notified the plaintiffs "that it would no longer accept from them shipments of intoxicating liquors in any quantity or under any condition consigned to parties in Osage county, Okl.," on the ground that all points in said Osage county are "Indian country"; that defendant thereafter refused to receive or accept from plaintiffs any shipment of intoxicating liquors to be carried over its line of railroad from Kansas City, Mo., to any point in Osage county, Okl.

Prior to the commencement of the suit the plaintiffs tendered to the defendant at Kansas City, Mo., for shipment to points in Osage county, Okl., on its line of railroad or the line of a connecting carrier in said county, nine separate shipments of intoxicating liquors, billed and properly addressed, consigned to different persons in said Osage county, with the lawful freight charges thereon to destination, orders for the purchase of which plaintiffs had received by mail at Kansas City, Mo., from persons residing in said Osage county, with the money to

pay for such liquors, all of which shipments the defendant refused to accept or transport to the consignee. This suit was then brought to restrain the defendant temporarily and permanently from refusing to receive from plaintiffs the intoxicating liquors tendered by them to the defendant, and to be thereafter tendered when properly packed, addressed, and consigned to parties in Osage county, Okl., with the lawful freight charges thereon to destination.

On the hearing it was admitted by defendant that shipments (presumably of intoxicating liquors) were tendered to it by plaintiffs for carriage and delivery to points in Osage county, Okl., consigned to persons named in the petition, that defendant refused, and still refuses, to accept, transport, or deliver any such shipment the destination of which is in Osage county, Okl., and that it had previously notified plaintiffs to that effect. It was then agreed that the cause be submitted on the verified bill, affidavits, exhibits, abstracts, and agreements of the parties. These exhibits, abstracts, and agreements show or tend to show that the Indian title to the lands in Osage county, upon which are the towns and villages to which the liquors were destined, had been legally extinguished; that the persons to whom the liquors were consigned were of pure white blood, over 21 years of age, under no legal disabilities, competent to purchase the liquors consigned to them; and that they were purchased by each of them respectively for his own personal use and consumption, but for what particular use is not shown. It was also admitted, or otherwise shown, that the land or territory comprising said Osage county, Okl., had prior to the admission of Oklahoma as a state, been set apart by Congress as a reservation for the Osage Indians in the territory of Oklahoma, and upon the admission of that territory as part of the state of Oklahoma those reservations became Osage county, in the western part of Oklahoma. It was agreed by the parties that the court in deciding the case might consider any statute or law of the state of Oklahoma or of the United States.

Upon these facts the court entered a decree enjoining the defendant as prayed by the plaintiffs, and provided in its order:

"That at the time of the tender of any such shipments the lawful and scheduled charges for such services should be also tendered; that plaintiffs shall tender with such shipment an affidavit, signed and sworn to by the consignee, to the effect that he is a man of pure white (or negro) blood, over 21 years of age; that the shipment of intoxicating liquor ordered by him from plaintiffs, if shipped and transported by the railroad company, will not be used for any unlawful purpose; that said liquor is purchased for, and will be used by affiant for, his own personal use and family consumption; that the destination of said shipment is not in 'Indian country' or the Indian Territory; that the original Indian title of the place of destination has been extinguished, and the affidavit is made for the sole purpose of obtaining the shipment of said liquor, and that affiant knows that everything stated therein is true; also that plaintiffs file with the defendant, prior to any shipments of liquor tendered, an affidavit signed and sworn to by one of them to the effect that the affidavit signed and sworn to by one of them to the effect that the affidavit by the consignee of such shipment is required in a restraining order against said railroad company, and is the original affidavit filed with the plaintiffs with the order which it received for the shipment tendered; that plaintiffs will mail the original bill of lading to the consignee of such shipment, or shipments, with instructions to deliver the envelope containing same to said addressee only;

that affiant will order said railroad company to deliver such shipment only on presentation of the original bill of lading; that no shipment will be tendered to be carried to any person enrolled as an Osage Indian; that every shipment tendered to said railway company will be made in good faith by the plaintiffs, with their belief that the same is intended and will be used for a lawful purpose; and that they have no knowledge or information which would lead them to believe otherwise. It is further ordered that the injunction be permanent upon the giving and approval of a surety bond in the penal sum of \$2,000, conditioned as by law provided." Signed by the judge.

[1] The decree so entered in effect requires the defendant as a common carrier of interstate commerce, to accept at Kansas City, Mo., for carriage and delivery to points in Osage county, Okl., intoxicating liquor sold by plaintiffs in Kansas City to persons in said Osage county upon mail orders received by plaintiffs for such liquors, when such sales and purchases are made for the alleged personal use and consumption of the purchasers, notwithstanding the act of Congress approved March 1, 1913 (37 Stat. 699), commonly called the "Webb-Kenyon Law," and the Constitution and statutes of the state of Oklahoma, which forbid the manufacture and sale of intoxicating liquors in that state.

The enabling act of Congress approved June 16, 1906 (34 Stat. p. 267, c. 3335), provides for the admission into the Union of the then territory of Oklahoma and the Indian Territory as the state of Oklahoma, but requires that a convention shall be held at the seat of government of the territory of Oklahoma to form a Constitution for the new state; and section 3 of the act requires that the Constitution so to be formed shall contain a provision that:

"The manufacture, sale, barter, or otherwise furnishing of intoxicating liquors within those parts of the new state known as the Indian Territory and the Osage and other Indian reservations existing on June 1, 1906, shall be prohibited for a period of twenty-one years from the date of the admission of the state, and thereafter until the people of said state shall otherwise provide by amendment of said Constitution and proper state legislation."

The Constitution so formed contained such provision, was adopted by the people of the territories at an election duly called and held for the purpose of ratifying such Constitution, which was duly ratified at such election and became a part of the Constitution of the new state, as section 7, article 1, thereof, and was afterwards included by the Legislature of the state as a part of section 3605 of the Revised Laws of Oklahoma of 1910; which forbids the manufacture, sale, barter, giving away, or otherwise furnishing intoxicating liquors therein, but contained a proviso:

"That the provisions of this chapter shall not apply to the manufacture and sale of unfermented cider and wine made from apples, berries or other fruit grown in this state, and the use of wine for sacramental purposes in religious bodies."

Otherwise the statute forbids the manufacture, sale, and use of intoxicating liquors in the state of Oklahoma.

It is the contention of the plaintiffs that the Webb-Kenyon Law does not forbid them from shipping, nor the defendant from carrying, intoxicating liquors from Missouri into Oklahoma and delivering the

same to the consignee or purchaser of such liquor; that any individual residing in Osage county has the legal right to purchase wherever he may lawfully do so, and receive in said Osage county intoxicating liquors for his own personal use and that of his family, for any purpose other than to sell the same, in violation of the Oklahoma statute; and *Adams Express Company v. Kentucky*, 238 U. S. 190, 35 Sup. Ct. 824, 59 L. Ed. 1267, L. R. A. 1916C, 273, Ann. Cas. 1915D, 1167, is relied upon as supporting this contention. This view was apparently upheld by the court below, and the provision of its decree requiring the plaintiffs to tender to the defendant with such shipment of intoxicating liquors to be carried into Oklahoma, the affidavit of plaintiffs and of the consignee that such sale and purchase were made in good faith and for the personal use of the consignee, was obviously to comply with the suggestion in *Adams Express Company v. Commonwealth*, 160 Ky. 66, 169 S. W. 603, cited in 238 U. S. at page 201, 35 Sup. Ct. 824, 59 L. Ed. 1267, L. R. A. 1916C, 273, Ann. Cas. 1915D, 1167, that the carrier and the shipper should exercise reasonable diligence to not aid in violating the prohibitory law of Oklahoma; otherwise, this requirement of the decree seems wholly without purpose. It should be said, however, in explanation of this part of the decree that it was entered prior to the decision of the Supreme Court in *Clark Distilling Company v. Western Maryland Ry. Co.*, 242 U. S. 311, 37 Sup. Ct. 180, 61 L. Ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845, prior to which the constitutional validity of the Webb-Kenyon Law, and its effect, if valid, upon the carriage of intoxicating liquors in interstate commerce into states which have prohibited the manufacture and sale of intoxicating liquors, was a much-mooted question. But in *Clark Distilling Company v. Western Maryland Ry. Co.*, after reciting the text of the Webb-Kenyon Act, the history of its enactment, and reviewing the prior authorities, including *Adams Express Co. v. Kentucky*, 238 U. S. at page 324, 37 Sup. Ct. 1184, 61 L. Ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845, the court says:

"There is no room for doubt that the Webb-Kenyon Act was enacted simply to extend that which was done by the Wilson Act; that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught. In this light it is clear that the Webb-Kenyon Act, if effect is to be given to its text, but operated so as to cause the prohibitions of the West Virginia law against shipment, receipt, and possession to be applicable and controlling irrespective of whether the state law did or did not prohibit the individual use of liquor."

Referring again to the case of *Adams Express Company v. Kentucky*, supra, as holding to the contrary, the court says:

"Clearly it does not do so. All that was decided in that case was that as the court of last resort of Kentucky, into which liquor had been shipped, had held that the state statute did not forbid shipment and receipt of liquor for personal use, therefore the Webb-Kenyon Act did not apply, since it only applied to things which the state law prohibited. * * * But we see no ground for following the ruling thus made, since, as we have already pointed out, it necessarily rested upon an entire misconception of the text of the Webb-Kenyon Act, because that act did not simply forbid the introduction of liquor into a state for a prohibited use, but took the protection of interstate com-

merce away from all receipt and possession of liquor prohibited by state law. The movement of liquor in interstate commerce and the receipt and possession and right to sell prohibited by the state law having been in express terms divested by the Webb-Kenyon Act of their interstate commerce character, it follows that if that act was within the power of Congress to adopt, there is no possible reason for holding that to enforce the prohibitions of the state law would conflict with the commerce clause of the Constitution; and this brings us to the last question, which is: Did Congress have power to enact the Webb-Kenyon Law?"

And it is held that it did.

This decision puts at rest, at least in all federal courts below the Supreme Court, the question of the constitutional validity of the Webb-Kenyon Law, and subjects intoxicating liquors carried in interstate commerce to the local laws of the state or territory into which they are carried, even though the liquors may be carried for the personal use of the purchaser as a beverage. The record, however, fails to show that the requirement of the decree that, if the injunction is to operate permanently, the plaintiffs shall give a bond in the penal sum of \$2,000, with sureties to be approved by the clerk, has been complied with; but the effect of the amendment to the act of Congress approved March 3, 1917 (39 Stat. c. 162, § 5, p. 1069), which provides that "whoever shall order, purchase or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any state or territory the laws of which state or territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be punished," etc., may be to annul such injunction, after the effective date of such amendment (July 1, 1917), if it had been previously issued.

[2] Whether or not the Indian title to the lands in the various Indian reservations in Oklahoma, and especially in Osage county, embraced within the Indian reservation or Indian country in that county, has been extinguished, is quite immaterial. The obvious purpose of Congress in forbidding the manufacture, sale, and giving away of intoxicating liquors in those parts of Osage county was to prevent intoxicating liquors coming within reach of the inhabitants of such reservations, more particularly the Indians; but the extinguishment of the Indian title to said lands does not extinguish the craving of the Indian for intoxicating liquors, nor lessen his capacity to absorb all such liquors that he can obtain, and the extinguishment of the Indian title only subjects the inhabitants of the territory to the prohibitory laws of the state of Oklahoma, if they did not already apply to such inhabitants.

We are of the opinion that the decree must be reversed, and the cause remanded, with directions to dissolve the injunction and dismiss the bill, at plaintiffs' costs; and it is so ordered.

Reversed.

UNITED STATES FIDELITY & GUARANTY CO. v. WALKER, Superintendent of Banks of State of Alabama.

(Circuit Court of Appeals, Fifth Circuit. January 24, 1918.)

No. 3147.

1. PRINCIPAL AND SURETY ⇨123(1)—NOTICE TO SURETY.

Where a bond, conditioned to save a bank harmless from embezzlement or larceny of its cashier, declared that, on discovery of any act capable of giving rise to any claim, the bank should at the earliest practicable moment give notice to the surety, the bank was not required to give notice, when it was not so far informed of the conduct of its cashier, and of the intent accompanying that conduct, as to be aware that he was guilty of what amounted to embezzlement or larceny; suspicion not being enough.

2. PRINCIPAL AND SURETY ⇨123(1)—NOTICE TO SURETY—REQUIREMENT OF BOND.

Where a bond conditioned to save a bank harmless from embezzlement or larceny of its cashier, required the bank, on discovery of any act capable of giving rise to a claim, to give notice to the surety at the earliest practicable moment, and declared that knowledge of a president, vice president, director, or other executive officer should be deemed the knowledge of the bank, recovery cannot be denied, because no notice was given, where the only representatives of the bank who were apprised of the cashier's larceny or embezzlement participated in or connived at his offense, for, notwithstanding the terms of the bond, the knowledge of such officials cannot be deemed knowledge of bank.

3. PRINCIPAL AND SURETY ⇨79—LIABILITY OF SURETY—DEFENSES.

Where the president of a bank incited and encouraged the cashier to appropriate the funds of the institution to his own use, the cashier cannot be deemed acting under the instructions of a superior, so that the surety on his bond, conditioned against loss by larceny or embezzlement, might escape under the clause excepting liability for acts done at the direction of a superior officer.

4. PRINCIPAL AND SURETY ⇨161—ACTIONS—RECOVERY.

In an action on a cashier's bond, conditioned to save a bank harmless, evidence held to show that as part of a fraudulent scheme the cashier, who was authorized to draw checks in the name of a partnership induced a third person, who was insolvent, to execute a note, that he then credited the sum to the account of the partnership and withdrew it for his own use, and that such action was not taken on objection by the partnership, that it was not liable on a note executed by it and held by the bank, but was a scheme of embezzlement, rendering the surety liable.

5. BILLS AND NOTES ⇨92(5)—CONSIDERATION—VALIDITY.

A note given to a bank to procure its surrender of a note of the third person is a binding obligation, though the maker of the note did not obtain the consideration therefor.

6. TRIAL ⇨260(1)—INSTRUCTIONS—REFUSAL.

The refusal of requests in substance covered by the instructions given is not error.

In Error to the District Court of the United States for the Middle District of Alabama; Henry D. Clayton, Judge.

Action by A. E. Walker, Superintendent of the Banks of the State of Alabama, liquidating the Clanton Bank, against the United States Fidelity & Guaranty Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Lee H. Weil, Davis F. Stakely, and J. W. Vardaman, all of Montgomery, Ala., for plaintiff in error.

B. P. Crum and Leon Weil, both of Montgomery, Ala., for defendant in error.

Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

WALKER, Circuit Judge. This was an action on a bond or contract by which the plaintiff in error obligated itself, subject to stated conditions, "to make good and reimburse" the Clanton Bank "such pecuniary loss as may be sustained by" the bank within a period named "by reason of the fraud or dishonesty of" E. A. Mathews, its cashier, "in connection with the duties of his office or position, amounting to embezzlement or larceny." Among the conditions stated in the bond were the following:

"That on the discovery of any act capable of giving rise to a claim hereunder, the employer shall at the earliest practicable moment give notice thereof to the company. * * * That the company shall not be liable, by virtue of this bond, for any act or thing done or left undone by the employé, in obedience to or in pursuance of any instructions or authorization received by him from the employer or any superior officer. * * * This bond shall become void as to any claim for which the company would otherwise be liable, if the employer shall fail to notify the company of the occurrence of the act or omission out of which said claim shall arise immediately after it shall come to the knowledge of the employer; and the knowledge of a president, vice president, director, secretary, treasurer, manager, cashier, or other like executive officer shall be deemed under this contract the knowledge of the employer."

The complaint claimed the amount of the penalty of the bond, \$7,500, and its averments showed that the Clanton Bank lost more than that amount by acts of Mathews, as cashier, which were such as made the maker of the bond liable. The defendant pleaded the general issue and filed a number of special pleas, which, severally, set out the above-quoted conditions of the bond and undertook to show that those conditions were violated or not complied with.

[1, 2] Complaint is made of the action of the court in sustaining demurrers interposed to several special pleas. If there was error in any of those rulings it was not a reversible one, as it is disclosed that in the trial the defendant was permitted to introduce evidence as to the matters upon which the special pleas were based, and that that evidence was submitted to the jury under instructions which permitted a finding for the defendant, if either of the conditions of the bond which was relied on was violated or not complied with. The evidence was not such as to require a finding for the defendant based upon either of those conditions. By the terms of the bond no conduct of the cashier made the defendant liable unless it amounted to embezzlement or larceny. This being so, the above-quoted provisions as to the bank giving notice are not to be so construed as to require action by the bank when it was not so far informed of the conduct of its cashier and of the intent accompanying that conduct as to be aware that he was guilty of what amounted to larceny or embezzlement. The existence of a mere suspicion of misconduct was not enough. *American Surety Co. v. Pauly*, 170 U. S. 133, 147, 18 Sup. Ct. 563, 42 L.

Ed. 987. Nor are those provisions to be regarded as contemplating the giving of notice when the only representatives of the bank, who were apprised of the cashier's guilt of larceny or embezzlement participated in or connived at his crime. *Fidelity & Deposit Co. v. Courtney*, 186 U. S. 342, 361, 22 Sup. Ct. 833, 46 L. Ed. 1193. From the evidence adduced it was permissible to find that there was no lack of promptness in giving notice to the defendant of the cashier's criminal misconduct after information of that misconduct was acquired by a director or official authorized to speak for the bank who did not share in the cashier's guilt.

[3] The defendant introduced testimony tending to prove that acts of the cashier which resulted in losses to the bank for which the defendant was made liable by the verdict and judgment were authorized and directed by the president of the bank. There was evidence tending to prove that the president was a merely nominal official, and was not really the cashier's superior officer, and, further, that he was a participant in the cashier's criminal conduct. This state of the evidence made the question raised by the defendant's contention based upon the provision of the bond relied on in this connection one for the jury. Certainly that condition contemplated such an instruction or authorization by a superior as could serve as an excuse for the subordinate's obedience to it, not a guilty incitement by a superior officer to the commission of a crime. *Fidelity & Deposit Co. v. Courtney*, supra. The evidence bearing upon the defenses based on the above-quoted conditions of the bond were submitted to the jury under appropriate instructions.

[4-6] It is contended that there was error in rulings of the court which permitted the defendant to be charged with the amount paid on a \$2,000 check drawn by the Chilton Fertilizer Company by Mathews, its treasurer. That company had a deposit account with the bank, and Mathews was authorized to draw checks in its name. The \$2,000 withdrawn from the bank on the check mentioned was used by Mathews to satisfy an execution against himself. The amount to the credit of the Chilton Fertilizer Company was made sufficient to cover the \$2,000 check in the following manner: For a considerable time prior to the date of that check the bank had held a note on which the Chilton Fertilizer Company appeared as a maker, which took the place of a note made by others, the latter note having been surrendered. Pursuant to a direction given by the state superintendent of banks to collect interest on the note signed by the Chilton Fertilizer Company that company was charged on its deposit account with the amount of interest accrued on that note. This occurred several months before the \$2,000 check was drawn and paid. There was evidence tending to prove that, when persons who were interested in the Chilton Fertilizer Company learned of the interest charge having been made on its account, they protested, and demanded that the amount be refunded, claiming that the Fertilizer Company was not liable on the note. On the day the \$2,000 check was drawn Mathews procured one Jowers to make his note to the bank for \$2,172.48. Jowers was insolvent, and was indebted to the bank on notes aggregating a larger amount, which had been charged to profit and loss as worthless. On

the same day the new note of Jowers, which was worthless, was taken, the interest and discount account of the bank was credited with the amount of that note, its loans and discounts account was debited with that note, the interest and discount account was debited \$2,053.73, the amount of the previous interest charge on the Chilton Fertilizer Company account, and the same amount was entered as a credit on the fertilizer company's account.

The Chilton Fertilizer Company was a partnership. The obligation to the bank incurred by the latter's acceptance of the new note as a substitute for one it held against a third party was not canceled or affected by the subsequent failure of the makers of the new note to acquire the properties of the maker of the surrendered note. A note given to a bank to procure its surrender of a note of a third party held by it is a binding obligation. There was nothing to indicate that in the subsequent suit, in which judgment was recovered on the Chilton Fertilizer Company note, the liability on it of any of its makers was even questioned. No tenable or even plausible ground for questioning the liability of any maker of the note was disclosed. Mathews took no action on the demand made several months before for a repayment of the interest collected until he had occasion to get the amount required to satisfy the execution against himself. The evidence was such as to support findings that there was an absence of any bona fide belief that the Chilton Fertilizer Company was entitled to the credit which was entered on its account, and that the taking of the worthless Jowers note and the making of the several book entries which followed were but steps in carrying out a fraudulent scheme, concocted by Mathews to enable him to withdraw from the bank \$2,000 of its money for his own use and give a color of regularity to his conduct. Under instructions given by the court, the jury were forbidden to find against the defendant as to the \$2,000 item mentioned, unless they found from the evidence that the withdrawal of that amount from the bank by Mathews constituted larceny or embezzlement. In view of the giving of such instructions, it was not reversible error for the court to refuse charges, requested by the defendant, to the effect that there should not be a finding against the defendant as to the \$2,000 item, if the jury believed from the evidence that Mathews' acts in having the credit entered on the Chilton Fertilizer Company's account and in drawing the check in the name of that company were unaccompanied by a criminal intent.

Our examination of the record has led us to the conclusion that no reversible error was committed.

The judgment is affirmed.

UNION TRUST CO. v. GREAT EASTERN LUMBER CO. et al.

(Circuit Court of Appeals, Fifth Circuit. January 15, 1918.)

No. 3095.

1. JUDICIAL SALES ⇨50(2)—PAYMENT OF TAXES—DIRECTION.

The purchaser at a sale under judicial decree, which does not order the property sold free from the lien of taxes, takes it subject to the tax lien.

2. RECEIVERS ⇨153—PAYMENT OF TAXES.

Property in the hands of a receiver is ordinarily bound for payment of taxes, and, in view of the paramount lien of taxes, it is the duty of the court to order them paid, no matter how the claim may be brought to its attention.

3. RECEIVERS ⇨153—OBLIGATIONS OF—TAXES.

Taxes accruing during a receivership are obligations or indebtedness of the receiver.

4. JUDICIAL SALES ⇨50(2)—DECREE—CONSTRUCTION.

A decree directing judicial sale of property declared that all liens allowed were subject to any lien that might exist for state, county, and municipal taxes. Other portions of the decree provided for preferential payments of liens out of the proceeds, specifying court costs, receiver's certificates, indebtedness, and obligations. *Held*, in view of the fact that the holder of what was evidently an assigned tax lien was given priority and the property was sold free from it, the decree must be construed as directing a sale of the property free from the lien of taxes and payment thereof out of the proceeds, for taxes accruing during receivership were included in the indebtedness and obligations of the receiver.

Appeal from the District Court of the United States for the Southern District of Georgia; Wm. Wallace Lambdin and Emory Speer, Judges.

Bill by the Union Trust Company against the Great Eastern Lumber Company and others. On petition of commissioners to sell, payment of taxes was directed, and complainant appeals. Affirmed.

W. L. Clay and Fred T. Saussy, both of Savannah, Ga., for appellant.

Geo. T. Cann, J. Ferris Cann, and Gordon Saussy, all of Savannah, Ga., for appellees.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. The sole question presented by the appeal is whether the terms of the decree of foreclosure and sale required the purchaser at the sale to assume payment of the taxes due on the property to be sold, or whether the property was sold free from the tax lien and the taxes were ordered by the decree paid out of the proceeds of the sale.

[1, 2] The purchaser at a sale under a judicial decree, which does not order the property sold free from the lien of taxes, takes the property subject to the tax lien. In that respect the rule of caveat emptor applies. The question depends upon the proper construction

of the decree in each case. In the case of *Railway Co. v. Harrison*, 96 Fed. 910, 37 C. C. A. 616, the Circuit Court of Appeals for the Seventh Circuit, after stating the rule as above, said:

"Exception to this general rule undoubtedly arises in equity in the following instances: First, where the decree or order for the sale expressly provides for discharging liens or other claims against the property out of the proceeds or other funds coming into court, or where the proceedings or provisions are otherwise inconsistent with such rule; and, second, where there is fraud, concealment, or unfair dealing in the proceedings, which entitle the purchaser to equitable relief."

In the case of *First National Bank v. Ewing*, 103 Fed. 168, 43 C. C. A. 150, this court said, referring to the status of taxes due on property in the court's custody:

"And it seems to be settled law that such liens are prior to all other liens whatsoever, except judicial costs, which are first to be paid where the property is rightfully in the custody of the court. 'It is the imperative duty of the court,' said Mr. Chief Justice Fuller, in the case of *In re Tyler*, 149 U. S. 187, 13 Sup. Ct. 791, 37 L. Ed. 696, 'to recognize as paramount, and enforce with promptness and vigor, the just claims of the authorities for the prescribed contributions to state and municipal revenue.' *Georgia v. Atlantic & C. R. Co.*, 3 Woods, 434, Fed. Cas. No. 5351; *Union Trust Co. v. Illinois M. Ry. Co.*, 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963. And it is immaterial how the claim for taxes may be brought to the attention of the court—whether by the receiver, the master appointed in the cause, the tax collector, or through intervening petitions filed by the state and municipalities interested. In any case, and whenever properly brought to the court's attention, they should be promptly paid."

In 34 Cyc. 346, the lien of taxes on property in the hands of a receiver, and the court's duty to direct their payment, is thus expressed:

Taxes.—Property in the hands of a receiver of any court, either of a state or of the United States, is as much bound for the payment of taxes, state, county, and municipal, as any other property. Generally a valid tax upon property of a corporation in the hands of a receiver constitutes a claim upon its assets within the jurisdiction, superior to every other claim, except judicial costs. It is the duty of the court not only to respect this paramount right, and to make no order for the distribution of assets in custodia legis, except in subordination thereto, but also to make such orders as will compel the receiver to discharge this obligation."

The question, therefore, is whether or not the decree of sale in this case, construed with reference to its language, and in the light of the paramount lien of taxes on property in the court's custody and of the imperative duty of the court to order the taxes paid, no matter "how the claim for taxes may be brought to the attention of the court, whether by the receiver, the master appointed in the cause, the tax collector, or through intervening petitions filed by the state and municipalities interested," provides for the payment of the taxes out of the proceeds of the sale.

[3, 4] There is no express provision of the decree ordering a sale free from the lien of taxes, nor is there any express provision in the decree ordering a sale subject to the tax lien. Section 25 of the decree provides that "all liens herein allowed are subject to any lien that may exist for state, county, and municipal taxes." This is the only provision of the decree directly providing for the status as to taxes. It

is to be observed that this provision precedes those relating to the sale of the mortgaged property and the terms thereof, and appears in connection with those provisions which adjudicate the claims against the property and its owner, and the order of their priority of payment out of the proceeds of the sale. The effect of paragraph 25 is to adjudge that all previously adjudicated preferential payments shall be subordinated to the payment of tax liens. And as the other preferential payments are to be paid from the proceeds of the sale, it is fair to assume, from the position of paragraph 25 and its language, that it is rather a direction to pay tax liens out of the same proceeds, and before the other claims, than a provision that the property is to be sold subject to tax liens. The language is not apt to subject the property in the hands of the purchaser to the tax lien. It subordinates other adjudicated claims to the lien of taxes, but does not order the property sold subject to the lien for taxes. No other paragraph of the decree directly relates to the question of tax liens.

Other paragraphs indirectly throwing light on the question are:

Paragraph 13 adjudges that G. K. Westbrook, Jr., recover of defendant \$280.11, with interest, and that he have a first lien, ranking as a tax lien, upon all the property of defendant. This lien was to be paid out of the proceeds and the property sold free from it. Yet it was evidently an assigned tax lien, or it would not have been accorded that rank. If the purpose of the court was to sell the property subject to tax liens, it would have been natural for it to have given Westbrook's lien the same treatment, instead of directing its payment out of the proceeds of the sale and giving it priority of payment therefrom.

Paragraph 34 of the decree provides that the purchaser, before using any bonds for paying purchase money, is to pay "in cash, to the extent of his bid, such amount as may be necessary to discharge all costs, and all prior and equal allowances, claims, or liens." Paragraph 34 follows paragraph 25, and those preceding paragraph 25, which fix the amounts and order of payment of allowances, claims, and liens, and paragraph 25 characterizes the amounts due for taxes as "liens" and as being prior to those preceding it in the decree. Paragraph 34 would therefore seem to include the payment of tax liens from the cash required to be paid by the purchaser.

Paragraph 36 provides for the distribution of the fund created by the sale of the property. It provides for the payment (1) of costs of court, receiver's certificates, indebtedness and obligations; (2) of certain items named, if thereafter determined by the court to rank as costs of administration; (3) to the payments of amounts adjudged in favor of the various interveners, "but only to the extent and priority herein adjudicated and allowed; said liens to be satisfied in the order or rank of priority herein adjudged."

(1) This clause mentions (a) receiver's certificates, (b) receiver's indebtedness, and (c) receiver's obligations. Taxes could not come under (a), but might well come under (b) or (c). That taxes, accruing during a receivership, are obligations or indebtedness of the receiver, is supported by the text of 34 Cyc. pp. 346, 347 (b, "Taxes"), citing *Wiswall v. Kunz*, 173 Ill. 110, 50 N. E. 184, and *Gehr v. Mont Alto*

Iron Co., 174 Pa. 430, 34 Atl. 638, which support the text. In the latter, the business was conducted by the receiver; in the former, the report does not show with certainty whether it was or not, but presumably it was not. It would seem that the terms receiver's "indebtedness" and "obligations" were broad enough to cover taxes accruing against the property while in the control of the court, and which by subdivision 1 of paragraph 36 of the decree the fund was required to pay.

(2) The second subdivision of paragraph 36 shows that, while the court, in the paragraphs preceding 25, had adjudicated the exact amounts of allowances, claims, and liens due interveners and others, it did not intend to decree payment of these exact amounts from the proceeds of the sale absolutely, but only after the costs of court, receiver's indebtedness, and expenses of the sale were deducted, and these were not only of uncertain amount, but it was left for the court to determine in the future whether the items mentioned in subdivision 2 should rank as costs of the administration of the cause at all. There could, therefore, be no ascertainment under the decree of the amounts each intervener or claimant was to receive, not only until after a computation by the clerk, but also until after further and future judicial ascertainment and approval of the costs of administration and of the receivership. The fact that the decree did not ascertain the amount of tax liens, but left this to future ascertainment, as in the case of the other mentioned items of costs of administration, is not, therefore, inconsistent with the general tenor of the decree.

(3) The third subdivision is to be construed in view of the tentative character of the decree in these respects. It directs that the purchase money be applied to the "payment of the amounts herein adjudged due the several interveners, and for which it is herein adjudged they are respectively entitled, * * * but only to the extent and priority herein adjudicated and allowed; said liens to be satisfied in the order or rank or priority herein adjudged." This would seem to mean that the adjudicated claims and liens of interveners were to be paid out of the proceeds of the sale, only after prior charges and liens were paid, and section 25 expressly subordinated the lien of the interveners, which had theretofore, in the decree, been fixed in amount, to the lien of taxes. So, whether taxes be considered obligations or indebtedness of the receiver under the first subdivision of paragraph 36, or liens under paragraph 25, the same result would seem to follow, viz. that paragraph 36 did not direct interveners' adjudicated claims to be paid out of the proceeds until after tax liens had been satisfied therefrom. The first amount adjudged to an intervener and directed to be paid out of the fund by paragraph 36, it will be observed, is a "lien ranking as a tax lien."

The court below framed the decree with the purpose in view of distributing the proceeds of the sale, first, among certain classes of claims, the amounts of which had not been fixed, such as court costs, costs of administration, to be thereafter determined, receiver's certificates, indebtedness, and obligations, and taxes, as part thereof, or under section 25, the amounts of which were also to be thereafter determined;

second, to certain classes of interveners and court officers, whose claims were fixed in amount and prior to the mortgage, but only to be paid after payment of the first class in full out of the fund, and ratably and according to priority, if the fund so reduced was insufficient to pay all in full; third, to the trustee for the bondholders; and, fourth, the surplus, if any, to the mortgagor, defendant. The decree did not attempt to arrive at the amount for distribution among the interveners, whose claims were adjudicated in amount, or to the mortgagee, until after further adjudication of the amounts necessary to satisfy court costs, costs of administration, receiver's debts, and taxes had been had. The master's report shows that information as to the amount of taxes and persons to whom due was not available to the court when the decree was passed, and hence this matter, as well as the status of the items of cost of administration mentioned in subdivision 2 of paragraph 36, were left to be fixed as to amount or status after the decree was entered.

This view is not only consistent with the frame of the decree, but with the recognized duty of the court, which had displaced the usual remedies for the collection of taxes by the receivership, to provide for the payment of taxes out of the proceeds of the sale, and not to remit the tax authorities to a belated use of their remedies against the property after it had passed out of the court's possession into that of the purchaser, and the presumption that the court in framing the decree acted in the light of this duty.

Entertaining these views of the proper construction of the decree, we think the order appealed from was correct, and should be affirmed; and it is so ordered.

CENTRAL IRON & COAL CO. v. HAMACHER.

(Circuit Court of Appeals, Fifth Circuit. January 14, 1918. Rehearing
Denied March 11, 1918.)

No. 3151.

1. WITNESSES ⇐159(2)—COMPETENCY—TRANSACTIONS WITH PERSONS SINCE DECEASED.

Code Ala. 1907, § 4007, declares that there shall be no exclusion of any witness because he is a party or interested in the issue tried, except that no person having a pecuniary interest in the result of the suit or proceeding shall be allowed to testify against the party to whom his interest is opposed as to any transaction with or statement by a deceased person whose estate is interested in the result of the suit or proceeding. In an action by the administratrix to recover under the Alabama Employers' Liability Act (Code 1907, § 3910), damages for the death of her intestate, a servant of the defendant company, the superintendent, whom it was claimed was negligent in directing him to work in a bin or washer in which, was stored a large amount of coal, was called as a witness, and, though not allowed to testify as to his instructions to plaintiff's intestate, was allowed to testify as to the facts surrounding the latter's entrance in the bin. *Held* that, as the purpose of the act was to remove the common-law disqualifications against testimony by parties and those interested, and the safeguard was for the estate of deceased persons,

defendant's superintendent was competent to testify as to his orders as well as the surrounding circumstances; it not being contemplated that the statute would be invoked to protect a master from liability for fatal injuries to a servant resulting from the negligence of its own superintendent, by rendering the superintendent incompetent to testify as to his orders, this being particularly true as the recovery under the Alabama Employers' Liability Act does not go into the estate of the deceased servant.

2. WITNESSES \Leftrightarrow 128.—COMPETENCY—TRANSACTIONS WITH PERSONS SINCE DECEASED.

The mere fact that the Alabama Employers' Liability Act gives the administrator of a deceased servant the right to sue for damages for death does not render the Code applicable, for the administrator sues for the benefit of those declared by the act entitled to the recovery, and the recovery becomes no part of the deceased's estate subject to the claims of his creditors.

3. WITNESSES \Leftrightarrow 128 —COMPETENCY—TRANSACTIONS WITH PERSONS SINCE DECEASED.

As the recovery does not inure to the benefit of the estate of the deceased servant, the estate cannot be deemed liable for the costs of the proceedings, so as to render the action one affecting the estate of a deceased person, within Code Ala. 1907, § 4007; this being so, even though the administrator, on becoming a nonresident, might under appropriate statutes be required to give bond for costs for that reason.

4. COURTS \Leftrightarrow 376—FEDERAL COURTS—EVIDENCE.

Under Rev. St. § 858 (Comp. St. 1916, § 1464), declaring that the competency of a witness to testify in a civil action in the federal court shall be determined by the laws of the state where the court is held, the federal courts should follow the decisions of the highest state court, interpreting such local statute as to competency of witnesses.

5. COURTS \Leftrightarrow 349—PRECEDENCE—PRESUMPTION.

In the absence of direct decisions by the state courts as to the competency of witnesses, it will not be presumed, in an action in the federal court, that such state court's rule of decision is in conflict with the unambiguous terms of the statute.

6. APPEAL AND ERROR \Leftrightarrow 1053(1)—REVIEW—HARMLESS ERROR.

In an action for the death of a servant, where the master's superintendent was competent to testify, not only as to his orders to the deceased servant, but the circumstances surrounding the fatal accident, the withdrawal of testimony by the superintendent as to orders was harmless as to the defendant master; the error being one which the plaintiff alone could complain of, because leaving the question of the orders of the superintendent to inference.

In Error to the District Court of the United States for the Northern District of Alabama; Wm. I. Grubb, Judge.

Action by Mrs. Sarah J. Hamacher, administratrix, against the Central Iron & Coal Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Henry A. Jones, of Tuscaloosa, Ala. (De Vane K. Jones, of Tuscaloosa, Ala., on the brief), for plaintiff in error.

George P. Bondurant, of Birmingham, Ala., for defendant in error.

Before WALKER and BATTIS, Circuit Judges, and FOSTER, District Judge.

BATTIS, Circuit Judge. Suit under the terms of the Alabama Employers' Liability Act was instituted by Mrs. Sarah J. Hamacher, as

administratrix of the estate of W. F. Hamacher, against the Central Iron & Coal Company, for the death of W. F. Hamacher. The petition was in six counts, all but one of which, count 4, were eliminated by the rulings of the trial court. The count upon which the trial was had was to the effect that the defendant was engaged in operating a coal mine, and plaintiff's intestate was in the service of defendant; that in the discharge of his duties he was in a bin or washer, in which was stored a large amount of coal, when the coal rolled down upon him, smothering and so badly bruising him that he died as a result of the injuries, and that the death was proximately caused by the negligence of some person in the service or employment of defendant, whose name was to plaintiff unknown, who had superintendence intrusted to him, and who, while in the exercise of superintendence, negligently ordered plaintiff's intestate to work in the bin. The person who exercised superintendency over the employé, W. F. Hamacher, who was killed, was his brother, Ed. Hamacher. The issues submitted by the trial court to the jury were whether, in the exercise of this superintendence, he gave a negligent order, which had the effect of putting the deceased to work at the bottom of the bin, and whether this was an unreasonably dangerous place for him to work, and whether the deceased was guilty of contributory negligence in working under the circumstances at the place at which he was killed.

[1] One of the principal controversies that arises in the case is whether the trial judge should have permitted the testimony of Ed. Hamacher, the brother of the deceased. This involves the construction of section 4007 of the Alabama Code of 1907, which is to the effect that:

"In civil suits and proceedings, there must be no exclusion of any witness because he is a party, or interested in the issue tried, except that no person having a pecuniary interest in the result of the suit or proceeding shall be allowed to testify against the party to whom his interest is opposed, as to any transaction with, or statement by, the deceased person whose estate is interested in the result of the suit or proceeding, or when such deceased person, at the time of such transaction or statement, acted in any representative or fiduciary relation whatsoever to the party against whom such testimony is sought to be introduced, unless called to testify thereto by the party to whom such interest is opposed, or unless the testimony of such deceased person in relation to such transaction or statement is introduced in evidence by the party whose interest is opposed to that of the witness, or has been taken and is on file in the cause.

Section 858 of the Revised Statutes of the United States (Comp. St. 1916, § 1464) provides that the competency of a witness to testify in a civil action in United States courts shall be determined by the laws of the state in which the court is held.

The trial judge, in passing upon the questions presented by the statute with reference to the exclusion of testimony, held that Ed. Hamacher, the superintendent, was incompetent to testify with reference to instructions given by him to deceased, but that he was competent to testify to the fact that he was present at the time W. F. Hamacher entered the bin, and as to the conditions existing at the time. Under charge of the court the jury were authorized, from this testimony and other evidence introduced in the case, to infer the fact, essential to

the cause of action of plaintiff, that the deceased had been instructed by Ed. Hamacher, the superintendent, to go to work at the dangerous place in the bin at which he was killed. It is insisted by the plaintiff in error, who cites Alabama authorities to sustain its position, that it is just as objectionable for the interested witness to testify to facts from which the transaction between him and the deceased could be inferred as to testify directly to the transaction. It may be that this position is sustained by the authorities. We are inclined, however, to believe that Ed. Hamacher was competent as a witness to detail all that occurred between himself and his deceased brother at the time of the accident.

The purpose of section 4007 is perfectly apparent. In the first place, it was intended to repeal the general inhibition against persons testifying who were interested in the issue to be tried. It then made an exception of testimony with reference to transactions between a person deceased and a person whose testimony was intended to be used in cases defined in the statute. It was conceived to be improper, when the mouth of one of the persons was closed by death, to permit the other party to a transaction to make statements in regard to it which could not be controverted. Its sole purpose was the protection of the estate of the deceased. To so construe the statute as to add to the impossibility of securing the testimony of the deceased an inhibition against receiving the testimony of another by whom his rights could be established would not be to conserve the purposes of the law, but would add to the disability which death imposed a new obstacle to the preservation of rights which had inured to or come from the deceased. The theory of the law was that, being dead and unable to speak, he was to be protected from the testimony of one whose statement could not be denied. The theory upon which the testimony in this case is excluded is that the defendant (and not the deceased) is to be protected by death from the testimony of one witness, and by the statute made for the protection of the estate of the deceased from the testimony of the only other person familiar with the facts. If W. F. Hamacher had been injured, but not injured so severely that death had ensued, he would have been permitted to testify with reference to the circumstances, and he could have compelled his brother, the superintendent, who was responsible for his injury, to have also testified with regard to the facts. It could not have been the purpose of the law, merely because the injuries were so serious as to produce death, to not only take advantage of the disability which death imposed, but to give to the company responsible for the damages immunity, by excluding evidence of the other person who knew about the facts. The section quoted inevitably carries with it the idea that the inhibition with reference to testimony is intended to be applied when it was claimed that the transaction involved imposed some obligation upon the deceased while living, and affected the estate after his death. It appears that there are some Alabama cases to the effect that this testimony is to be excluded, whether its effect is to decrease or enlarge the estate; but it is safe to assume that in every case in which such a ruling has been properly made some contract or other act of the deceased created or

affected some legal obligation of his effective before his death. It is to be borne in mind always that the policy of the law, as declared by this section, is not to exclude ordinarily the testimony of the witness simply because of his interest; but it is to exclude it only when such exclusion is essential to the preservation of rights which were, prior to the death, in the person whose mouth is closed by death.

Under the very terms of the statute, the exception is confined to inhibiting the testimony where the transaction is with "the deceased person whose estate is interested in the result of the suit." The estate of W. F. Hamacher is not interested in this suit. Whatever property rights exist as the result of the injury causing the immediate death of W. F. Hamacher, they were never at any time in W. F. Hamacher, and did not descend to any legal representative of him. Whatever right of recovery may exist against the defendant is a right that did not arise until after his death. It could not have been a part of his estate, because it did not exist at any time during his life. The Employers' Liability Act names classes of persons who could, under the contingencies named in the law, recover for his death. The concurrence of the law and of the fact of his death, under the circumstances mentioned in the statute, create rights in the persons named by the statute; but the deceased was not and could not be one of those persons. The recovery is not even for the benefit of creditors of the deceased. By the express terms of the statute, they are excluded.

[2] An argument is based on the fact that the statute requires the suit to be brought by the administrator of the estate of deceased. The efficient administration of the law required that some one of a class should be named to discharge this duty, as it could not be determined before a trial whether any particular individual was entitled to the damages provided for by the statute. The mere choice by the law of the administrator of an estate does not make the recovery a part of the estate. *White v. Ward*, 157 Ala. 345, 47 South. 166, 18 L. R. A. (N. S.) 568; *Holt v. Stollenwerck*, 174 Ala. 213, 56 South. 912.

[3] It is insisted that the estate is interested, upon the ground that it is responsible for the costs of the suit authorized to be instituted by the administrator. This proposition is based on the case of *Ex parte Louisville & Nashville R. R. Co.*, 124 Ala. 547, 27 South. 239. In this case it was held that the administrator, who had moved from the state of Alabama, and who instituted a suit under section 1749 of the Code of 1896, might be compelled to give a bond for the costs of the suit. The ruling was based on the unequivocal language of section 1350 of the Code, and is, in no sense, a ruling to the effect that the estate is responsible for the costs. If the statute had undertaken to provide that the costs in a case under the Employers' Liability Act should be paid out of the estate, a serious doubt would arise as to whether it would be effective to that end. The recovery does not become available for the debts of the estate, and creditors could very well question the validity of a statute which took from them a fund, out of which they were entitled to be paid, to discharge costs of a suit in which they were denied an interest.

[4, 5] It is claimed that the conclusion reached as to the admissibility of the testimony of Ed. Hamacher is directly in conflict with

Cobb v. Owen, 150 Ala. 410, 43 South. 826; Guin v. Guin, 196 Ala. 221, 72 South. 74, and Buye v. Alabama, etc., Co. (Ala.) 75 South. 9. Neither of these cases discusses the proposition we have considered. If they are in conflict, it is a fact to be inferred from the assumption that the judgments could not have been rendered if the court had followed the view of the law herein expressed. We are under obligation to follow, as to the matter of competency of witnesses in civil cases, the law of the state; and the statements by the highest courts of the state as to what that law is will, of course, be followed. We will not, however, in the absence of such statements, make a ruling in direct conflict with the unambiguous terms of the statute of the state. An opinion is cited (*White v. Thompson*, 123 Ala. 610, 26 South. 648) wherein the court says:

"That our own adjudications extend the rule to cases within its purview and spirit, though not strictly within its terms."

The extremest possible application of this doctrine could not properly extend the inhibition of the exception in the law to the present case. Always in the application of the statute it should be remembered that its purpose is to liberalize the common law, to permit testimony by interested witnesses. The exceptions were for the protection of the estate of the decedent. The contention of defendant would require that the language of the statute be changed, and that its purpose be defeated.

[6] The court erred in withdrawing the testimony of Ed. Hamacher as to what passed between him and the deceased; it follows that there was no error in admitting that part of his testimony which the court permitted to remain before the jury. Nor can the defendant complain of the admission of Ed. Hamacher's testimony and the subsequent withdrawal of a part. The error was in the withdrawal, and not the admission of the evidence. It jeopardized the plaintiff, but did not injure the defendant.

The judgment is affirmed.

In re BRAUS.

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

No. 14.

1. BANKRUPTCY ⇨407(1)—DISCHARGE—CONSTRUCTION OF ACT.

Though provisions for discharge were not an incident to the original bankruptcy acts, those provisions should not be construed against the bankrupt, and, if his discharge is to be denied, it must be because there has been strict proof of the existence of some one of the bars which the statute has provided.

2. BANKRUPTCY ⇨414(3)—DISCHARGE—DENIAL—CONCEALMENT OF ASSETS.

For a bankrupt to be denied a discharge on the ground of concealment of assets, the case must be made out by more than a mere preponderance of evidence.

3. BANKRUPTCY ⇨414(3)—DISCHARGE—DENIAL—EVIDENCE.

Evidence held insufficient to show that the bankrupt who transferred his property to a corporation within four months of bankruptcy was

guilty of any fraudulent intent to hinder and delay his creditors; the bankrupt receiving practically all of the stock of the corporation.

4. BANKRUPTCY ⇨177—EFFECT—RIGHTS OF INSOLVENT DEBTOR.

An insolvent debtor has the right of disposition of his property until the commencement of proceedings in bankruptcy against him.

5. BANKRUPTCY ⇨180—DISCHARGE—DENIAL—TRANSFER.

Though it may have that effect incidentally, a transfer by an insolvent debtor cannot be set aside under Bankruptcy Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 (Comp. St. 1916, § 9651), as one tending to hinder and delay creditors, unless it was made with the intention of unlawfully hindering, delaying, and defrauding creditors.

6. BANKRUPTCY ⇨407(3)—DISCHARGE—FRAUDULENT TRANSFER.

An insolvent debtor who owned a number of stores organized a corporation of which he held all the stock except a few qualifying shares held by his wife and another, and to such corporation he transferred the more profitable stores; it being his avowed intention to break the leases on the unprofitable stores. The bankrupt made no effort to dispose of the stock so received in fraud of creditors, and contended that he incorporated his more profitable business for the purpose of securing additional capital. *Held* that, where it did not appear that he had any unlawful intent to hinder and delay his creditors, a discharge could not be denied, though the transfer occurred within four months of the filing of the petition, on the ground that he was guilty of a fraudulent transfer with intent to hinder, delay and defraud creditors.

Hough, Circuit Judge, dissenting.

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

In the matter of the bankruptcy of Arthur L. Braus. The bankrupt's petition for discharge was by the District Court, on objections of F. T. Van Buren and others, denied (237 Fed. 139), and the bankrupt appeals. Reversed, and cause remanded, with directions to grant discharge.

See, also, 233 Fed. 835.

Alex B. Greenberg, of New York City (Jos. L. Hochman, of New York City, of counsel), for appellant.

Mitchell & Mitchell, of New York City (Wm. Mitchell, of New York City, of counsel), for objecting creditors F. T. Van Buren and others.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge. This is an appeal from an order confirming the report of a special master recommending that the bankrupt be denied his discharge on the ground that he had made a fraudulent transfer of property within the four-month period next preceding the filing of the involuntary petition against him.

The record discloses the following facts: The bankrupt was engaged in the cloak and suit business, and had been so engaged for a period of 15 years prior to the bankruptcy. He was the owner of nineteen stores in which his business was carried on. These stores were in New York City; Boston and Lowell, Mass.; Newark, N. J.; and New Haven, Conn. In January, 1915, he conveyed five of the stores to a corporation organized by himself under the name of Arthur L. Braus, Inc. These five stores were sold to the corporation for \$50,000,

which sum was arrived at by taking the cost figures to the bankrupt of the stores so sold. The consideration for the sale received by the bankrupt was 494 out of the 500 shares of stock which were issued by the corporation at a par value of \$100 per share. Four of the remaining shares were sold to the bankrupt's wife for \$400 cash, and the remaining 2 shares were held by the bankrupt's bookkeeper in order to qualify him as an incorporator. The bankrupt retained title to all the shares of stock issued to him until an involuntary petition in bankruptcy was filed against him, which occurred two months after the aforesaid conveyance, and then, a trustee having been appointed, the bankrupt turned over to him all of the shares of stock which he had owned, about 250 of which had been pledged with other creditors of the bankrupt as security for debts, and also caused to be turned over to the trustee in bankruptcy the 500 shares of stock unissued by the corporation. All this he did voluntarily.

The bankrupt testified that at the time the incorporation was effected he did not know whether he was solvent or insolvent, although he knew that he was losing money, and he did not think whether he was solvent or insolvent. His inventory taken a year before showed that the net assets in his business were \$305,915.46, with cash on hand of \$18,537.50. He stated that the reason why he incorporated was that he was trying to get some friends interested in his business so as to get more capital in it, and that they had examined his books and did not wish to invest any money in any of the stores except the five which he subsequently transferred to the corporation. His purpose, he said, was to protect his creditors by getting more capital, and by closing up the stores that were being run at a loss, if he could not get lower rentals. He intended to break the leases of the other stores if the rental of them was not reduced. He was asked again, "What brought about the incorporation of these stores?" To which question he replied, "To protect my creditors." And then he was asked, "What did you have in mind, what protection did you have in mind?" To that he replied, "So I would be able to break the other leases here." He was asked whether he had made up his mind to liquidate his business. He answered, "Yes." Again he said his object was, "To protect all I could of my creditors and get rid of the bad stores."

The corporation was organized openly, and the conveyance made to it was with the knowledge of the creditors.

No one of the creditors had taken any proceedings seeking to reach any of the bankrupt's property prior to the filing of the involuntary petition in bankruptcy against him. And no one of the leases was broken.

The master reported that he was satisfied that the incorporation of the five profitable stores and the transfer to the corporation of some of the insolvent's property for the capital stock of the corporation were made by him with the intent to hinder, delay, and defraud his creditors, and that his discharge in bankruptcy should be denied on that account.

The report of the special master was confirmed by the learned District Judge, who held it fraudulent in law for an insolvent to convey

all his property to a corporation in exchange for all or nearly all its stock. While it is not clear upon the authorities, he said, that such is the law, "I cannot agree on principle that the stock is the equivalent of the chattels for the purpose of the creditors; that depends upon whether on execution sale the stock will realize as much as the chattels, which every one who has any experience knows it generally will not. A judgment creditor must, therefore, in practice buy in the stock at the sale and then try to get possession of the chattels and sell them. He may or may not succeed in this without substantial delay or hindrance. That will depend upon how surely he can disregard the corporate form, which in turn depends in part upon whether he is the only shareholder and whether there have been debts contracted by the corporation. Even then he must have another sale. I do not believe that the law should tolerate any such embarrassments to creditors when they result from mere contrivances to effect just what they do effect, and are not the incidents of a genuine effort to conduct the insolvent's affairs in his own interest."

[1, 2] The discharge of a bankrupt was not originally a feature of bankruptcy legislation. It was not introduced into English legislation until 160 years after the first bankruptcy law was enacted, and in our legislation it was not provided for unqualifiedly until the act of 1841 (Act Aug. 19, 1841, c. 9, 5 Stat. 440). There has been a growing tendency in the direction of liberality in favor of a bankrupt's discharge, and it has come to be recognized that the provisions of the law relating to discharge are not to be construed against a bankrupt, and if his discharge is to be denied it must be because there has been strict proof of the existence of some one of the bars which the statute has set up against the discharge. Thus in the case of concealment of assets the courts have required it to be made out by more than a mere preponderance of evidence. In Remington on Bankruptcy (2d Ed.) § 2467, that writer says:

"The act is very liberal towards the bankrupt as to his discharge, and strict construction of the terms under which opposition will be sustained are had in favor of the bankrupt's discharge."

And in Black on Bankruptcy, § 666, it is said that:

The "refusal of a discharge does not rest in the discretion of the judge, but the applicant is entitled to a discharge as a matter of right, unless he is found guilty of some one of the prescribed acts or omissions."

And the same writer, in section 670, speaking of the bar of a fraudulent transfer, says:

"As this (provision) is in the nature of a penal enactment, it is to be construed with some strictness."

[3] We fail to discover in anything this bankrupt did the fraudulent intent which it is necessary he should have had if he is to be denied his discharge. In what he did he was striving to maintain his solvency. It was for the benefit of his creditors that he should continue the business of the profitable stores, and it was a wise plan to assign those stores to a corporation for their fair value in stock, there being still unissued capital stock, by means of which further capital might be ac-

quired. It was also wise to stop the business in the unprofitable stores unless he could secure such a reduction of rentals as would enable him to continue in business in those stores at a profit.

We do not believe that the evidence discloses as matter of fact an intent to hinder, delay, or defraud his creditors. To be sure he transferred a large part of his property to a corporation and took stock for it in return, but he retained all the stock in his possession, and it remained liable to his creditors as fully after as before the transfer.

[4-6] Did the transfer constitute a fraud upon the creditors as a matter of law? There are some authorities that indicate that it should be so construed. But before considering them, attention may be called to a class of cases which hold that, where such a transfer of property is made to a corporation with intent to hinder, delay, or defraud creditors, it is a fraudulent transfer. There can be no question that if such an intent existed the result follows.

In *Booth v. Bunce*, 33 N. Y. 139, 88 Am. Dec. 372 (1865), the managing members of an embarrassed firm organized a manufacturing corporation under the general law and transferred to it the property of the partnership. A creditor of the firm, asserting that the transfer of the property was fraudulent as to creditors, levied on a steam engine which had belonged to the firm, and at sheriff's sale purchased and took possession of it. Later creditors of the corporation levied on the machine as the property of the corporation and bought it in at sheriff's sale and the property was delivered to them. For this taking the action was brought for the seizure and conversion of the engine. The plaintiff claimed that the organization of the corporation and the transfer of the property to it was a fraudulent device of the form intended to hinder, delay, and defraud their creditors. The trial judge charged the jury that, if the corporation was fairly organized and the sale of the property to it by the firm was also fair and done without fraudulent intent, the defendants were entitled to recover, and if otherwise the plaintiff was entitled to a verdict. The Court of Appeals held the charge entirely sound and that as the jury found a verdict for the plaintiff it was conclusive. The case had four trials at circuit and four reviews in the Supreme Court and was three times in the Court of Appeals. It simply shows that the effect to be given to the organization of a corporation by persons in failing circumstances who transfer their property to it depends upon the intent with which the parties acted and with that doctrine we are in full accord.

In *Metcalf v. Arnold*, 110 Ala. 180, 20 South. 301, 55 Am. St. Rep. 24 (1895), a bill was held not demurrable which alleged that the members of a partnership had organized a corporation to which they had transferred all the firm assets in return for its capital stock, and had done this with the intention of hindering, delaying, and defrauding their creditors, and had parceled out the stock to themselves and their wives. The bill was filed by judgment creditors of the partnership who asked that the property transferred to the corporation be subjected to the payment of their judgments. There can be no question but that this decision was right. If the transfer was made with the intent alleged, it was, of course, clearly void.

In *Bennett v. Minott*, 28 Or. 339, 39 Pac. 997, 44 Pac. 288 (1896),

the court held that where a debtor, for the purpose of hindering and delaying creditors, organizes a corporation and transfers to it all his assets, he himself being the owner of practically all the corporate stock, and continuing the business the same after as before the incorporation, using the proceeds for his own benefit, equity would set aside the transfer at the instance of creditors. In that case the total number of shares was 300 having a par value of \$100 a share, and the debtor took 120 shares, his wife 40, and his attorney and a friend one each. The claim was made that he was indebted to his wife, at the time the stock was given her, in the sum of \$10,000 and that this was in payment of the debt due to her. At the time he organized the corporation he was being pressed by creditors and he transferred to the company in return for the stock substantially all the property he owned not exempt from execution. The court, in speaking of the transfer by the debtor of his property to the corporation in return for stock, said:

"If this sale was valid and made in good faith the plaintiff must fail in this suit without regard to the disposition Minott may have made of his stock in the corporation. But, on the other hand, if it was made, as we think the evidence clearly shows it to have been, for the purpose of hindering and delaying creditors, then it is void as to them."

We fully agree with this holding.

In *Kellogg v. Douglass County Bank*, 58 Kan. 43, 48 Pac. 587, 62 Am. St. Rep. 596 (1897), the plaintiff had organized a corporation to which he transferred his business house, his stock of merchandise, and certain notes and accounts, retaining a small amount of property in his own name. He was at the time insolvent. The capital stock of the corporation was fixed at \$15,000 of a par value of \$100 a share. He received 100 shares, his wife 20 shares, and his nephew 20 shares.

"He * * * organized a corporation," said the court, "in order to shield himself from the attacks of his creditors, and enable him to carry on his business and enjoy the income therefrom. The incorporation seems to have been little but a paper scheme devised in his own interest. His wife and clerks were mere instruments in his hands, contributing no real capital and obtaining no substantial interest in the property. Clearly, a fraud may be committed in the transfer of a debtor's property to such a corporation, as well as by a transfer to another individual for the purpose of placing it beyond the reach of creditors. In such case, the court was clearly warranted in closely scrutinizing the transaction and declaring its real purpose, notwithstanding the elaborate fabrications of charters, by-laws, and paper transfers."

There is nothing in this from which we dissent. Such a transaction is not necessarily fraudulent, but it is to be carefully scrutinized to arrive at the real intent.

But there is another class of cases which hold it fraudulent per se for a person whose financial circumstances are embarrassed to organize a corporation and transfer to it a large part of his property, receiving therefor the capital stock of the corporation so formed.

In *Benton v. Minneapolis, etc., Co.*, 73 Minn. 498, 76 N. W. 265 (1898), an insolvent person transferred nearly all of the goods in his wholesale store and all of the fixtures therein, "about all he had," to a corporation and accepted in payment shares of stock in the corporation which he was instrumental in forming; the stock so received amount-

ing to \$9,600 par value. He immediately turned over shares of the par value of \$5,000 in payment of a note for that amount held against him by his mother-in-law, and soon after pledged the balance of his shares, par value \$4,600, as security for a loan of \$1,500 made to him and which he used in paying off a loan made to him by a bank. The action was brought to set aside the transfer to the corporation on the ground that it was fraudulent, and the case was tried without a jury, and judgment was ordered for the plaintiff which the Supreme Court affirmed, saying:

"He (defendant) must have intended the necessary consequences of his own acts. * * * He converted his available personal property into that which was much less available for the payment of his indebtedness; and the transaction had a direct and immediate tendency to hinder, delay, and defraud his creditors."

In holding the transaction fraudulent all the circumstances shown on the trial were, however, taken into the account, and they strongly suggested fraud. And it does not clearly appear that the court in the absence of those circumstances would have held the transfer fraudulent per se as matter of law.

In *First National Bank of Chicago v. Trebein Co.*, 59 Ohio St. 316, 52 N. E. 834 (1898), the court held that where a failing debtor formed a corporation, composed of himself and certain members of his family, he taking substantially all the stock, and at once conveyed all his property to the corporation in exchange for the stock, and immediately placed all his stock except one share with certain of his creditors as collateral security to their claims, the transfer to the corporation was a fraud on his other creditors and could be set aside. The court declared that the debtor's good faith in the transaction was to be determined by its legal effect on the rights of others, and that if its legal effect worked a fraud on their rights the finding of a court that the parties acted in good faith was simply an erroneous conclusion of law from the facts. In the course of its opinion the court said:

"The transaction cannot be likened to a conveyance to a third person for a valuable consideration; considered in the light of the facts, it was no more than a conveyance from himself to himself. The corporation was in substance another F. C. Trebein. His identity as owner of the property was no more changed by his conveyance to the company than it would have been by taking off one coat and putting on another. He was as much the substantial owner of the property after the conveyance as before, and had substantially the same use of it as if the conveyance had not been made. The only purpose the creation of the corporation and the conveyance to it subserved was to hinder creditors in levying upon the property and selling it on execution at law; and it is this hindrance the law will not permit, and, when ascertained in a proper proceeding, requires the conveyance to be set aside and the property administered for the benefit of all the creditors of the fraudulent grantor."

In *Bourgeois v. Risley Real Estate Co.*, 82 N. J. Eq. 211, 88 Atl. 199 (1913), which was a case before the vice chancellor, it is said that:

"A conveyance of the property of an insolvent debtor to a corporation formed by him for the sole purpose of taking over the property, the consideration of which is the issuance of all of the capital stock of the company, is void as against creditors."

This brings us to another class of cases which hold that it is not fraudulent per se for a person financially embarrassed to organize a corporation and transfer to it the largest part of his property, receiving in return the capital stock of the company which he continues to retain in his possession.

In *Coaldale Coal Co. v. State Bank*, 142 Pa. 288¹ (1891), the members of a partnership in mining and selling coal, indebted but not insolvent, formed a corporation with a capital stock fixed at \$250,000, consisting of 2,500 shares of the par value of \$100 a share. The members of the partnership transferred all the firm property to the corporation and received in return all the shares except six which were distributed to six different persons so that there might be a sufficient number of persons for officers and directors of the company. At the time the corporation was formed the partnership owed bills payable in excess of bills receivable in the amount of \$150,000. But after the corporation was formed the partners continued to mine and ship coal in the firm name and became bankrupt. It was held that creditors of the partnership had no right to levy upon and sell the corporate assets as the property of the partnership. The jury was instructed to bring in a verdict for the plaintiff, there being not sufficient evidence of fraud for the court to submit the question to the jury, the court declining to charge that it was fraud in law to transfer the firm property to the corporation in return for the capital stock issued to the individual partners. The Supreme Court held this was no error and affirmed the judgment, saying that there was nothing to show that the transfer was intended as a fraud upon creditors.

"It was not," said the court, "a withdrawal of their property from the grasp of creditors. On the contrary, it remained subject to their claims, though in a changed form. The interest of the partners in the corporation was represented by stock. This stock was as much liable to the demands of creditors as was the property itself before the formation of the company."

In *Scripps v. Crawford*, 123 Mich. 173, 81 N. W. 1098 (1900), a transfer made by the defendant of all his assets to a corporation which he had organized was held valid, although the court was satisfied that the transfer was made to defeat a levy by a judgment creditor. The court so held because in its opinion the stock being subject to levy was the equivalent of the property transferred to the corporation. And the same court, in *Plaut v. Billings, Drew Co.*, 127 Mich. 11, 86 N. W. 399 (1901), adhered to the doctrine announced in the *Scripps Case*. The *Plaut Case* was an action to set aside a transfer by a debtor of all of his merchandise to a corporation organized by himself and another person on the ground that the property was conveyed to it by the debtor with intent to hinder, delay, and defraud his creditors, and in return for which merchandise he had received full value in stock. The court said:

"We are not able to distinguish this case from *Scripps v. Crawford*, 123 Mich. 173, 81 N. W. 1098. In that case it was held that the transfer of property to a corporation of which the transferor is an organizer, and the acceptance of stock for the full value of the property could not work an injury to creditors, as the property, in its new form, is still subject to levy and sale to satisfy the creditors' debts."

¹ 21 Atl. 811.

In *Kingman & Co. v. Mowry* (1899), 182 Ill. 256, 55 N. E. 330 (74 Am. St. Rep. 169), the court held that the formation of a corporation by a debtor who transfers all his property to it in good faith, after notice to his creditors and with the approval of most of them, as being the most desirable method of conserving the interests of all, is not fraudulent either in fact or law, where the debtor retains the open ownership of the stock interest based upon the value of the property. It declared that a mere change of property by a debtor into a stock interest in a corporation to which the property is conveyed is not fraudulent in law on the ground that it compels a creditor to levy upon and sell the stock interest instead of the property, upon which the creditor has no lien.

"The law has," it was said, "no universal rule that a mere change of the property into a stock interest in a corporation must be denounced a fraud in legal contemplation though it may be clearly seen it is not so in fact. The operations of a debtor in dealing with his property may so change its character as to make it more inconvenient to levy upon and sell the same under execution without subjecting the debtor, as matter of law or fact, to the charge he has fraudulently hindered and delayed his creditors in the collection of their debts."

In *Shumaker v. Davidson*, 116 Iowa, 569, 87 N. W. 441 (1901), the court said:

"We can easily imagine a case where a transfer to a corporation would be held fraudulent. If a debtor should organize such an artificial institution for the purpose of shielding himself from creditors, and should transfer his property to it, without other consideration than the stock of such corporation, no doubt the transaction would be fraudulent. And it is no doubt true that a corporation, as well as an individual, may be so connected with a fraudulent conveyance as that the transfer will be set aside. But it must in either case first be shown that there was a fraudulent intent on the part of the grantor in the disposition of his property. Without that there can be no fraud, provided the conveyance was based on a consideration."

We agree with the above statement that the transfer is not to be held fraudulent unless it first be shown that there is a fraudulent intent behind it.

In *Gardiner v. Haines*, 19 S. D. 514, 104 N. W. 244 (1905), it was held that an embarrassed debtor has a right to organize a corporation and transfer his property to it for stock so long as such transfer is not with intent to defraud. And the court said that:

"During the year that Haines (the debtor) held the capital stock of the corporation his stock was subject to seizure or attachment upon execution, the same as would have been his stock of merchandise; hence the creditors of Haines were neither hindered nor delayed by the transfer of * * * merchandise to the corporation."

The conclusion we have reached upon an examination of the cases has led us to the conclusion that the weight of authority is against the conclusion reached by the District Judge, and we are also satisfied that upon principle it is better to hold that in such a case as is here presented the question of intent is one of fact and not of law. In holding that such a transfer of property as was made in this case was not fraudulent per se, we have kept in mind certain well-established prin-

principles of law which lead up to such a conclusion. These are that the fact that a debtor is insolvent does not in itself deprive him of the right to sell, or mortgage, or pledge, or otherwise transfer his property for a valuable and adequate consideration. *Bergen v. Porpoise Fishing Co.*, 42 N. J. Eq. 397, 400, 8 Atl. 523. An insolvent debtor has the *ius disponendi* of his property until the commencement of proceedings in bankruptcy against him. And the fact that a transfer operates incidentally to hinder or delay creditors is not in itself sufficient to make it void. Every conveyance of a debtor's property may have that effect in some degree. 20 Cyc. 464, and cases there cited. It is also the law that it is not every intent to hinder or delay creditors in collecting their debts that avails to avoid a transfer under section 67e of the Bankruptcy Act. It is every intent to hinder, delay, and defraud creditors unlawfully only, not every intent to hinder or delay them in collecting, or to prevent them, from collecting, their claims, that avails to avoid a transfer under that section.

The matter came before our court in 1914, in *Re Julius*, 217 Fed. 3, 133 C. C. A. 328 (L. R. A. 1915C, 89).¹

In that case insolvent persons transferred all their property to a corporation organized for the purpose by friends of the bankrupts, none of whom were creditors, and who took the stock, and the corporation paid for the property its full value, putting into the hands of the counsel of the bankrupts the amount paid which was to be distributed among such of the creditors of the bankrupts as were willing to accept a certain per cent. of their claims. The discharge of the bankrupts was refused by the lower court on the ground that they had made a transfer of their property with intent to hinder, delay, and defraud creditors. This court on the appeal reversed the court below and remanded the case with directions to grant the discharge. This we did because we were satisfied that the transfer was made in entire good faith and for a valuable consideration. In that case we said:

"The intent to defraud is something distinct from the mere intent to delay or hinder. But there is no distinction between delaying and hindering. The statute must be construed according to its reasonable intent and object, 'and by a reasonable construction only such hindrance and delay as will operate as a fraud come within its operation.' *Bump on Fraudulent Conveyances* (3d Ed.) p. 20. This author, after stating that the presence of intent is essential goes on to explain that: 'The transfer must also be devised and contrived of malice, fraud, covin, collusion, or guile.' *Id.*, p. 20."

¹ In the recent case of *Dean v. Davis*, 242 U. S. 438, 445, 446, 37 Sup. Ct. 130, 61 L. Ed. 419 (1917), the Supreme Court in considering transfers which hinder, delay or defraud creditors, refers to several cases decided in the District and Circuit Courts which it finds it difficult to reconcile with the great weight of authority and its own decisions. The case of *In re Julius* is not among those so mentioned. The case of *Sargent v. Blake*, 160 Fed. 57, 87 C. C. A. 213, 17 L. R. A. (N. S.) 1040, 15 Ann. Cas. 53, cited in our opinion in *In re Julius*, is among the cases so criticized. But our decision in *In re Julius* was not dependent upon *Sargent v. Blake*, and was cited with a number of other cases to show how far the courts had gone in a certain direction, and the citation was without comment from us either in approval or disapproval. If the Supreme Court deemed *In re Julius* inconsistent with its decisions we should naturally expect that it would have been included among those which it enumerated.

This seems to us conclusive of the case now presented to the court. The transfer which the bankrupt made to the corporation, even though it hindered and delayed creditors, certainly did not defraud them and was not intended to defraud them. And unless there was such an intent to defraud the bankrupt is entitled to his discharge.

The decree below must be reversed, and the cause remanded, with directions to grant the bankrupts their discharge; and it is so ordered.

HOUGH, Circuit Judge. From the majority opinion I am compelled to dissent:

(1) Because the question, whether it should be conclusively held fraudulent for an insolvent to convey all his property to a corporation in exchange for all or nearly all of its stock, was in my opinion correctly disposed of both on reason and authority by Learned Hand, District Judge, in the lower court.

(2) Because by bankrupt's own testimony it was proved that the conveyance was in fact fraudulent. He admitted that he created his new corporation to coerce or compel the landlords of his unprofitable stores to reduce their rentals to a point that might enable him to make money. Such an assertion of intent states a purpose to defraud. Undoubtedly the bankrupt too deemed it "wise to stop the business in the unprofitable stores," but such wisdom gave him no right to change, into easily hidden corporate stock, visible property on the faith of which he had received credit. That stock shares are not equivalent to stocks of goods seems especially plain, and the exchange was a badge of fraud.

But what Braus did with the corporate stock taking the place of all the property out of which he had any hope of profit is instructive. As soon as he formed the new corporation, he made new creditors, borrowing (whether in his own name or that of the new corporation does not appear) new money for the use of that company, and for such loans presently made he hypothecated 356 out of its 500 shares. Thus in effect he not only conveyed his property, but hypothecated the stock that took the place of said property in order to get money for the benefit of an entity, which was not liable to the men who had largely furnished what the new concern got.

Braus knew that he was sinking into insolvency, if not already insolvent; but the only definite statement he makes of the purpose of transfer is that it was to protect "all I could of my creditors and get rid of the bad stores," i. e., get rid of them without paying the rent. The whole sentence (if it means anything) means that he would pay if he could those creditors whom it was profitable for him to keep in a good humor. This is the object of most fraudulent transfers.

(3) The majority opinion places special reliance on *In re Julius*, 217 Fed. 3, 133 C. C. A. 328, L. R. A. 1915C, 89. That case largely rested on *Sargent v. Blake*, 160 Fed. 57, 87 C. C. A. 213, 17 L. R. A. (N. S.) 1040, 15 Ann. Cas. 58. The *Sargent Case* together with our earlier decisions in *Re Bloch*, 142 Fed. 674, 74 C. C. A. 250, and in *Re Baar*, 213 Fed. 628, 130 C. C. A. 292, have been specifically disapprov-

ed, at least as to their language, in the recent case of *Dean v. Davis*, 242 U. S. 438, 32 Sup. Ct. 130, 61 L. Ed. 419. I think conformity to the spirit of that decision would produce affirmance of the order appealed from.

GRAHAM v. J. D. SPRECKELS & BROS. CO. et al.

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

No. 2904.

1. COMPROMISE AND SETTLEMENT \Leftrightarrow 17(1)—VALIDITY—DELIBERATION.

Where an elaborate contract adjusting the difficulties between the parties was the result of much consideration and many consultations with counsel, it is not thereafter subject to attack on the ground that it was not deliberately entered into.

2. CHATTEL MORTGAGES \Leftrightarrow 6—DISTINGUISHED FROM CONDITIONAL SALES.

To adjust difficulties between the parties and terminate pending litigation, complainant entered into a contract with the principal defendant whereby securities, deeds, and releases of claims were deposited with a trustee under an agreement that if complainant should pay a large sum of money within six months they should be returned to him, and, if not, they should become the absolute property of the principal defendant. The contract further declared that all claims and demands between the parties should be forever settled and determined. *Held*, that such contract cannot be construed as a mortgage, pledge, or security for any indebtedness thereby renewed, but must be deemed a conditional sale of the securities and claims deposited with the trustee, it appearing that complainant entered into the contract in the hope of saving some at least of his interests in the properties in controversy, and hence no foreclosure was necessary to enable defendant to acquire the property deposited with the trustee.

Appeal from the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Suit by R. A. Graham against the J. D. Spreckels & Bros. Company, a corporation, and another. From a decree dismissing the bill, complainant appeals. Affirmed.

John L. McNab and Robert M. Reid, both of San Francisco, Cal., and Martin L. Pipes, of Portland, Or., for appellant.

Morrison, Dunne & Brobeck and Peter F. Dunne, all of San Francisco, Cal., and Fenton, Dey, Hampson & Fenton, of Portland, Or., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. We are, in our opinion, precluded from considering the merits of the numerous original controversies between the principal parties to this suit, or the various technical defenses interposed by the defendants thereto, because of the agreement entered into between them on the 8th day of June, 1899. For years prior to that time they had had extensive dealings regarding the building of a short line of railroad from Marshfield, on Coos Bay, Or., to Myrtle Point in that state, and which was designed to be extended to

Roseburg, and in the acquiring and development of certain coal lands in the vicinity and in connection with certain lands donated by the citizens of Marshfield as a bonus to aid in the building of the road. Out of those dealings various disputes arose, resulting in certain lawsuits that were pending at the time the agreement of June 8, 1899, was entered into. One of those suits was brought in the Circuit Court of the United States for the District of Oregon, by Graham against the Beaver Hill Coal Company, which held the title to the coal lands, in which company both Graham and the J. D. Spreckels & Bros. Company were stockholders, and in which suit various charges and counter charges respecting the management of that property and the true status of the indebtedness between Graham and the J. D. Spreckels & Bros. Company were involved, and in which suit a receiver of the property of the coal company was appointed by the court in which the suit was commenced and pending. Another of the suits was one brought in the superior court of the city and county of San Francisco, Cal., against Graham, for an accounting of his management of the property of the Beaver Hill Coal Company. Another of the suits was one brought by the J. D. Spreckels & Bros. Company in the Circuit Court of the United States for the District of Oregon, against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, of which Graham was president and a large stockholder, and which company he caused to be organized for the purpose of building the railroad that has been mentioned. In that suit a receiver was also applied for and appointed. Another suit pending at the time of the making of the contract of June 8, 1899, between Graham and the Spreckels Bros. Company, was that then on trial, and which had been on trial for nearly one month in the superior court of the city and county of San Francisco, where it was brought by the J. D. Spreckels & Bros. Company against Graham, for the foreclosure of the liens given by him to them as security for his indebtedness to them, on the various properties he by the present suit claims the right to redeem, consisting of his interest in the Marshfield lands that have been referred to, of his stock in the railroad company mentioned, and of certain bonds of the latter company owned by the pledgor, and certain life insurance policies. In that condition of the dealings between Graham and the Spreckels Bros. Company and of the then pending litigation between them growing out of those dealings, the agreement of June 8, 1899, was executed.

The contentions on the part of the appellant are: First, that the contract is on its face a mortgage, pledge, or security, and not a conditional sale of Graham's properties; and, secondly, that the contract was made under such circumstances of duress and oppression that equity will hold it to be a mortgage, pledge, or security, with a right on his part to an accounting and the right to redeem the properties, and, in view of the claim of notice of the facts on the part of the appellee Southern Pacific Company, to a judgment. We are unable to take the view of the contract so contended for, but, on the contrary, are of the opinion that it was rightly construed by the learned judge of the court below. It shows upon its face, in our opinion, unmistak-

able evidence that it was not intended by the parties to be a mortgage, pledge, or security. Graham is named as party of the first part thereto, and J. D. Spreckels & Bros. Company, a corporation, as the party of the second part, and it starts with the express declaration that the agreement is made "for the purpose of completely adjusting all matters of difference between themselves and between each of them, and the Beaver Hill Coal Company, a corporation, and the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, a corporation."

Its first provision is, in effect, that the receivership suit brought by Graham against the Beaver Hill Coal Company, and then pending in the Circuit Court of the United States for the District of Oregon, should be at once dismissed upon the settlement of the account of the receiver, the parties to bear their own costs; that an order be at once made requiring the receiver to render such account, with provisions not necessary to be stated regarding the payment of fees, costs, and charges, after which the receiver should surrender to the coal company all of its property, which company should remain in the possession thereof during the life of the contract of June 8, 1899, without interference in any manner by Graham; that the Spreckels Bros. Company should cause proper steps to be taken by the coal company, so long as it controlled the same, for the care and preservation of the said property of the coal company during the life of the contract of June 8, 1899, with certain provisions not important to be mentioned, relating to the payment of certain fees, costs, and expenses.

The second provision of the contract of June 8, 1899, provided for the immediate dismissal of the suit brought by the Beaver Hill Coal Company against Graham in the superior court of the city and county of San Francisco, the parties to bear their own costs, and for the delivery to Graham, upon the signing of the contract of June 8, 1899, of a release executed by the Beaver Hill Coal Company, releasing and discharging him of and from any and all claims and demands which it then had or claimed to have against him.

The third provision required the immediate dismissal of the suit then pending in the Circuit Court of the United States for the District of Oregon, brought by the J. D. Spreckels & Bros. Company, against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, the parties thereto to bear their own costs.

The fourth paragraph provided for the immediate entry in the suit brought by the Spreckels Bros. Company against Graham, then pending and on trial in the superior court of the city and county of San Francisco, of a judgment in favor of the Spreckels Bros. Company against him, for the sum of \$532,162.52, together with interest thereon at the rate of 6 per cent. per annum from the 1st day of April, 1898, both in United States gold coin, and providing for a sale of the pledged securities sought to be foreclosed in that suit, with the usual provisions for the docketing of a judgment against the judgment debtor for any deficiency which might exist after the sale of the collaterals specified in the original complaint in that suit, and that all proceedings to enforce said judgment be stayed for the period of six months after the date of the said agreement of June 8, 1899.

By the fifth clause of that contract the parties thereto designated and appointed the Bank of California, a corporation, as trustee for them, to hold the properties and written instruments therein and hereinafter mentioned, for the purposes subsequently specifically set out in the contract of June 8, 1899, and to perform the duties therein-after also specifically prescribed.

By the sixth subdivision of the contract Graham was required to deliver to the trustee:

(a) All of the shares of the capital stock of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company in excess of 10,001 shares thereof then held by the Spreckels Bros. Company, certificates therefor to be properly indorsed, "excepting seven shares thereof to be issued to the directors of said company as hereinafter provided."

(b) The resignation of all of the directors of said company then in office, the same to take effect upon the election of the directors subsequently named in the contract.

(c) A release executed by Graham releasing and discharging the Beaver Hill Coal Company of and from any and all claims and demands he then had or claimed to have against it, such release not to take effect, however, except upon his failure "to pay or cause to be paid to said trustee for the use and benefit of the second party (Spreckels Bros. Company) the sum of \$550,000.00, gold coin of the United States, as hereinafter provided."

(d) A release executed by Graham releasing and discharging the Coos Bay, Roseburg & Eastern Railroad & Navigation Company of and from any and all claims and demands which he then had or claimed to have against that company; also a disclaimer of all right, title or interest in or to any of the property of that company, including the equipments and rolling stock of the railroad and the spur tracks to the mine of the Beaver Hill Coal Company, and to the mine of the Beaver Hill Coal Company, the same being known as the "Klondike Mine," such release and disclaimer not to take effect, however, except upon the failure of Graham "to pay or cause to be paid to said trustee for the use and benefit of the second party [Spreckels Bros. Company] said sum of \$550,000.00 in gold coin of the United States, as hereinafter provided."

The contract of June 8, 1899, further provided that the J. D. Spreckels & Bros. Company should deliver to the trustee:

(a) The certificate for the 10,001 shares of the capital stock of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company theretofore pledged to it by Graham, said certificate to be properly indorsed by the pledgee.

(b) All of the bonds of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company theretofore pledged by Graham to the Spreckels Bros. Company and then in its hands, of the par value of \$620,000.

(c) Assignments in proper form to the trustee of all judgments of record which had been rendered in the courts of Coos county, in the state of Oregon, in favor of the Spreckels Bros. Company and then held by it as collateral security for the payment of moneys owed to it by Graham.

(d) All of the shares of the capital stock of the Beaver Hill Coal Company excepting one share thereof to be issued to each one of the then directors of that company, such shares of stock issued to those directors to be duly indorsed and delivered by them to the trustee "as soon as possible hereafter, the same to be then held by said trustee, together with the other shares of said stock, for the uses and purposes hereinafter set forth."

(e) A satisfaction, in proper form, and duly acknowledged of the "judgment entered in said suit mentioned in paragraph number four of this agreement."

The contract of June 8, 1899, further declared that the parties thereto should jointly execute and deliver to the trustee a deed to the specifically described Marshfield lands, sufficient in form and substance to vest the title thereto in the trustee; that there should be transferred and issued to each of the following named persons, to wit: William L. Pierce, Frederick S. Samuels, W. S. Chandler, S. H. Hazard, R. A. Graham, J. W. Bennett, and T. R. Sheridan, one share of the capital stock of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, which said shares of stock should be duly indorsed and delivered by them to the trustee as soon as possible thereafter, the same to be then held by the trustee, together with the other shares of the stock of that company for the uses and purposes afterwards set forth in the contract; that a meeting of the directors of the company should be called for the reorganization of its board of directors, at which meeting the persons named should be elected to serve as directors of the company during the life of the contract of June 8, 1899, and until their successors should be elected and qualified; that upon their election each of such directors should sign a written resignation of his office and deliver the same to the trustee, "such resignation not to take effect, however, except as hereinafter provided."

Paragraph 8 of the contract of June 8, 1899, provided that Graham should remain manager of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company during the life of the said agreement and subject to its terms; that at all times during the life of said contract the Spreckels Bros. Company should be entitled to have a representative in the county of Coos, state of Oregon, who should be permitted upon demand to inspect all books, papers and vouchers of every kind connected with the business of that company, which company should be operated during the life of the said agreement of June 8, 1899, as a railroad corporation and common carrier of passengers and freight for hire, and should not be used to further the personal purposes or enterprises of any individual in any manner which would not be to the best interests of the said company, and should offer no special advantages in freights or fares, rebates or credits to any individual not granted to the community by general tariff and regulation, and that the rate of 40 cents per ton theretofore fixed for the transportation of the coal of the Beaver Hill Coal Company over said railroad should not be changed during the life of the contract of June 8, 1899.

By paragraph 9 of that contract it was declared that if at any time within six months from its date Graham should pay or cause to be

paid to the trustee for the use and benefit of the Spreckels Bros. Company the sum of \$550,000 in gold coin of the United States, "the title to all of the shares of stock, bonds, real property and judgments below mentioned shall thereupon vest in and the same shall become the absolute property of the first party [Graham]; and said trustee is hereby authorized and directed to thereupon deliver to the first party [Graham], and the second party [Spreckels Bros. Company] hereby obligates itself to cause to be thereupon delivered to him"—

(a) All of the capital stock of the Beaver Hill Coal Company placed in the hands of the trustee and all of the shares therein issued to said directors of said company, all duly indorsed.

(b) All of the capital stock of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company placed in the hands of the trustee, and all of the bonds of that company placed in the hands of the trustee.

(c) A good and sufficient deed of conveyance executed by the trustee to Graham of the specifically described Marshfield property.

(d) Assignments in proper form executed by the trustee to Graham of all of the judgments mentioned in favor of the Spreckels Bros. Company assigned by it to the trustee, "or if said judgments or any of them have been collected by said trustee then to pay over the moneys collected thereon to the first party [Graham]."

(e) "Said satisfaction of said judgment entered in said suit mentioned in paragraph number four of this agreement."

(f) "The resignations of the following directors of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, to wit, William L. Pierce, Frederick S. Samuels, W. S. Chandler, and S. H. Hazard, said resignations to then take effect."

(g) "Said release executed by the first party [Graham] in favor of said Beaver Hill Coal Company, and said release and disclaimer of the first party [Graham] in favor of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company. And said trustee shall at the same time deliver to the second party [Spreckels Bros. Company] said sum of \$550,000 in gold coin of the United States. Said payment of said sum of \$550,000 in gold coin of the United States to said trustee, for the use and benefit of the second party [Spreckels Bros. Company], shall operate as a full settlement, satisfaction, and discharge of all claims and demands of every kind and nature whatsoever now existing in favor of either party hereto against the other; and of all claims and demands of every kind and nature whatsoever now existing in favor of the second party [Spreckels Bros. Company] against said Beaver Hill Coal Company and said Coos Bay, Roseburg & Eastern Railroad & Navigation Company. The second party [Spreckels Bros. Company] further agrees that it will upon demand of the first party [Graham], at any time after the payment of said sum of \$550,000 to said trustee, execute a proper consent in writing to the cancellation of that certain order heretofore given by said Coos Bay, Roseburg & Eastern Railroad & Navigation Company to the Farmers' Loan & Trust Company, directing the delivery by said Farmers' Loan & Trust Company to the second party [Spreckels Bros. Company] of the bonds

of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company as they may be issued from time to time."

Paragraph 10 of the contract of June 8, 1899, is as follows:

"10. Should the first party fail to pay or cause to be paid to the said trustee for the use and benefit of the second party, within said six months from the date hereof, said sum of \$550,000.00, in gold coin of the United States, the title to all of the shares of stock, bonds, real property and judgment above mentioned shall, at the expiration of said six months, vest in and the same shall become the absolute property of the second party; and said trustee is hereby authorized and directed to thereupon deliver to the second party:

"(a) All of the capital stock of said Beaver Hill Company placed in the hands of said trustee, duly indorsed.

"(b) All of the capital stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company placed in the hands of said trustee, and all of the bonds of said company placed in the hands of said trustee.

"(c) A good and sufficient deed of conveyance executed by said trustee to the second party of the above described real property in said town of Marshfield.

"(d) Assignments, in proper form, executed by said trustee, to the second party of all said judgments in favor of the second party assigned by it to said trustee, as hereinabove provided, or, if said judgments, or any of them, have been collected by said trustee, then to pay over the moneys collected thereon to the second party.

"(e) The resignation of the following directors of the said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, to wit: R. A. Graham, T. E. Sheridan and J. W. Bennett, said resignation to then take effect.

"(f) Said release executed by the said party in favor of said Beaver Hill Coal Company, and said release and disclaimer of the first party in favor of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company.

"And said trustee shall at the same time deliver to the first party said satisfaction of said judgment entered in said suit mentioned in paragraph number four of this agreement; and second party shall cause said Coos Bay, Roseburg & Eastern Railroad & Navigation Company to execute and deliver to the first party a release and discharge of any and all claims and demands which it may have or claim to have against the first party. And all matters and things in dispute between the parties hereto, or between the first party and said Beaver Hill Coal Company and said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and all claims and demands shall be and become, by virtue hereof, finally and forever settled and determined."

Paragraph 11 declared that upon the performance by the trustee of the acts therein provided to be done by it, the trust should cease and determine, and paragraph 12 made certain provisions concerning two portions of the Marshfield lands in the event that the party of the first part to the agreement (Graham) should pay the \$550,000 to the trustee for the use and benefit of the Spreckels Bros. Company within six months from the date of the contract; and by paragraph 13 the party of the second part (Spreckels Bros. Company) further agreed that it would redeliver to the party of the first part (Graham) that certain policy of life insurance numbered 664,673 and then held by the second party (Spreckels Bros. Company), together with a waiver by the latter of all claim to or interest in the policy upon the payment by the first party (Graham) of the sum of \$2,950 at any time during the life of the contract, and the concluding paragraph of the contract is as follows:

"14. It is mutually agreed that time shall be the essence of this agreement and that this agreement shall inure to the benefit of and shall bind

the heirs, executors, administrators, successors or assigns of the respective parties hereto."

[1] The record shows that the contract was duly executed by the parties to it, and the trust duly accepted by the trustee, Bank of California, and by it duly performed. It shows that the contract was the result of much consideration by both parties to it, after repeated consultations with their respective counsel. There is, therefore, no sound reason by which it can be properly held that it was not deliberately entered into.

[2] It is equally clear, we think, that the contract cannot be held to show on its face that it was intended as a mortgage, pledge, or other security for any indebtedness thereby renewed. On the contrary, the parties thereby expressly declared its purpose to be the complete adjusting of "all matters of difference between themselves and between each of them and the Beaver Hill Coal Company, a corporation, and the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, a corporation," and thereby agreed that the then existing indebtedness from Graham to the Spreckels Bros. Company was \$523,162.52, for which sum judgment should be and was entered against him in the suit then on trial, with interest thereon at the rate of 6 per cent. per annum from April 1, 1898, and providing for a sale of the pledged securities there, as well as here involved, with the usual provisions for the docketing of a judgment against the debtor for any deficiency which might exist after such sale, and with a provision to the effect that all proceedings to enforce the decree be stayed for the period of six months, within which period, according to the contract, upon Graham paying or causing to be paid to the trustee for the use and benefit of the Spreckels Bros. Company \$550,000, all of the securities that he had given and that were placed in the hands of the trustee, should, together with the various releases, etc., be by the latter thereupon returned to Graham and become his absolute property, and that such payment should thereupon "operate as a full settlement, satisfaction, and discharge of all claims and demands of every kind and nature whatsoever now [then] existing in favor of either party hereto against the other; and of all claims and demands of every kind and nature whatsoever now [then] existing in favor of the second party [Spreckels Bros. Company] against said Beaver Hill Coal Company and said Coos Bay, Roseburg & Eastern Railroad & Navigation Company." Such payment within the stipulated period of six months was by express agreement of the parties made of the essence of the contract. And upon Graham's failure in that regard (which confessedly occurred) the express provision of the contract was that "the title to all of the shares of stock, bonds, real property and judgment above mentioned shall at the expiration of said six months, vest in and the same shall become the absolute property of the second party [Spreckels Bros. Company]; and said trustee is hereby authorized and directed to thereupon deliver to the second party [Spreckels Bros. Company]" the titles, releases, disclaimers, and pledged properties that had, in pursuance of the contract, been placed in its hands for that purpose, and to Graham, the satisfaction of the judgment that had, pursuant to the agreement, been

entered against him; and the Spreckels Bros. Company should cause the Coos Bay, Roseburg & Eastern Railroad & Navigation Company to execute and deliver to him a release and discharge of any and all claims and demands which it might have or claim to have against him. "And," continued the contract, "all matters and things in dispute between the parties hereto, or between the first party (Graham) and said Beaver Hill Coal Company and said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and all claims and demands shall be and become by virtue hereof, finally and forever settled and determined," with the further provision that upon the performance by the trustee of the acts therein provided to be done by it the trust should cease and determine.

Such being the contract of the parties, we regard it as clear that the appellant is concluded by his failure to pay or cause to be paid to the trustee for the use and benefit of the Spreckels Bros. Company the \$550,000 within six months from June 8, 1899.

The judgment is affirmed.

THE JOHNSON LIGHTERAGE CO. NO. 24.

THE JOHNSON LIGHTERAGE CO. NO. 15.

(Circuit Court of Appeals, Third Circuit. January 3, 1918. Rehearing Denied February 8, 1918.)

No. 2281.

1. SALVAGE ⚡38—SERVICES RENDERED BY CHARTERED VESSEL—RIGHT TO AWARD FOR RISK TO VESSEL.

As between charterer and owner, even when the charterer was owner pro hac vice under a demise, the determination of the question as to who is entitled to the share of salvage money awarded for the risk to the vessel depends both upon who is entitled to the vessel's services and earnings and upon whom the loss would fall if the vessel had been injured or lost in the salvage operations, and in a proper case the award may be apportioned between them.

2. SHIPPING ⚡54—DEMISE BY CHARTER—LIABILITY OF CHARTERER FOR INJURY TO VESSEL.

A charterer under a time charter of demise, in the absence of provisions in the charter party to the contrary, is only responsible as bailee for hire for ordinary diligence, and is only liable for ordinary negligence in the care of the vessel.

3. SALVAGE ⚡38—SERVICES RENDERED BY DEMISED VESSEL—APPORTIONMENT OF AWARD.

A time charter of a tug, which was a demise, contained no provision respecting salvage services, nor requiring redelivery of the tug in as good condition as when received, except that, in case of trips to a certain outside port, the charterer was required to procure insurances, or, if that could not be obtained, to give a bond to protect the owner from loss or damage to the boat while on such trips. The tug rendered a dangerous salvage service in New York Harbor in rescuing two scows laden with war munitions and high explosives, which had broken loose during a storm and imminently threatened the safety of other shipping. A fund was paid into court by the owners of the cargoes to compensate the salvors. *Held*, that the court, after making a satisfactory award to the

crew, properly decreed that the remainder of the available fund should be apportioned between the owner and the charterer, on the basis of risks incurred.

4. ADMIRALTY ⇨121—PROCTOR'S FEES—CONTRACT BETWEEN ATTORNEY AND CLIENT.

A controversy with respect to a contract between a proctor and his client for fees cannot be litigated in the admiralty suit.

5. SALVAGE ⇨52—SUITS FOR SALVAGE—COSTS.

Proctor's fees are not properly allowable as costs, to be taken out of the general fund recovered in a suit for salvage.

6. SALVAGE ⇨38—APPORTIONMENT OF AWARD—SHARE OF CREW.

The fact that the captain of a tug demised to a charterer was, under his contract of hiring, entitled to a share of the charterer's part of a salvage award, *held* not to deprive him of the right to share also in the award to the crew.

Appeal from the District Court of the United States for the District of New Jersey; Thos. G. Haight, Judge.

Suit in admiralty for salvage by William J. Scanlan and others, composing the firm of W. J. Scanlan & Co., against the scow Johnson Lighterage Company No. 24 and the derrick lighter Johnson Lighterage Company No. 15 and their cargoes; the Johnson Lighterage Company, claimant, and James Shewan & Sons, Incorporated, intervening libellant. From the decree of distribution, various appeals have been taken. Modified and affirmed.

For opinion below, see 240 Fed. 435. See, also (D. C.) 231 Fed. 365.

Foley & Martin, of New York City (William J. Martin and George V. A. McCloskey, both of New York City, of counsel), for appellants.

Runyon & Autenrieth, of Jersey City, N. J. (Horace L. Cheyney and Edward W. Norris, both of New York City, of counsel), for appellee James Shewan & Sons.

E. Curtis Rouse, of New York City (Arthur L. Burchell, of New York City, of counsel), for appellee Axtell.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. These are appeals from a decree in admiralty distributing salvage to the owner, charterers, master and crew of the salving vessel and to their proctors. 240 Fed. 435. They raise, not without confusion, every phase of the conflicting claims adjudged by the decree.

On December 26, 1915, the steamtug "John A. Seeley," bound down the New York Bay, encountered a storm of unusual violence. She sighted two deck scows, flying munition cargo signals, adrift near Red Hook Flats in imminent peril of collision with steamships and other craft anchored in the course in which the wind was driving them. The master of the tug immediately changed her course and made for the scows, with full knowledge of the character of their cargoes and the danger of attempting their rescue. When she reached them they were afoul a steamer. Their position and the gale made it impossible to get a hawser to them. The tug went around the scows and nosed

them off with her stem until they were clear, and then, succeeding in getting a line aboard, towed them to a place of safety.

The tug was owned by the Seaboard Equipment Corporation and was under charter to W. J. Scanlan & Company. The scows were owned by Johnson Lighterage Company and were named respectively "Johnson Lighterage Company No. 24" and "Johnson Lighterage Company No. 15." The former was laden with munitions belonging to the Russian Government; the latter with munitions belonging to the French Government.

Scanlan & Company, as charterers, and Seaboard Equipment Corporation, as owner of the tug, filed libels against the scows, their cargoes and pending freight for salvage. The two governments disposed of any question of right to salvage against their property by obtaining its release from the libels upon payment into court of the respective sums of \$25,000 and \$6,500. Thereafter the actions were consolidated and were prosecuted against the fund.

After filing its libel, the Seaboard Equipment Corporation sold the tug "John A. Seeley," to James Shewan & Sons, Inc., and also assigned its claim for salvage, whereupon, James Shewan & Sons, Inc., was substituted as a party to the salvage proceedings.

When the pleadings were concluded, the claimants to the fund for salvage services, (as distinguished from claimants for professional services,) were Scanlan & Company, charterers, claiming as owners pro hac vice all the salvage excepting the crew's share and allowances for expenses and costs; James Shewan & Sons, Inc., assignee of the general owner, claiming the same fund; and lastly, the crew.

The trial court distributed the fund by two decrees, made necessary by the separate funds arising from the two scows, the substance of which taken together is as follows:

(1) That out of the fund there first be paid Foley & Martin, proctors for Scanlan & Company, charterer libellants, all taxable costs and disbursements incident to filing their libel and to the seizure and preservation of the cargoes; that there be paid E. Curtis Rouse, proctor for Seaboard Equipment Corporation, original owner libellant, his costs and fees in filing and prosecuting its libel.

(2) That there be next paid Foley & Martin, proctors for Scanlan & Company, the sum of \$1,500, for their services in creating the fund now in court.

(3) That the balance then remaining be divided into three equal parts; that one part be paid Scanlan & Company, charterers of the tug; that another part be paid to and divided among the master and members of the crew of the tug in proportion to the wages they were receiving at the time of the rendition of the salvage services; and that out of the remaining part, there be paid to Silas B. Axtell, proctor for Seaboard Equipment Corporation, original owner, the sum of \$1,250 proctor fee, and to Shewan & Sons, general owner, \$8,000, the ascertained value of the tug, and that the balance of the third part, if any, be paid to Scanlan & Company, charterers.

Appeals were taken by one party or another upon every phase of the decree of distribution, including the master's share as a member

of the crew; but as no appeal was taken by or against the crew upon the proportion awarded the crew as a whole, the matters raised on the various appeals resolve themselves, primarily, into a contest between the owner and charterers of the tug for the whole of the remainder of the salvage fund, according secondarily, as that fund is enlarged by the disallowance or diminished by the allowance of contested claims for proctor fees.

[1] There is no dispute about the facts. The owner chartered the "bare tug" for a period of three months and surrendered her to the full possession, management, and control of the charterers without condition, except in two negligible particulars. The charter contained no reference to salvage services or to the division of salvage rewards. The service rendered the munition scows was in every respect salvage service and was performed with risk to the tug.

The boat was owned by one party and chartered by another. One was entitled to the boat and the other to her services. Both claim salvage for risks of loss in the salvage service, not by way of division between owner and charterers, however, but for the whole of the boat's share of the salvage recovered.

The charterers say that the charter was a demise of the tug, which made them owners *pro hac vice*, and that, being such, they are entitled to the owner's share of the salvage. The owner admits that the charter was a demise, *United States v. Shea*, 152 U. S. 178, 186, 14 Sup. Ct. 519, 38 L. Ed. 403; *Leary v. United States*, 14 Wall. 607, 610, 20 L. Ed. 756; but maintains that it is none the less the owner of the tug; that its tug was risked in a dangerous service; that the tug's risk was the owner's risk; and therefore, as the tug's general owner, it should have the tug's share of the reward.

The test which the owners *pro hac vice* ask us to apply to this question, is the bare present ownership of the salving boat, without any other consideration; and the test which the general owner asks us to apply, is the risk of the boat in the salvage service and the corresponding risk to the general owner of losing the boat in that service. To the owner's claim of risk, the charterers reply that it had none, except such as was either compensated by the charter hire or was protected by the charterers as insurers. We believe the question cannot be solved by applying either test separately, and can only be solved by ascertaining what was the measure of ownership possessed by the two, (the general and the temporary owner,) and by determining upon which the loss of the boat would have fallen if she had been destroyed in the salvage service.

The general rule of admiralty law is that the share of a salving boat in salvage compensation belongs to the owner of the boat, for the obvious reason that ordinarily the boat is engaged in the dangerous service at risk of loss to her owner. But there is an exception to this rule, upon which the charterers confidently rely, which is, that the boat's share of salvage is awarded the charterer, if the salving boat is at the time under a charter that amounts to a demise of the boat—*locatio navis*—or, if the charter party so expressly provides. *Kennedy on Law of Civil Salvage*, 67. The exception, being likewise pred-

icated upon the theory of risk, is enforced only when the loss of the boat in a salvage service would fall upon the charterer. The reason for the exception being precisely the same as the reason, for the rule, we are of opinion that the mere fact of ownership, as contended by the charterers, without regard to where the risk lay and where the loss would fall, is not enough to determine where the reward should go. The charterers cite three cases in support of their contention that under a charter of demise the boat's share of salvage belongs unconditionally to the owner *pro hac vice*. These are *The Kaiser Wilhelm der Grosse* (D. C.) 106 Fed. 963, 969, 970; *The Scout*, 1 *Aspinall* (N. S.) 259; *The Maria Jane*, 14 *Jurist*, 859 (Dr. Lushington). A careful reading of these cases shows that they do not support the charterers' contention as broadly made, but indicate on the contrary, that the boat's share belongs to the one who must bear the loss if the boat is destroyed, whether that be the general owner, or a temporary owner under legal liability to make good its loss to the general owner.

In the case of *The Kaiser Wilhelm der Grosse*, the court awarded the share of the salving tug "Dalzell" to the charterer as against the claim of the general owner, on the ground that the charter was a charter of demise. So far, that decision is authority for the charterers' position in this case; but the court went further, and, showing the terms of the charter, awarded the salvage to that owner at whose risk the boat was put into the hazardous service. Referring to the charter, the court said, the charterer "agreed *unconditionally* to return her to her owner in as good condition as it received her, reasonable wear and tear alone excepted," and that, "If the vessel was damaged in any salvage operation, the *charterer alone was bound to make good the loss*," citing *The Scout*, L. R. 3 *Adm. & Ecc.* 522, as "precisely in point."

The Scout clearly sustains the decision in *The Kaiser Wilhelm der Grosse*, for there too it appears that the charterer "in case of damage to the vessel would have been bound under the charter to repair her. He was bound to deliver her up to the general owners in good condition."

That part of Dr. Lushington's opinion in *The Maria Jane*, cited as applicable to this case, is nothing more than an argument applied by way of illustration to facts which do not resemble even remotely the facts in this case. Therefore, the paragraph relied upon is scarcely dictum.

Setting aside *The Maria Jane*, it is clear that the decisions in *The Kaiser Wilhelm der Grosse* and *The Scout* were not based upon the bare fact that at the time of the salvage service the boats were under charters of demise, but upon the fact that such charters of demise, by express terms, placed liability for damage to and loss of the demised boats upon the charterers. The courts found that the boats were engaged in salvage service at the risk, not of the general owners, but of the charterers, owners *pro hac vice*, and that as the risk was theirs, the reward should be theirs also.

The decisions in *The Kaiser Wilhelm der Grosse* and *The Scout* bear upon the case before us in that they show that a charterer by

demise is entitled to the owner's share of salvage when the boat is engaged in salvage service at the charterer's risk, and, inferentially that the general owner is entitled to the boat's share when the boat is put into the service at his risk. But *The Arizonan* (D. C.) 136 Fed. 1016, and 144 Fed. 81, 75 C. C. A. 239, bears more directly upon the case. There, the tug "Unique" was awarded salvage for services rendered the steamship *Arizonan* when on fire. The tug was at the time under charter, which was not a charter of demise. The owner claimed the whole of the salvage compensation; the charterer claimed a part of it. The District Court awarded it all to the owner, under the general rule "that the owner is entitled to such reward unless there is a demise of the tug or the contract of hiring stipulates to whom it shall belong." The Circuit Court of Appeals reversed this decision and divided the salvage between the owner and the charterer, according as each had contributed in earning the salvage reward. It said in its opinion that:

"It is true that several text-writers have stated the rule broadly that a charterer is not entitled to salvage unless he becomes the owner *pro hac vice*, but we are referred to no controlling authority to that effect and are not impressed by the rationale of the rule. The theory of salvage is to reward all who have contributed anything to the work of saving the imperiled property. Thus, it has included the risk assumed by the salving vessel, her services and the services of her master and crew not only, but it has been extended to services rendered by passengers and, in some instances, remuneration has been awarded for the risk to her cargo. There never has been any difficulty in segregating these interests and we see no reason why it may not be done even when the risk to the vessel and the services she renders are represented by different individuals.

"At the time in question the appellant was entitled to the exclusive use of the tug and to every dollar she might earn during the existence of the charter. On the other hand, the appellee, not having parted with the ownership, was entitled to remuneration for any risk the tug might run while engaging in a dangerous salvage service. We are unable to see why the right to receive remuneration on account of the ownership, which was retained, carries with it the right to remuneration for the services which passed, without qualification, to the appellant. The two are as separate and distinct as are the risk of the tug and the services of her crew. * * *

"The solution of the present controversy seems plain. The appellee owned the tug, the appellant owned the tug's services. She was in a dangerous occupation and for the risk so run the appellee is entitled to compensation. She did the work of rescuing the *Arizonan* from the burning dock and for these services the appellant is entitled to compensation."

To the same effect is the decree in *The New Orleans* (C. C.) 23 Fed. 909.

The decision in *The Arizonan* bears upon several phases of the case before us. It is authority for the claim of the charterers to at least a part of the boat's share in the salvage, as against the claim of the general owner for the whole of it, and is authority for a claim of the owner to at least a part of the salvage if it appear that the boat earned the salvage at risk of loss to its owner. The important point of the decision, as bearing upon the claims of both owner and charterers, is, that the right of the general owner to a boat's share of salvage is not in all instances absolute, and is not, therefore, exclusive of all other claims that may be asserted against it, but that the claim of the owner must yield to claims of others with equal merit, and that salvage may

be apportioned. If the owner's claim to salvage earned by a boat not under a charter of demise is not absolute and exclusive, then, similarly, the claim of an owner by demise cannot be higher than that of an owner who has not parted with his boat, and cannot be exclusive of all other claims. If the claim of an owner of a boat not demised is subject to deduction in favor of the claim of a charterer, (The Arizonan,) so also may the claim of a charterer, made owner pro hac vice by a charter of demise, be subject to deduction in favor of claims of others contributing to the earning of the salvage reward. Of such may be the general owner, who contributes his boat as the instrument by which the salvage is earned. When a boat having two owners with different interests is put into such a service and is subjected to the hazard of loss, as concededly the boat was in this instance, the one question which determines the right to salvage, is—Which owner would have sustained the loss if the boat had been destroyed in the service? For answer to this question, we must go to the charter and examine its terms, both expressed and implied.

[2, 3] The charter is undoubtedly a demise of the tug by the owner to the charterers for general service, subject to one limitation not pertinent to this discussion. It contains by expression no covenant to return the boat to the owner in good condition, or to repair her damages, or make good her loss. The charterers were entitled, under the charter, to engage the tug in any proper nautical enterprise, which includes salvage operations. The charter is silent upon the subject of salvage service and upon the division of salvage compensation. The parties, therefore, in failing to stipulate which was to bear the risk of loss of the boat in salvage and other operations, left the risk where the law places it. While in every charter there is an implied covenant to deliver up the vessel at the end of the term, that covenant alone does not make the charterer an insurer. *Lake Michigan, etc., Co. v. Crosby* (D. C.) 107 Fed. 723, 724; *Killam & Co. v. Monad Engineering Co.* (D. C.) 216 Fed. 438, 442. Nor does it alter the nature of the contract of charter. This the law makes a simple bailment for hire. In such a contract the charterer stands as a bailee for hire, who is only responsible for ordinary diligence and is only liable for ordinary negligence in the care of the property bailed. As this is the rule, not only of the common law, but of the general law as applied to this subject, the hirer is not responsible for the failure to return the thing hired when it has been lost or destroyed without his fault, unless he has, either expressly or by fair implication, assumed the absolute obligation to return, even though the thing hired has been lost or destroyed without his fault. *Strum v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093; *Sun Printing & Publishing Ass'n v. Moore*, 183 U. S. 642, 654, 22 Sup. Ct. 240, 46 L. Ed. 366. We are of opinion that there is in this charter no implied undertaking to return the boat. The parties stipulated with respect to the loss of the boat on a certain run and provided for either a policy of insurance or a bond of indemnity to protect the owner against loss of the boat on that particular run. No provision was made to protect the owner on any other run or in any other service in which the charterers might engage the boat. The in-

clusion of the covenant covering the owner's risk of losing the boat in one kind of service on one particular run excludes the implication that the charterers covenanted safely to return the boat to the owner from other kinds of service on other runs, and therefore leaves the parties to the law of bailment for hire as applied generally to charters. *Clark v. United States*, 95 U. S. 539, 542, 24 L. Ed. 518; *Sun Printing & Publishing Ass'n v. Moore*, 183 U. S. 642, 654, 22 Sup. Ct. 240, 46 L. Ed. 366; *W. H. Beard Dredging Co. v. Hughes* (D. C.) 113 Fed. 680, 682, affirmed 121 Fed. 808, 58 C. C. A. 192; *Bleakley v. City of New York* (D. C.) 139 Fed. 807; *Lake Michigan, etc., Co. v. Crosby* (D. C.) 107 Fed. 723, 724; *Charles Killam & Co. v. Monad Engineering Co.* (D. C.) 216 Fed. 438, 442.

Without repeating the very full discussion of the learned trial judge upon this subject, we find ourselves in entire accord with his conclusion, and hold that in the absence of negligence in handling the tug (of which none is charged), the risk of loss of the tug while rendering the salvage service in question, was upon the general owner, and that, accordingly, the general owner is entitled to compensation for what it risked.

The distribution of the salvage fund being decreed on the basis of risks incurred, we must ask—What did the general owner risk, and what did the charterers and crew risk? The crew risked their lives. No one questions that. And as no one questions the salvage awarded the crew as a whole, (which for the moment we shall consider as one-third,) we must assume that their reward was equitably commensurate with the risks they incurred. This leaves substantially two-thirds of the fund to be divided between the general owner and the charterers, according to their respective risks. What the owner risked was its boat; no more, no less. Its boat was worth \$8,000. It therefore risked that sum. It got that sum in the award. In getting all that it risked, we think it should not complain. The value of the boat's service to the rescued scows, urged by the owner as a consideration inducing a larger reward, is too much involved with the meritorious service of the crew, whose reward cannot be altered without an appeal, to justify changing the theory of the awards.

What did the charterers risk to entitle them to a third of the fund, plus what is left of the one-third from which the owner's \$8,000 is to be deducted? Having the entire services of the boat, the charterers were, of course, entitled to compensation for the risk of losing it. It is a little difficult to say, in view of the rather small monthly charter hire, that these services were worth from \$8,000 to \$10,000 for the balance of the term. Yet, as we must assume, in the absence of an appeal, that the crew were fully paid for their risks, and as we find that the owner was fully paid for its risk, the balance must go to the one other party that contributed to the earning of the salvage fund. If the charterers' share is excessive, it may be because the salvage fund is excessive. As to that, however, there is no complaint by the only parties qualified to complain, namely, the ones paying the salvage. We therefore find no error in the distribution of the salvage fund to the

crew, the charterers, and the owner, except as affected by certain minor allowances next to be considered.

By its decree, the trial court awarded \$1,500 to Foley & Martin, proctors for the charterers, for their services in creating the fund; and \$1,250 to Silas B. Axtell, proctor for the original owner, for professional services.

The owner and charterers appear here as contesting claimants for the whole salvage fund (after paying the crew) and, failing that, are striving for the position of residuary distributee. Both are interested alike in the size of the fund and in opposing its diminution by the allowance of fees for professional services. Therefore, both have appealed from such allowances.

Both owner and charterers appealed from the allowance to Silas B. Axtell, proctor for Seaboard Equipment Corporation, original owner. Scanlan & Company, who are entitled under the decree to the residuum of the fund, object to the allowance of any fee to Axtell, but urge, that if a fee is to be allowed him, it should be paid not out of the general fund, but out of the fund awarded Shewan & Sons, Inc., upon the ground that this concern succeeded to the salvage rights of Seaboard Equipment Corporation, and succeeded also, it is claimed, to its liability to Axtell for his fee. Shewan & Sons, Inc., having succeeded to the liability of the Seaboard Equipment Corporation to Axtell for his fee, or having conceded that the salvage fund is liable for Axtell's fee, acts as though it were estopped, by one position or the other, from contesting the allowance altogether, and therefore maintains merely that the allowance to Axtell is excessive and should be reduced to a reasonable amount; and when reduced, should not be paid out of the fund awarded it, as the court first ordered, but should be paid out of the general fund.

At the trial, Axtell claimed that he had an equitable lien upon the fund to the extent of 50 per cent. growing out of an equitable assignment of 50 per cent. of the claim to him, and that he was entitled to recover the same as an independent party. Shewan & Sons, Inc., admits that Axtell is entitled to recover reasonable compensation for his services from the time he was retained by the Seaboard Equipment Corporation until discharged by Shewan & Sons.

[4] We briefly dispose of this controversy by holding with the trial court, that Axtell did not have an equitable lien upon the fund, and by holding further, that whatever arrangements Axtell had for fees, they were between him and his client. If the fees are in dispute, they cannot be litigated in this proceeding; in any event, they are not properly chargeable as a cost or an expense in an admiralty proceeding.

[5] The court allowed Foley & Martin \$1,500 "for their services in creating the fund." This sum was made payable out of the general fund before it was divided into thirds. From this allowance Shewan & Sons, Inc., appeals, because conceivably it might reduce its share of the fund. Foley & Martin are doubtless entitled to credit for their industry in creating the fund, and are entitled to compensation. But their industry was exerted not on behalf of the court

or of the general litigation, but on behalf of their clients, to whom alone, we think, they should look for compensation. We find no authority for taxing such fees as costs in an admiralty proceeding. What authorities we find lean the other way. *The Baltimore*, 8 Wall. 377, 19 L. Ed. 463; *The Alice* (D. C.) 12 Fed. 496, 502. At all events, we are not inclined to institute or sanction a practice of such doubtful propriety. We are of opinion, therefore, that the claims of Foley & Martin and of Axtell, for professional services, should be disallowed, and that to this extent the decree below should be reversed.

[6] The remaining question has to do with the share of the master of the tug in the salvage and is raised on the appeal of Shewan & Sons, Inc., general owner. George O. Wilson, the master of the tug, was under contract with Scanlan & Company, the charterers, to operate the tug for one-third of the profits. Of the award to the charterers, the master will get a third, by force of his contract; and of the award to the crew, he will get a share, by force of the decree. Shewan & Sons, Inc., maintains that the master is not entitled to share in the salvage awarded the crew, because of his share in the salvage awarded the charterers. But the latter share is not awarded the master under the decree or by reason of this litigation; he is entitled to it under his contract with the charterers. The existence of such a contract does not detract from his right as a member of the crew to share in a reward which the law gives the master as well as the rest of the crew for salvage services. The master risked his life in a courageous act and saved a large amount of property. The owner did nothing at the time, and nothing afterward, except to claim compensation for perils to its boat, through all of which the master safely navigated her. We find no error in the allowance to the master.

The decree below, when modified in accordance with this opinion, is affirmed.

MILLER et al. v. BELVY OIL CO.

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

No. 4895.

1. JUDGMENT ⇔713(2)—CONCLUSIVENESS OF ADJUDICATION—MATTERS NOT IN ISSUE.

When a second suit is between the same parties or their privies and upon the same cause of action as a former suit, the judgment or decree in the first is conclusive upon all the parties and their privies in the second suit, not only as to every question and issue which was, but also upon every question and issue, claim, or defense, which might have been, presented in the first suit; but where the second suit is upon a different cause of action, but between the same parties as the first, or their privies, the judgment or decree in the first operates as an estoppel in the second only as to those points or questions which were actually litigated and determined in the first suit.

2. JUDGMENT ⇔713(2)—RES JUDICATA—IDENTITY OF CAUSES OF ACTION.

A decree for the defendant in a suit by a lessor for the cancellation of a lease and its assignment as clouds upon his title is a bar to a second suit by the lessor or his privies for the same relief upon different grounds, but which might have been set up in the former suit.

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

3. JUDGMENT ⚡731—RES JUDICATA—EXCLUSION OF ISSUES.

That the court, after having announced its decision in a suit, refused to permit the filing of an amended complaint setting up additional grounds for the relief prayed for, does not change the effect of the decree as a bar to a second suit by plaintiff for the same relief.

4. JUDGMENT ⚡682(1)—PERSONS CONCLUDED—PURCHASERS PENDENTE LITE.

One who, pending a suit to cancel a lease, made a contract with the lessor, who was plaintiff, to purchase the land in case the lease was canceled, became from that time privy to the suit, and was bound by the decree therein, although it was adverse to the lessor.

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

Suit in equity by Emil C. Miller and W. H. Byron against the Belvy Oil Company. Decree for defendant, and complainants appeal. Affirmed.

Charles West, of Oklahoma City, Okl., for appellants.

John J. Shea, of Tulsa, Okl. (Thomas F. Shea, of Deer Lodge, Mont., and Burdette Blue, of Bartlesville, Okl., on the brief), for appellee.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal from a decree of dismissal of the complaint in a suit in equity upon the ground that the matters which the plaintiffs sought to litigate were res adjudicata by reason of a former suit and decree. On December 9, 1910, James C. Cowles, Jr., the lessor, brought a suit in equity against Alva C. Lee, his lessee, in the district court of Washington county, Okl., to cancel and avoid his oil and gas lease, and for such other equitable relief as might be just and proper. Pleadings were made, the Belvy Oil Company, an assignee of the lease, was made a party defendant and answered the complaint, the trial was had and a decree was rendered that the plaintiff take nothing by the action, that the Belvy Oil Company was the full legal and equitable owner of the lease, and of all the rights of the lessee thereunder, that the plaintiff James C. Cowles, Jr., and any and all persons acting by, through or under him, were enjoined from interfering with or molesting the Belvy Company in the possession of the leased premises, or in the operation of the lease, and that the plaintiff pay the costs. This decree was rendered on September 5, 1911. During the pendency of that suit in the state court Emil C. Miller and W. H. Byron succeeded to the rights of the lessor, Cowles, Jr., and the Belvy Oil Company succeeded to the rights of the lessee, Lee. After the rendition of the decree Miller and Byron brought suit in the court below against the Belvy Oil Company to cancel and set aside the lease involved in the first suit, to enjoin the Belvy Oil Company from entering upon the leased premises, operating them for oil and gas, or developing the production of oil or gas thereon, and for such other relief as the equity of the case might warrant. As Miller and Byron succeeded to the rights of the lessor, Cowles, Jr., and the Belvy Oil Company succeeded to the rights of the lessee, Lee, pendente lite, their respective rights against each other are the same as they would have

been if Miller and Byron had been lessors and the plaintiffs and the Belvy Company had been the lessee and the defendant in the first suit. For the sake of brevity, therefore, this case will be treated as though they had been, and Miller and Byron will be called the plaintiffs and the Belvy Oil Company the defendant.

James C. Cowles, Jr., was a member of the Cherokee Tribe of Indians. He had only a small fraction of Indian blood. On March 6, 1907, when the lease was made, he was a minor, and he became of age on July 1, 1910. The lease was made by James C. Cowles, Jr., and James C. Cowles, as guardian of James C. Cowles, Jr., pursuant to an order of the United States Court for the Northern Judicial District of the Indian Territory, which court had both chancery and probate jurisdiction. It covered the allotment of Cowles, Jr., as a Cherokee Indian and its term was 15 years, thus extending more than 11 years after he became of age.

In the course of the litigation through the two suits the plaintiffs have alleged in all 12 reasons why the lease and the assignment to the Belvy Oil Company should be decreed to be void and be canceled:

- (1) That the lessee had failed to pay the royalties reserved in the lease.
- (2) That the lessee had failed to explore and develop the leased land for natural gas and oil as he had agreed to do by the terms of the lease.
- (3) That the lessee assigned the lease without the consent of the lessor.
- (4) That Cowles, Jr., had attained his majority, that he had never ratified the lease, and that it had been and was avoided as to that part of its term which extends beyond his minority.
- (5) That the court under whose order the lease was made had no jurisdiction to direct the lease of his land beyond his minority.
- (6) That that court had no authority to permit or make the lease, because the proceedings therein for that purpose failed to comply with indispensable statutory requirements relating to such proceedings.
- (7) That the lease was assigned without the consent or approval of the lessor or the Secretary of the Interior.
- (8) That the lease was not recorded as required by section 20 of the Act of April 26, 1906 (34 Stat. 145, c. 1876).
- (9) That the lease of the land of the minor Indian allottee, Cowles, Jr., was forbidden, unless made in the manner expressly authorized by statute; that the proceeding in the United States Court for the Northern District of the Indian Territory, pursuant to which the lease was ordered and made, was a proceeding to give rights of majority to Cowles and to allow him to make the lease; that this was not an authorized method of alienation, and was not a proceeding permissible or in conformity to the applicable statutes in order to permit a guardian to make a lease of the lands of a minor Indian allottee.
- (10) That the consent of the Secretary of the Interior to the assignment of the lease to the defendant had never been obtained.
- (11) That the assignment of the lease to the defendant was not made in accordance with the rules and regulations of the Secretary and

would not have been approved if it had been presented to him before the authority to approve it was abolished by the Act of April 26, 1906.

(12) That after the Secretary's authority to approve the assignment had been abolished the plaintiffs presented to him the facts regarding the same and he declined to act because he had no authority so to do.

The fundamental cause of action in both suits is that the lease and its assignment to the defendant are apparently valid, but were actually void; that they apparently conferred rights on the defendant, but actually conferred no rights; that they, therefore, created a cloud upon the plaintiffs' title, and gave to the defendant an apparent right to possess, develop, and operate the premises for oil and gas, while it had no such right. In their original complaint in their first suit the plaintiffs pleaded the first four grounds or reasons above stated for this cause of action; in a second amended complaint in that suit, which the plaintiffs first tendered after the court had announced its decision of the case, and which the court refused to permit to be filed, but marked tendered and made a part of the record, they pleaded the fifth, sixth, and seventh grounds or reasons above stated; and in the complaint in this, the second suit, they have pleaded the eighth, ninth, tenth, and eleventh grounds or reasons for this cause of action. The question in this case, therefore, is: May the plaintiffs, in view of the decree against them in their first suit to cancel this lease and assignment, remove the cloud they are alleged to cause, and enjoin the defendant from their use, maintain this second suit for substantially the same relief?

[1] The rules of estoppel which must determine the answer to this question are: When the second suit is between the same parties, or their privies, and upon the same cause of action as the first, the judgment or decree in the first is conclusive upon all the parties and their privies in the second suit, not only as to every question and issue which was, but also upon every question and issue, claim, or defense which might have been presented in the first suit. But where the second suit is upon a different cause of action, but between the same parties as the first, or their privies, the judgment or decree in the former operates as an estoppel in the latter as to every point or question which was actually litigated and determined in the first action, but it is not conclusive relative to other matters which might have been, but were not, litigated and decided. *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195; *Union Central Life Ins. Co. v. Drake*, 214 Fed. 536, 542, 131 C. C. A. 82, 88. One may not split his cause of action. An action upon an indivisible cause and an adjudication thereof bars a subsequent action between the same parties and their privies upon the same cause. *Brown v. First National Bank*, 132 Fed. 450, 451, 66 C. C. A. 293, 294; *Id.*, 196 U. S. 641, 25 Sup. Ct. 796, 49 L. Ed. 631; *Harrison v. Remington Paper Co.*, 140 Fed. 385, 397, 72 C. C. A. 405, 417, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314; *Watkins v. American Nat. Bank*, 134 Fed. 36, 41, 67 C. C. A. 110, 115.

[2] Counsel for the plaintiffs argues that they are not estopped by the decree in the first suit from maintaining the second suit because the two suits are founded on different causes of action. Taking, for illustration of his argument, the ninth alleged ground or reason why

the lease is asserted to be void, which was pleaded for the first time in the complaint in the second action, he contends that this constitutes a different and independent cause of action from that set forth in the complaint in the first action, in which were pleaded the first four reasons only, and he cites in support of this view *Lim Jew v. United States*, 196 Fed. 736, 116 C. C. A. 364; *Water, Light & Gas Co. v. City of Hutchinson*, 160 Fed. 41, 90 C. C. A. 547, 19 L. R. A. (N. S.) 219; *Wyman v. Bowman*, 127 Fed. 257, 62 C. C. A. 189; *Lublin v. Stewart, Howe & May Co.* (C. C.) 75 Fed. 294; *Delaware, L. & W. R. Co. v. Kutter*, 147 Fed. 51, 77 C. C. A. 315; *Radford v. Myers*, 231 U. S. 725, 34 Sup. Ct. 249, 58 L. Ed. 454; *Harrison v. Remington Paper Co.*, 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314; *Union Central Life Ins. Co. v. Drake*, 214 Fed. 536, 131 C. C. A. 82; *Troxell v. Del., Lack. & Western R. R.*, 227 U. S. 434, 33 Sup. Ct. 274, 57 L. Ed. 586. He declares that the *Troxell* Case is the best case he has cited. In that case the parties were not the same. In the first action the plaintiff was the surviving widow and the two living children of the deceased; in the second action the plaintiff was the same widow as administratrix of the deceased. 227 U. S. 443, 444, 33 Sup. Ct. 274, 57 L. Ed. 586; *American Railroad Co. v. Birch*, 224 U. S. 547, 32 Sup. Ct. 603, 56 L. Ed. 879. In that case the cause of action in the first suit was the failure of the defendant railroad company to use reasonable care to supply reasonably safe and proper appliances and instruments in violation of the law of Pennsylvania under which the negligence of fellow workmen is no ground for recovery. In the second action the cause was the negligence of the defendant under the federal Employers' Liability Act, as amended (Act April 22, 1908, c. 149; 35 Stat. 65 [Comp. St. 1916, §§ 8657-8665]; Act April 5, 1910, c. 143, 36 Stat. 291), under which a recovery could be and was had for the negligence of the fellow workmen of the deceased, 227 U. S. 441, 33 Sup. Ct. 274, 57 L. Ed. 586.

In *Union Central Life Ins. Co. v. Drake*, 214 Fed. 536, 546, 547, 131 C. C. A. 82, 92, 93, upon which counsel seems to place some reliance, the insurance company had three separate and independent liens upon the property of a bankrupt, its lien for \$10,080 by subrogation to the rights of the mortgagees of three prior mortgages, its lien for \$10,000 by its separate and independent mortgage, and its lien for about \$50,000 by virtue of a transaction termed the mortgage of December 20, 1907. It brought its suit to foreclose the mortgage of December 20, 1907, and made no claim in that suit on account of any of its other liens. The trustee for the bankrupt's estate defended on the ground that the mortgage of December 20, 1907, was a voidable preference, and the insurance company was defeated. The trustee then brought a suit to set aside the mortgage of December 20, 1907, as a voidable preference, and also to avoid the claim of the insurance company to a lien upon the proceeds of the mortgaged property for \$10,080 by subrogation to the rights of the three first mortgages. The insurance company answered and pleaded this claim for the \$10,080, and the trustee asserted that the insurance company was estopped from maintaining its lien for this amount by the decree in the former suit. The court held that the suit on the \$50,000 mortgage was upon a different cause of

action from that upon a lien by subrogation for the \$10,080, and that the decree in the former suit did not render the latter lien *res adjudicata*. The other cases cited above are of a like nature. They are cases in which, as in the two reviewed, the causes of action were clearly different, independent and distinct.

The case in hand is better typified by *United States v. California & Oregon Land Co.*, 192 U. S. 355, 356, 358, 24 Sup. Ct. 266, 48 L. Ed. 476; *Northern Pacific Ry. Co. v. Slaght*, 205 U. S. 122, 27 Sup. Ct. 442, 51 L. Ed. 738; *Dowell v. Applegate*, 152 U. S. 327, 332, 333, 334, 341, 342, 343, 345, 14 Sup. Ct. 611, 38 L. Ed. 463; *Beloit v. Morgan*, 7 Wall. 619, 622, 19 L. Ed. 205; *Wilson's Executor v. Deen*, 121 U. S. 525, 534, 7 Sup. Ct. 1004, 30 L. Ed. 980. In *United States v. California & Oregon Land Co.*, 192 U. S. 355, 356, 358, 24 Sup. Ct. 266, 48 L. Ed. 476, the United States brought a suit in equity to avoid certain of its patents and to forfeit all claims of the defendant thereunder on the ground that certain wagon roads in the state of Oregon were not completed within the time required by the grants of the United States under which the patents were issued. The defendant pleaded matters showing the validity of the patents and a decree was rendered in its favor. Then the United States brought a second suit to set aside the same patents and to recover the lands they described from the same defendant on the ground that the lands were excepted by the terms of the granting act from the grant under which the patents were issued. The Supreme Court held that the United States was estopped by the decree in the former suit from maintaining the second suit and said:

"The best that can be said, apart from the act just quoted, to distinguish the two suits, is that now the United States puts forward a new ground for its prayer. Formerly it sought to avoid the patents by way of forfeiture. Now it seeks the same conclusion by a different means, that is to say, by evidence that the lands originally were excepted from the grant. But in this, as in the former suit, it seeks to establish its own title to the fee. * * * But the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot even split up his claim (*Fetter v. Beale*, 1 Salk, 11; *Trask v. Hartford & New Haven Railroad*, 2 Allen [Mass.] 331; *Freeman, Judgments* [4th Ed.] §§ 238, 241); and, a fortiori, he cannot divide the grounds of recovery." 192 U. S. 358, 24 Sup. Ct. 267, 48 L. Ed. 476.

In *Northern Pacific Ry. Co. v. Slaght*, 205 U. S. 122, 128, 131, 133, 27 Sup. Ct. 442, 51 L. Ed. 738, the predecessors in interest of the Northern Pacific Railway Company brought a suit in equity against Slaght, who was in possession of the land which was the subject of the suit under a homestead patent, to have him decreed to be a trustee of the title to the lands for the use and benefit of the plaintiffs on the sole ground that at the date of the issuance of the patent the land was not, nor was it at the time Slaght applied to enter it as a homestead, public land subject to settlement or entry under the land laws of the United States other than the grant of the land to the Northern Pacific Railroad Company of July 2, 1864, under which the plaintiffs claimed their title. The plaintiffs neither claimed nor pleaded any title or right to the land under any statute or theory, except that the land passed to them under the railway grant of July 2, 1864. Slaght demurred to the plaintiff's amended complaint, his demurrer was sustained and a

decree of dismissal of the suit was rendered. Thereafter the Northern Pacific Railway Company, which had succeeded to the rights to the land of the plaintiffs in the former suit and had no other rights, brought an action of ejectment against Slaughter on the ground that its predecessors in interest had a perpetual right of way over the land by virtue of Act March 3, 1875, c. 152, 18 Stat. 482 (Comp. St. 1916, §§ 4921-4926), a claim which had not been pleaded in the former suit. The defendant interposed the defense of *res adjudicata*. The railway company asserted that the estoppel of the former decree "extends only to the very point raised in the pleading, and does not bar another action based upon other facts," that the effect of the decree was only to decide against the title specially set forth in the pleading and that "in this action the right asserted is a perpetual easement or way by virtue of the act of 1875 through the lands involved in the former suit. Not only was this right not pleaded in the former complaint, but under it the title now asserted could not have been proved." But the Supreme Court cited the general rule that in second actions between the same parties on the same cause the former judgments are conclusive of all claims that might have been litigated, declared that there was a distinction between personal actions and real actions, and from *Herman on Estoppel*, § 92, quoted with approval this paragraph:

"Although there may be several different claims for the same thing, there can be only one right of property in it; therefore, when a cause of action has resulted in favor of the defendant, when the plaintiff claims the property of a certain thing there can be no other action maintained against the same party for the same property, for that would be to renew the question already decided, for the single question in litigation was whether the property belonged to the plaintiff or not; and it is of no importance that the plaintiff failed to set up all his rights upon which his cause of action could have been maintained. It is sufficient that it might have been litigated."

It then cited the *California & Oregon Land Company's Case*, which has just been reviewed, and numerous other cases of like character, held that the former decree estopped the railway company from maintaining the second suit, and closed the discussion with these words:

"In other words, plaintiff in error, as successor of the Spokane & Palouse Railway Company, again asserts title to the very property that was the subject of the other suit, the source of title, only, being different. If this may be done, how often may it be repeated? If defeated upon the new title, may plaintiff in error assert still another one, either in its predecessor or in itself, and repeat as often as it may vary its claim? The principle of *res adjudicata* and the cases enforcing and illustrating that principle declare otherwise."

In the light of the opinions in these cases and those cited with them above, there can be no doubt that the alleged causes of action in the two suits under consideration are the same, and that the decree in the first suit renders every point, reason, ground, and suggestion made in the second suit *res adjudicata*, because every one of them might have been litigated in the first suit. The cause of action in each suit was the apparent validity of the lease and the assignment, and their actual invalidity and the apparent grant, but actual failure to grant, by them substantial rights to the defendant to possess, develop, and operate the leased premises for oil and gas. The reason for the rule on this sub-

ject is the injustice and intolerable vexation of numerous suits for the same cause. The plaintiffs now concede that they had about a dozen reasons or grounds for their cause of action, for the avoidance of the lease and assignment and the consequent accounting and other relief. They alleged seven of them in their first suit, four in the complaint, and five in the rejected amended complaint, filed after the announcement of the decision, and saved up the others for this suit. If they can now try the latter, there is no reason why they might not have maintained as many suits as they thought they had reasons or grounds for their cause of action, and there is no reason why, if defeated in the present suit, they might not maintain as many more suits for the same cause as the ingenuity and research of counsel may discover new reasons or grounds in the future. The salutary established rule, reason, and equity alike prohibit such a practice.

[3] But counsel for the plaintiff contends that there is an exception to the rule of estoppel which we have recited to the effect that one may maintain a second suit for the same cause upon reasons or grounds that were kept out of actual litigation therein at the instance of the opposite party or of the court, and that under this exception the plaintiffs are entitled to maintain this second suit upon the ninth, tenth, and eleventh grounds, which were included in the fifth, sixth, and seventh grounds pleaded in the second amended answer in the first suit, and were, by the refusal of the court to permit the filing of that answer, excluded from litigation therein. In support of this position he cites *Virginia-Carolina Chemical Co. v. Kirven*, 215 U. S. 252, 255, 256, 258, 260, 30 Sup. Ct. 78, 54 L. Ed. 179, in which Kirven sued the chemical company for damages arising from the destruction of crops caused by the defective manufacture by it of fertilizers which he had bought of it, and was met by the answer that his claim was barred by the judgment in a former action of the chemical company against Kirven upon his note for the price of the fertilizers. Kirven had answered in the first action that there was no consideration for the note in that the fertilizers were of no benefit but were a detriment to the crops. He had subsequently filed a supplemental answer, in which he omitted any reference to the damage to the crops and had presented a counterclaim for damages caused by the sale of his property under attachment proceedings instituted by the chemical company. During the trial the chemical company had objected to the evidence of damage to the crops which was offered by Kirven, and the court sustained the objection. The Supreme Court held that the judgment in the first suit was not a bar to Kirven's cause of action for a recovery of the damages resulting from the injury to the crops caused by the fertilizers, because that was a cross-demand which Kirven had the option to set up as a counterclaim or in recoupment in the first action, or to withhold and sue upon as a separate and independent cause of action. It held that this was a different cause of action from that in issue in the first action upon the note. 215 U. S. 257-261, 30 Sup. Ct. 78, 54 L. Ed. 179. It is true that in the course of the opinion the court also remarked that there was support for the contention that the company was estopped to urge that a defense that was excluded upon its objection was never in the action

and concluded by the judgment. But this was not the ground upon which it placed its decision. It put its decision upon the ground that the cause of action for the damages was a separate and independent cause of action from that presented in the action upon the note, and herein this case differs from the case at bar.

Counsel also cites *Bingham v. Honeyman*, 32 Or. 129, 51 Pac. 735, 52 Pac. 755, which is irrelevant, and *Major v. Owen*, 126 Minn. 1, 147 N. W. 662, Ann. Cas. 1915D, 589, wherein the Supreme Court of Minnesota held that a judgment in favor of Owen in an action brought by Major and others against him to quiet the title of land against adverse claims, in which the plaintiffs alleged that they were the owners of the land and the defendant Owen claimed the same, but had no right or interest in it, the defendant answered that he was the owner, and the plaintiffs had no right or interest in it, none of the parties pleaded any equitable rights or claims, and the judgment was that Owen was the owner, holding free of all claims of the plaintiffs, was not a bar to a subsequent suit in equity by Owen to recover from the plaintiffs in the first suit the proceeds of the land, upon the ground that the deed, by virtue of which he secured his judgment against Owen, was fraudulent and void, because it was procured by him without consideration with the intent and purpose of cheating and defrauding Owen. But this decision of the Supreme Court of Minnesota runs clearly counter to repeated decisions of the Supreme Court of the United States and of the other national courts, and may not prevail here. *Dowell v. Applegate*, 152 U. S. 327, 341, 344, 345, 14 Sup. Ct. 611, 38 L. Ed. 463; *Eastern Building & Loan Ass'n v. Welling (C. C.)* 116 Fed. 100, 105; *In re Dutton's Estate*, 208 Pa. 350, 57 Atl. 719, 720, 721. Owen was called upon in the suit against him to quiet title to set forth any adverse claim, legal and equitable, which he had; he could have pleaded and proved his claim of fraud in the first action, and under the rule in the federal courts he was estopped by the judgment against him there from pleading it thereafter.

The only other citations which have any particular pertinency to the matters here in issue are 23 Cyc. 1172, 1292, 1312. But the most pertinent statement in Cyc. upon this subject is at 23 Cyc. 1173e, in these words:

"A judgment is not a bar to the further prosecution of claims or demands which, although set up in the action, were excluded by the court or withheld from the jury, and therefore formed no part of the verdict or judgment, or which were withdrawn by plaintiff voluntarily before verdict, or on being required to elect between two or more causes of action joined in his declaration, or which for any reason were not submitted to the court or jury and not considered or passed upon, provided always that the claim withdrawn or withheld was a distinct and independent matter, legally detachable from the rest of plaintiff's case, and not an inseparable part of it."

This case falls within the proviso of the statement. The grounds and reasons for the plaintiffs' cause of action were not different causes of action from the plaintiffs' cause of action in their first suit, which it was optional for them to present in that suit, or to withhold for subsequent suits, as was the cause of action for damages in *Kirven's Case*;

they were not distinct and independent matters, legally detachable from the plaintiffs' cause of action in the first suit; on the other hand, they inhered in that cause of action, were inseparable parts of it, and when the plaintiffs permitted it to be decided without presenting them in due time in their original or first amended complaint, and proving them, they were as completely defeated as were the reasons and grounds they pleaded in their first complaint. *Dutton v. Shaw*, 35 Mich. 431; *Thompson v. Myrick*, 24 Minn. 4, 12, 14.

Not only this, but the refusal of the trial court in the first suit to permit the filing of the second amended complaint, when it was tendered for the first time after its announcement of its decision of the case, was in itself an adjudication either that the grounds or reasons therein stated were barred by the laches of the plaintiffs in failing to set them forth in either their original or first amended complaint, or that they were without legal merit. That decision was affirmed by the Supreme Court of the state, and it constitutes as conclusive a bar to the plaintiffs' relitigation of the claims set forth in the second amended complaint as the decree against them on evidence and trial would have made. If they had not pleaded these grounds at all in the first suit, they would have been barred by their laches in failing to plead them. They are equally barred because they failed to plead them until so late a time that their laches barred them from so doing.

[4] After a full discussion of the questions heretofore considered, counsel for the plaintiffs contends that the plaintiff Byron was not bound by the decree in the first suit, so that the parties to the two suits are not the same. But that suit was commenced on December 9, 1910. On March 16, 1911, Byron made a written contract with Cowles, Jr., the plaintiff in that suit, to purchase the leased premises and to pay \$25 per acre therefor if the leases thereon were void, but that if they were valid he should be discharged from the obligation to purchase, and he agreed that in the event that the lessors, the plaintiff, Cowles, Jr., and his guardian, were entitled to have the leases canceled, he would procure the record cancellation at his expense. From the day that Byron made that agreement he was a privy with Cowles, Jr., bound by every act of his in the suit, and by every order and decree in that case. He was a purchaser *pendente lite*. The record has been carefully searched, and there is no escape from the conclusion that the parties and their privies in that first suit are identical with the parties and their privies in the suit here in hand.

Finally, it is contended that the judgment in the first suit is a nullity, because its effect is to maintain an alienation of an Indian's allotment when that was forbidden by the acts of Congress. If we concede that such an effect has been produced, the record of the first suit demonstrates the fact that it was the laches of the plaintiffs in failing to plead and prove their whole cause of action in that suit, which was the primary cause of that result, and also of the judgment in the state court, which they now claim accomplishes it. That judgment cannot be lawfully attacked collaterally here, and, if it could be, the acts and laches of the plaintiffs in the conduct of that suit would bar them from any relief therefrom.

The decree of the court below was right, and it is affirmed.

VINCENNES BRIDGE CO. v. BOARD OF COUNTY COM'RS OF ATOKA COUNTY, OKL.

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

No. 4845.

1. COURTS ⇨366(8)—FEDERAL COURTS—AUTHORITY OF DECISIONS OF STATE COURTS.

The national courts uniformly follow the construction of the Constitution and statutes of a state, announced by its highest judicial tribunal, in all cases that involve no question of general or commercial law, and no question of right under the national Constitution or acts of Congress; and the character and limits of the powers and liabilities of the municipal and quasi municipal corporations of a state are generally questions of state or local law.

2. COUNTIES ⇨150(1)—INDEBTEDNESS—CONSTITUTIONAL AND STATUTORY LIMITATIONS.

Const. Okl. art. 10, § 19, requires every resolution and ordinance by a county levying a tax to specify distinctly the purpose for which the tax is levied, and declares that no tax levied and collected for one purpose shall ever be devoted to another one. Section 26 provides that no county shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year without the assent of three-fifths of the voters thereof voting at an election to be held for that purpose. Comp. Laws Okl. 1909, § 1683, provides that "it shall be unlawful for the board of county commissioners to issue any certificate of indebtedness, * * * or to make any contracts for or incur any indebtedness against the county in excess of eighty per cent. of the tax levied for county expenses during the current year, nor shall any expenditures be made or indebtedness be contracted, to be paid out of any of the funds of said county, in excess of eighty per cent. of the amount levied for said fund." *Held* that, under the decisions of the Supreme Court of the state that such constitutional provisions are not a grant of power to counties, but a limitation on the power of the Legislature, section 1683 of the statutes, being within such limitation, is valid, and a board of county commissioners is without authority to contract for an indebtedness in excess of 80 per cent. of the special fund applicable to its payment.

3. COUNTIES ⇨223—INDEBTEDNESS—ACTION AGAINST COUNTY.

In an action to enforce such a contract, illegal because its execution is beyond the powers of the county commissioners, it is immaterial what use the county made of the fund.

4. COUNTIES ⇨130—RECOVERY OF PAYMENT BY COUNTY.

Although contracts by a county for bridges were unenforceable, because they created an indebtedness in excess of the current levy for the road and bridge fund, which was prohibited by the state Constitution and statutes, payments made thereon in a subsequent year, after the bridges had been built and accepted, and from funds of another levy which could be legally used for the purpose, were not without consideration, and cannot be recovered by the county.

5. PAYMENT ⇨82(1)—RECOVERY—ACTION—NATURE AND GROUNDS OF OBLIGATION.

An action to recover money paid voluntarily will lie only where equity and good conscience require the return of the money.

6. COUNTIES ⇨111(2)—POWERS—CONTRACTS ULTRA VIRES.

Under a constitutional provision, which prohibits county commissioners from contracting an indebtedness in excess of the levy made for the

fund applicable to its payment, the validity of such a contract does not arise from want of corporate power in the county to make it, but from the failure of the commissioners to make prior provision for its payment.

7. COUNTIES \Leftrightarrow 130—RECOVERY OF PAYMENTS—INVALIDITY OF CONTRACT.

Where a contract by a county or city is prohibited by law, so that the county or city cannot make it by any means at its command, and it has paid money under such a contract, without receiving any benefit therefrom, such money may be recovered back; but, where the county or city has the corporate power to make a contract, the object of which is legitimate, but the contract is invalid because the officers fail to pursue methods which are within their power and prescribed by law to render it valid, and the contract has been executed, the county or city, which retains the benefit, cannot recover money paid thereon.

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

Action at law by the Vincennes Bridge Company against the Board of County Commissioners of Atoka County, Okl. From the judgment, plaintiff brings error. Modified.

The Vincennes Bridge Company made and performed two contracts with the board of commissioners of Atoka county to build some bridges for it. One contract was made on September 28, 1908, and the agreed price of the bridge was \$14,830. The other was made on June 11, 1909, and the agreed price was \$2,670. The Bridge Company performed the contracts, the county accepted the bridges, and there became due to the Bridge Company, according to the terms of the contracts, \$17,500. The county has paid the Bridge Company \$9,908.50 and has refused to pay it any more on the ground that the contracts were illegal, because they were attempts to create in the fiscal year commencing July 1, 1908, and ending July 31, 1909, without the assent of three-fifths of the voters of the county, an indebtedness to an amount in excess of the income and revenue provided for that year in violation of sections 19 and 26 of article 10 of the Constitution of Oklahoma. Section 19 requires every resolution and ordinance passed by any county levying a tax to specify distinctly the purpose for which said tax is levied, and declares that no tax levied and collected for one purpose shall ever be devoted to another one. Section 26 provides that no county "shall be allowed to become indebted, in any manner, for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of three-fifths of the voters thereof, voting at an election, to be held for that purpose." Revised Laws of Oklahoma 1910, p. clviii, clx. Section 1683, Compiled Laws of Oklahoma 1909, which was in force when these contracts were made, provides that "it shall be unlawful for the board of county commissioners to issue any certificate of indebtedness, * * * or to make any contracts for, or incur any indebtedness against the county in excess of eighty per cent. of the tax levied for county expenses during the current year nor shall any expenditures be made or indebtedness be contracted, to be paid out of any of the funds of said county, in excess of eighty per cent. of the amount levied for said fund. If any such certificate of indebtedness be issued, or any indebtedness be incurred or contracted in excess of eighty per cent. of the tax levied for that purpose for that year, such certificate, contract or debt, shall not be a charge against the county, but may be collected, by civil action, from the board of county commissioners, or either of them, or their bondsmen." On September 28, 1908, before the contract of that date was made, the board of county commissioners made a levy of 1.7 mills on the dollar of the assessed value of the property of the county for roads and bridges which, if collected, would have raised \$6,892.80, and made other levies for specified purposes which, together with the levy for roads and bridges would, if collected, have raised \$34,464, to "defray," as the levy resolution recited, "the expenses of the year 1908 ending July 1, 1909, also to pay the deficit of the

fiscal year ending July, 1908." The court below held that under sections 19 and 26 of the Constitution the two contracts were beyond the powers of the board of county commissioners in so far as they exceeded in amount the \$6,892.80 levied for roads and bridges in September, 1908, and rendered a judgment against the Bridge Company for \$3,015.70, the difference between the \$6,892.80 levied for roads and bridges and the \$9,908.00 paid to the Bridge Company by the county. The Bridge Company questions this result by its writ of error.

William T. Hutchings, of Muskogee, Okl., for plaintiff in error.

Baxter Taylor and Ira J. Banta, both of Atoka, Okl., for defendant in error.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

SANBORN, Circuit Judge (after stating the facts as above). [1] The national courts uniformly follow the construction of the Constitution and statutes of a state announced by its highest judicial tribunal in all cases that involve no question of general or commercial law and no question of right under the national Constitution or the acts of Congress. The character and limits of the powers and liabilities of the municipal and quasi municipal corporations of a state are generally questions of state or local law. *Claiborne County v. Brooks*, 111 U. S. 400, 410, 4 Sup. Ct. 489, 28 L. Ed. 470; *Detroit v. Osborne*, 135 U. S. 492, 499, 10 Sup. Ct. 1012, 34 L. Ed. 260; *Madden v. Lancaster County*, 65 Fed. 188, 192, 12 C. C. A. 566, 570; *Blaylock v. Incorporated Town of Muskogee*, 117 Fed. 125, 126, 54 C. C. A. 639, 640.

[2] Counsel for the Bridge Company assert that under a correct construction of sections 19 and 26 of the Constitution of Oklahoma the entire income and revenue provided for the year 1908-1909 by the levy of September 1908, to wit, \$34,464, was the measure of the indebtedness the county might contract under these sections, and that, as the aggregate amount of the two contracts fell within that limit, the court below erred in holding them void on the ground that their amount exceeded the \$6,892.80 levied for road and bridge purposes, and he cites these decisions of the Supreme Court of Oklahoma, which he argues sustain this contention: *Buxton & Skinner Stationery Co. v. Bd. of Com'rs (Okl.)* 155 Pac. 215; *Bd. of Com'rs v. Smartt (Okl.)* 158 Pac. 601, L. R. A. 1916F, 892; *In re Town of Afton*, 43 Okl. 720, 144 Pac. 184, L. R. A. 1915D, 978; *O'Neil Engineering Co. v. Incorporated Town of Ryan*, 32 Okl. 738, 124 Pac. 19; *Campbell v. State*, 23 Okl. 109, 99 Pac. 778. All these cases have been carefully examined. But in *Kerr, County Clerk, v. State ex rel. Wimbish*, 33 Okl. 110, 112, 114, 115, 124 Pac. 284, a petition for mandamus upon the county clerk to issue warrants on certain claims was presented. He answered that these claims were in excess of 80 per cent. of the levy for that year for the specific fund applicable to their payment, and hence violative of section 1683 of the statutes of Oklahoma. Sections 26 and 19 of the Constitution of Oklahoma were in force when these claims accrued and when this petition was presented, the petitioner replied that section 1683 was void because it was in conflict with section 26 of the Constitution, which fixed the limit of indebtedness at the entire income and revenue levied and provided for the year for all funds and therefore

was not brought over to the state by the enabling act. But the Supreme Court, speaking of the provision of section 26, said:

"It is difficult to make clearer the force and meaning of the language used by any degree of refinement or discussion. It is the contention of counsel for relator, however, that this portion of this section of the Constitution is a grant of power to the municipal subdivisions of the state to become indebted to the amount of the income and revenue provided for the year, and, that being a grant of power, the act of the territorial Legislature under consideration, limiting as it does the amount of indebtedness which could lawfully be incurred, must fall. We cannot so read this language. * * * To our minds the simplest and most obvious interpretation of this section of the Constitution is to say that it is here intended to place a limitation upon the authority of the Legislature and other agencies of the state of allowing any of the subdivisions mentioned to create, assume, or incur in any manner or for any purpose any indebtedness in excess of the limitation therein fixed."

And the court proceeded to hold that section 26 did not restrict the power of the Legislature to fix a lower limit of indebtedness than that specified in that section. In *Haskins & Sells v. Oklahoma City*, 36 Okl. 57, 66, 126 Pac. 204, 208, the Supreme Court of Oklahoma, speaking of this decision, said:

"In *Kerr, County Clerk, v. State ex rel. Wimbish, County Atty.*, 33 Okl. 110, 124 Pac. 284, in an opinion by Justice Dunn, this court held that the act of 1885, fixing the indebtedness which counties may incur at 80 per cent. of the tax levy, is not repugnant to section 26, art. 10, of the Constitution (section 291, Williams' Ann. Const. Okla.), fixing the maximum limit at a higher rate. The question presented in the case *supra*, was whether the limitation fixed by the Constitution was a grant of power which the Legislature could not prevent counties or subdivisions of the state from reaching, or whether it was merely a maximum limit within which the Legislature might fix a lower maximum, but could not prescribe a limit beyond or in excess of that fixed by the Constitution. The court held it to be a limitation upon the authority of the Legislature to allow counties or other subdivisions of the state to become indebted beyond the limit therein prescribed and not a limitation upon its authority to fix a limit within the maximum prescribed by the Constitution. This holding is in thorough accord with our views on the question presented."

In the case of *In re Town of Afton*, 43 Okl. 720, 144 Pac. 184, L. R. A. 1915D, 978, the Supreme Court of Oklahoma held that an indebtedness incurred in excess of the entire income and revenue provided for the year was violative of section 26 and therefore unenforceable. If these three decisions do not indicate with sufficient certainty the opinion of the Supreme Court of Oklahoma upon the question whether sections 26 and 19 of the Constitution fix a limit of indebtedness at the total income and revenue provided for the year, it is not so indicated, for none of its other decisions expressly decide that question, or come so near it as the three which have been last referred to. In this state of the case the opinion of the majority of the court, in which the writer is unable to concur, is that sections 26 and 19 limit such indebtedness to the amount of the levy for the special fund applicable to the payment of the specific debt in question.

However that may be, the Supreme Court of Oklahoma has directly decided that under a statute substantially identical with section 1683, which expressly prohibits the board of commissioners from making any expenditures or contracting any indebtedness to be paid

out of the funds of the county in excess of 80 per cent. of the amount levied for the specific fund, unless a greater amount has been collected, a contract for an indebtedness in excess of 80 per cent. of the special fund, applicable to its payment, is beyond the powers of the board of commissioners of the county and unenforceable (*Haskins & Sells v. Oklahoma City*, 36 Okl. 57, 59, 60, 71, 72, 126 Pac. 204), and the conclusion is that the Bridge Company could not maintain its action on the contracts for the balance due to it according to their terms in view of this decision.

[3] The second objection to the judgment is that it was necessary for the county to show that at the time this suit was brought all of the income and revenue for the fiscal year in which these contracts were made had been expended or appropriated to other proper objects and that it failed to do so. But if the contracts were unenforceable because their execution was beyond the powers of the board of county commissioners when they were made, the condition of the income and revenue for the fiscal year 1908-1909, and its relation to the expenditures and applications thereof prior to and at the time of the commencement of the suit, were immaterial. It was the aggregate amount of the levy for roads and bridges for the fiscal year 1908-1909, and the amount of cash and other assets available to pay the debts created in that year by these contracts, at the respective times when those debts were incurred and the contracts were made, respectively, that determine whether or not the contracts were legal. *Haskins & Sells v. Oklahoma City*, 36 Okl. 57, 71, 126 Pac. 204; *Huddleston v. Bd. of Com'rs*, 8 Okl. 614, 58 Pac. 749; *O'Neil Engineering Co. v. Incorporated Town of Ryan*, 32 Okl. 738, 124 Pac. 19; *Buxton & Skinner Stationery Co. v. Bd. of Com'rs (Okl)* 155 Pac. 215. And there was sufficient evidence before the court below that neither on September 28, 1908, when the first contract was made, was there such an aggregate amount available to pay the debt created thereby, nor on June 11, 1909, when the second contract was made, was there an aggregate amount available sufficient to discharge the debt created by that agreement. Oklahoma became a state of the Union on November 16, 1907, and the county then had no funds or levy to be expended for roads and bridges during the remainder of that year. The parties to this action stipulated that in April, 1908, the county borrowed from the state \$24,000, that \$5,000 of this sum was appropriated for roads and bridges for the fiscal year ending June 30, 1908, that this sum was expended before the beginning of the year 1908-1909, and that the board, in making its levy of September 28, 1908, recited and declared that this levy was made to defray the expenses of the year 1908, ending July 1, 1909, and also to pay the deficit of the fiscal year ending July, 1908. This stipulation sufficiently indicates the absence of sufficient funds available for the road and bridge fund during the fiscal years 1908 and 1909 to discharge the contracts.

[4] The third complaint of the judgment is that the court below permitted the county to recover of the Bridge Company the difference between the \$6,892.80 levied by the board in September, 1908, and the \$9,908.50, which the county paid to the city for the bridges which,

according to the terms of the contracts, were worth \$17,500. It was indispensable to the maintenance of the county's claim to recover this difference, \$3,015.70, that it should establish, by a fair preponderance of the evidence, the fact that at the time this \$3,015.70, which it seeks to recover back, was paid, there was, as it alleged, "no contract or consideration for its payment to the Bridge Company," and it has failed to make that proof. There was, as has been stated, evidence sufficient to warrant the finding that on September 28, 1909, the levy of \$6,892.80 was the only amount then provided to pay for the bridges. But this \$3,015.70 was not paid by the county until after the bridge specified in the first contract for which the county was, according to the contract, to pay \$14,830 was completed. The contract of September 28, 1908, was that this bridge should be finished by April 1, 1909. It was built by the Bridge Company and accepted by the county. On April 7, 1909, the county issued to the Bridge Company its warrant for \$4,000, on October 19, 1909, it issued its warrant to the Bridge Company for \$3,908.50 and on September 7, 1910, it issued its warrant to the Bridge Company for \$2,000, and these warrants, aggregating \$9,908.50 and \$212.50 interest, were paid by the county prior to September 29, 1913. Now, while the limit of indebtedness which the board could incur in September, 1908, without another levy, was \$6,982.80, yet when the warrant for \$3,908.50 was issued the levy for roads and bridges for the year 1909-1910 was available to pay that warrant, and when the warrant for \$2,000 was issued the levy for 1910-1911 was available to pay that warrant. Moreover, any unappropriated cash in the treasury and any balance in the special funds remaining after claims justly chargeable thereto, were also available for that purpose. Section 1682, Compiled Laws of Oklahoma 1909.

Conceding that the contract of September, 1908,^o was illegal and that the county was not indebted under it, nevertheless the board of commissioners had the right and the power to make the necessary levies in September, 1909, and September, 1910, to buy of the Bridge Company and to pay it for this bridge, which the county had procured from it, had accepted, and was using. These county warrafts are prima facie evidence that they were lawfully issued for the discharge of valid claims, and in the face of the stipulation that they were issued and paid the burden was upon the county to prove that they were not issued for such a claim, or that at the time of their issue or payment there were no taxes levied, cash, or other available assets applicable to their payment. *Johnson v. County Com'rs*, 7 Okl. 686, 689, 691, 56 Pac. 701. The county failed to carry this burden, and is not entitled to recover back this \$3,015.70 for that reason. There are, however, broader and more compelling reasons why it may not have this recovery.

[5]. The county set up in its answer a claim to recover the entire \$9,908.50 it had paid for the bridges, "for the reason that there was no contract or consideration of any nature" therefor. The court below concluded that, inasmuch as there was a levy of \$6,892.80 and the county could have incurred a valid debt for that amount for

the bridges, and as the bridges it had obtained were worth \$17,500, it was unjust and inequitable to permit it to recover back this \$6,892.80. The county has sued out no writ of error, and this conclusion stands unchallenged. Is it not also unjust and inequitable to permit it to recover the balance of the \$9,908.50 it paid for the bridges? If it does not pay back this \$3,015.70, the Bridge Company will have lost and the county will have gained \$7,591.50, the difference between \$17,500 and \$9,908.50, by this transaction. What justice or equity is there in increasing the county's gain and the Bridge Company's loss by \$3,015.70 more? In *Cary v. Curtis*, 44 U. S. (3 How.) 235, 246 (11 L. Ed. 576), the Supreme Court said:

"The action of assumpsit for money had and received, it is said by Lord Mansfield, *Burr*, 1012, *Moses v. Macfarlen*, will lie in general whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by the ties of natural justice and equity to refund. And by Buller, Justice, in *Stratton v. Rastall*, 2 T. R. 370, "that this action has been of late years extended on the principle of its being considered like a bill in equity. And therefore, in order to recover money in this form of action the party must show that he has equity and conscience on his side, and could recover in a court of equity."

In *Bradley Lumber Co. v. Bradley County Bank*, 206 Fed. 41, 45, 124 C. C. A. 175, 179, Judge Smith, delivering the opinion of this court, said:

"This was an action which at common law would have been assumpsit for money had and received. While this was an action at law, it was based upon the broad equities of the plaintiff. Such an action would lie if the defendants had received money, the property of the plaintiff, under such circumstances as to be obliged by natural justice, good conscience, right, and equity to refund. * * * In such cases, if the defendant may in good conscience retain the money in his hands, there can be no recovery. *Barr v. Craig*, 2 Dall. 151, 1 L. Ed. 327; *Morris v. Tarin*, 1 Dall. 147, 1 L. Ed. 76."

In the last case the court said:

"This is a liberal kind of action, and will lie in all cases where by the ties of natural justice and equity the defendant ought to refund the money paid to him; but where the party might with a good conscience receive the money, and there was no deceit or unfair practice in obtaining it, although it was money which the party could not recover by law, this action has never been so far extended as to enable the party who paid the money voluntarily, to recover it back again. The case of *Lowrey v. Bourdieu*, in *Doug.* 452, and that of *Farmer v. Arundel*, in 2 W. Black. 825, are full to this point."

In *Barr v. Craig*, 2 Dall. 151, 153 (1 L. Ed. 327), Mr. Justice Bradford said:

"This is an equitable action; the defendant, under the general issue, may go into all the equity of the case; and unless it appears that he cannot in conscience and equity retain the money, unless, *ex æquo et bono*, he is bound to refund it, the verdict must be for him."

Here is the principle which ought to determine this case. While the Bridge Company could not have recovered this \$3,015.70 by an action at law because the county failed to comply with the provisions of the statute as to the method of making the contract, yet, since the county has paid it, it cannot recover it back because it has received,

accepted, and is using, and has never tendered or offer to return, the bridges, worth \$17,500, built by the Bridge Company, and has paid it only \$9,908.50, therefore, in justice, equity, and good conscience, the Bridge Company may keep the \$3,015.70, because it would be inequitable and unjust to take this money from it and give it to the county, and thereby increase the gain of the latter and the loss of the former by that amount. The county in this case is in the same situation as one who has paid his debt after it was barred by the statute of limitations. Having paid his money in discharge of an unenforceable moral obligation, the courts may not aid him to recover it. The county's cause of action is in reality an equitable action, an action for money had and received, whether stated in an action at law or in a suit in equity, and it is governed by the rules and principles of equity, which have been cited and which forbid its maintenance.

Counsel argue, however, that both parties in this action, violated the law and made an illegal contract. If so, when an illegal agreement has been made and both parties are equally at fault, neither a court of equity nor a court of law will grant relief to either. But these parties were not equally at fault. The prohibition of the law which made the contracts unenforceable was against the county, not against the Bridge Company. It declared that it should be unlawful for the county to incur any debt in excess of the levy it made for the special fund and its other assets available to pay it, and while the Bridge Company was chargeable with notice of the county's disregard of the law the primary duty to obey it, and to make a lawful levy and a lawful contract, was upon the county, and it was the main wrongdoer. *Louisiana v. Wood*, 102 U. S. 294, 298, 26 L. Ed. 153; *Parkersburg v. Brown*, 106 U. S. 487, 503, 1 Sup. Ct. 442, 27 L. Ed. 238. Having violated the law, secured, accepted, and kept the bridges, and paid less than two-thirds of their value, it appeals to the conscience of the chancellor to pay back \$3,015.70 and inflict still greater loss upon the Bridge Company. But "he who has done inequity cannot have equity," and "he who comes into a court of equity must come with clean hands."

Again:

"A court of equity can act only on the conscience of a party; if he has done nothing that taints it, no demand can attach upon it, so as to give any jurisdiction." *Boone v. Chiles*, 10 Pet. 177, 210 (9 L. Ed. 388).

If this \$3,015.70 was received by the Bridge Company, it undoubtedly supposed, as did the county, that the contracts were valid. It had built the bridges worth \$17,500, and they had been accepted by the county. In consideration of those bridges, which the county still has, it paid the Bridge Company \$3,015.70 in part payment for them, and the Bridge Company received it. There is certainly nothing in this transaction to taint the conscience of the Bridge Company, nothing unjust or inequitable in its acts, and there is no equity, but much inequity, in the claim of the county to recover back this payment.

[6] Counsel for the county argue, however, that it may recover back this \$3,015.70, because the contracts were beyond the powers of the board and in violation of the prohibition of the creation of a debt

or the making of a contract in excess of the levy for roads and bridges and the other assets of the county applicable to the payment of such debts; and they cite *City of Geneseo v. Gas Co.*, 55 Kan. 358, 40 Pac. 655; *People v. Fields*, 58 N. Y. 491; *Kint v. Dithridge, etc.*, *Cut Glass Co.*, 5 O. C. D. 107; *Salt Creek Township v. King Iron Bridge & Mfg. Co.*, 51 Kan. 520, 33 Pac. 303; *Griffin v. City of Shakopee*, 53 Minn. 528, 55 N. W. 738; *Chaska v. Hedman*, 53 Minn. 525, 55 N. W. 737. But the case in hand differs from those cases and others of like character, in that the contracts in this case were not beyond the powers of the corporation, but were within its powers, and their invalidity was due to the neglect of the board to make such prior provision as it could have made for their payment; the contracts were not violative of public policy; they were not *malum in se*, but the mere way in which the board made them was forbidden; the county has received and keeps the consideration, the bridges, worth more than 150 per cent. of the \$9,908.50 it has paid; by its failure to challenge by writ of error the judgment of the court that it cannot recover back the \$6,892.80 it concedes the inequity of its claim to recover that amount, and its claim to recover the \$3,015.70 is not less inequitable; it paid this \$3,015.70 to the Bridge Company after the bridges were built and accepted; and it does not return or offer to return the bridges.

There is no such case among the authorities cited for the county, nor has any such case been found, where a like recovery has been permitted in the face of equities so compelling in favor of the defendant. In the first case cited for the county (*City of Geneseo v. Gas Co.*, 55 Kan. 358, 40 Pac. 655) the city recovered the proceeds of its bonds issued to discharge its contract to become a stockholder in a mining corporation, a contract that was beyond its corporate power, and, because it could not be a stockholder, and had therefore received no consideration for its bonds it was permitted to recover back the money it paid for them. In the *Fields* Case the recovery was granted because the city received no consideration whatever for moneys to the amount of about \$500,000, which it paid out to those who had no legal or equitable claim against it. *People v. Fields*, 58 N. Y. 491, 499, 501, 503. In the cases of *Shakopee* and *Chaska* those cities recovered because they had paid their money upon contracts beyond their corporate power, contracts to pay manufacturing companies moneys in order to bring their plants and business from other places to those cities and there to operate them. Chief Justice Gilfillan said:

"It is conceded that the contract was invalid; that it was beyond the power of the corporation, and, a fortiori, of any officer of the corporation, to make such a contract. * * * It had no authority to make it; no one of its officers, nor all of them together, had authority to make it. The case stands in law as it would, had some person, not connected with the city government, taken the money from its treasury, and paid it to defendants."

But he added, and here is the controlling difference between these cases and those of like character and the one in hand:

"It may be different in a case where the payment is for a legitimate purpose, within the power conferred on the municipal corporation, and is made by an officer, or upon the direction of an officer, who has authority to de-

termine whether some condition precedent to the authority of the paying officer to pay has been complied with."

The payments to the Bridge Company were made by the treasurer of the county on county warrants issued and delivered to it after the bridges were built and accepted by the county. They were made for the building of bridges, for a legitimate purpose to accomplish which the county had plenary corporate power.

[7] Where a contract is beyond the powers of a corporation, so that it cannot make it by any means at its command, where it is *malum in se*, and where it is prohibited by law under a penalty which renders its making a penal offense, a county or city which has paid money under it without receiving any benefit therefrom may recover that money back. But where a county or city has the corporate power to make a contract, the object of which is legitimate, but the contract is invalid, so that it cannot be legally enforced, because the officers of the county, who had the power by pursuing the methods prescribed by law to accomplish the object of the contract, fail to pursue those methods, and for that reason the contract is invalid, and it has been executed, the county or city has accepted and holds the benefit of its execution, and has paid therefor in part, it may not, while it retains that benefit, recover back the money it has paid. *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 453, 469, 470; *Pimental v. City of San Francisco*, 21 Cal. 352, 361, 362, 363, 366; *Brown v. City of Atchison*, 39 Kan. 37, 46, 54, 17 Pac. 465, 7 Am. St. Rep. 515; *Parkersburg v. Brown*, 106 U. S. 487, 500, 501, 503, 1 Sup. Ct. 442, 27 L. Ed. 238; *Chapman v. County of Douglas*, 107 U. S. 348, 355, 356, 357, 2 Sup. Ct. 62, 27 L. Ed. 378; *Hitchcock v. Galveston*, 96 U. S. 341, 350, 351, 24 L. Ed. 659; *Louisiana v. Wood*, 102 U. S. 294, 298, 26 L. Ed. 153; *Logan County National Bank v. Townsend*, 139 U. S. 67, 68, 74, 11 Sup. Ct. 496, 35 L. Ed. 107; *Aldrich v. Chemical National Bank*, 176 U. S. 618, 628-629, 20 Sup. Ct. 498, 44 L. Ed. 611; *Geer v. School District No. 11*, 111 Fed. 682, 684, 685, 686, 690, 49 C. C. A. 539; *Fernald v. Town of Gilman (C. C.)* 123 Fed. 797, 800; *Illinois Trust & Sav. Bank v. City of Arkansas City*, 76 Fed. 271, 293, 22 C. C. A. 171, 34 L. R. A. 518; *California-Oregon Power Co. v. City of Medford (D. C.)* 226 Fed. 957, 961, 962; *Chelsea Savings Bank v. City of Ironwood*, 130 Fed. 410, 411, 66 C. C. A. 230; *Bangor Savings Bank v. City of Stillwater (C. C.)* 49 Fed. 721.

In *Railway Co. v. McCarthy*, 96 U. S. 258, 267 (24 L. Ed. 693) the Supreme Court said:

"The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong."

In *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 60, 11 Sup. Ct. 478, 488 (35 L. Ed. 55) the Supreme Court said:

"A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the

parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it."

The construction of the bridges described in the contracts was within the corporate power of the county. The board of commissioners had the power to purchase or contract for these bridges (section 1671, Revised Statutes of Oklahoma 1909), to levy taxes to pay for them, but in making its contracts it was forbidden to make a contract at any given time in excess of the levy for roads and bridges plus the other assets of the county available for its discharge. It is conceded that the board had the power to make the levy of \$6,892.80 for the fiscal year 1908-1909 and to apply it to the payment of the bridges. By dividing the work of constructing the bridges into three parts, limiting its first contract to one-third of the bridges in value, making a like levy and contract in each of the fiscal years 1909-1910 and 1910-1911, it could have lawfully contracted for or purchased the bridges without the vote of the electors. It might have refrained from contracting debts chargeable to other funds to such an extent that there would, at the end of the fiscal year 1908-1909, have been a surplus from those funds sufficient to discharge the contracts it made. Probably it could have borrowed money, as it did in the preceding year, and have applied that money to discharge the contract. So it is that this is a case in which without a vote of the electors the board could have lawfully obtained the bridges for the county and have lawfully bound it to pay for them, and the only reason why its contract for them is unenforceable is that it did not comply with the laws made for its government which it was its duty to observe.

In *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 453, 470, the city defended an action for \$18,188 for gas furnished to it on the ground that no obligation or liability of the city could be created without the passage of a proper ordinance, and no such ordinance had been passed. Justice Field, afterwards Mr. Justice Field of the Supreme Court, said:

"The obligation to do justice rests equally upon it as upon an individual. It cannot avail itself of the property or labor of a party, and screen itself from responsibility under the plea that it never passed an ordinance on the subject."

And he affirmed a judgment against the city. If the city had paid to the gas company a part of the \$18,188, and had then brought a suit for money had and received, its cause would have been on all fours with the claim in hand, and there is no doubt what its fate would have been.

In *Pimental v. City of San Francisco*, 21 Cal. 352, 361, 362, 363, 366, the passage of an ordinance was indispensable under the city charter to empower the mayor and joint committee on legal claims to sell certain parcels of real estate of the city at public auction. The mayor and committee, however, sold the lots to various holders, who paid the purchase prices therefor to them, and they paid them into the city treasury, and the city gave conveyances of the respective parcels. These conveyances were void and gave no title, and the bidders

brought actions against the city to recover back their money or its equivalent. The city defended on the ground that the entire transaction was illegal and void, that the committee was not authorized to make the sale, or to receive the money, or to pay it over to the city, and therefore the city was under no obligation to return it. Chief Justice Field said:

"The city is not exempted from the common obligation to do justice, which binds individuals. Such obligation rests upon all persons, whether natural or artificial. If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it, from this general obligation. If she obtain other property, which does not belong to her, it is her duty to restore it, or, if used, to render an equivalent therefor, from the like obligation. *Argenti v. San Francisco*, 16 Cal. 282. The legal liability springs from the moral duty to make restitution. And we do not appreciate the morality which denies in such cases any rights to the individual whose money or other property has been thus appropriated. The law countenances no such wretched ethics; its command always is to do justice."

In *Parkersburg v. Brown*, 106 U. S. 487, 500, 501, 503, 1 Sup. Ct. 442, 455 (27 L. Ed. 238), the city under a void law and against public policy issued and loaned its bonds to M. to the amount of \$20,000 to aid him in carrying on a manufacturing business, and he mortgaged his real and personal property to secure the payment to the city of the interest and principal of the bonds, and the city sold the bonds to A. and B. The court held the bonds void, and thereupon the bondholders brought a suit in equity to recover the mortgaged property which the city had taken over after the mortgagor failed to pay the interest on the bonds, and the court granted the relief sought and said:

"The property was transferred under a contract which was merely *malum prohibitum*, and where the city was the principal offender. In such a case the party receiving may be made to refund to the person from whom it has received property for the unauthorized purpose, the value of that which it has actually received."

In *Chapman v. County of Douglas*, 107 U. S. 348, 355, 356, 357, 2 Sup. Ct. 62, 69 (27 L. Ed. 378) the authority of the county commissioners to purchase a poor farm was limited to a purchase at such a price, payable in such installments as could be discharged by a tax of 1 per cent. per annum. They contracted for and obtained a deed for such a farm upon the payment by the county of \$2,000 cash and its agreement to pay \$6,000 in four equal annual payments, evidenced by its promissory notes and secured by its mortgage on the poor farm. The \$2,000 was paid; the county delivered its note and mortgage and took possession of the property. The amounts and times of payment were such that they could not be met by an annual tax of 1 per cent., and the contract, the notes and mortgage, were held illegal and void. Thereupon Chapman, the representative of the owners of the notes and mortgage, brought his suit to recover the land. The city defended on the ground that as the entire transaction was illegal and the parties could not be put in *statu quo* the court should grant no relief. But the Supreme Court held that as the board had the power to buy the farm, and the contract, notes, and mortgage were void because the board contracted to buy it and to pay for it by instruments, the note

and mortgage, and at times that they could not lawfully agree to pay for it, to wit, prior to the times when the 1 per cent. annual tax could be raised to meet the indebtedness, the plaintiff was entitled to recover the farm on equitable terms, and said of the contract:

"It was not illegal in the sense of being prohibited as an offense; the power in that form was simply withheld. The policy of the law extends no further than merely to defeat what it does not permit, and imposes upon the parties no penalty. It thus falls within the rule, as stated by Mr. Pollock, in his Principles of Contract, 264: 'When no penalty is imposed, and the intention of the Legislature appears to be simply that the agreement is not to be enforced, then neither the agreement itself nor the performance of it is to be treated as unlawful for any other purpose.'"

In *Geer v. School District No. 11*, 111 Fed. 682, 684, 685, 687, 692, 49 C. C. A. 539, 541, 542, 544, 549, the statutes prohibited the creation of any debt by a school district by a loan in any form unless approved by a majority of its qualified taxpayers, and also forbade the creation of an aggregate bonded indebtedness in excess of 3½ per cent. of the assessed value of the property in the district. The qualified taxpayers voted to issue bonds to build the schoolhouse. The school district issued and sold the bonds and used the proceeds to construct a schoolhouse, which it retained and held. The bonds made the bonded indebtedness more than 3½ per cent. of the assessed valuation of the property of the district, and when the bondholder sued upon them this court denied him any recovery, and held that the bonds were illegal and void. He then sued the district to recover the money he paid to it for the bonds and recovered.

Because the city failed to prove that at the time the \$3,015.70 was paid to the Bridge Company in satisfaction of the warrants it had issued the payment was illegal; because the county was under a moral obligation to pay the \$3,015.70, although that obligation could not be enforced at law, and where one pays money in satisfaction of an unenforceable moral obligation like a just debt barred by the statute of limitations, he cannot maintain a suit to recover the money back; because the city's cause of action is for money had and received, which in good conscience, justice, and equity the Bridge Company ought to return, and in good conscience, justice, and equity the Bridge Company may retain the money, and the city ought not to recover it; and because the contracts for the bridges were within the corporate powers of the county, were not against public policy or malum in se, or forbidden under any penalty, the board of commissioners had the authority by proceeding in a manner prescribed by the statute to purchase and secure for the county the bridges it has received and retained without a vote of the electors, the contracts are unenforceable only because the board did not proceed in the manner prescribed by the statute, but in another way; the county has received, accepted, and retains the full benefit of the Bridge Company's complete performance of the contracts—for these reasons the county is not entitled to recover the \$3,015.70 it has paid to the Bridge Company in part payment for the bridges, and the judgment below must be modified in accordance with the views expressed in this opinion.

KETCHUM v. DENVER & R. G. R. CO. et al.

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

No. 4933.

1. MONOPOLIES ⇨24(1)—ANTI-TRUST ACT—RIGHT OF INDIVIDUAL TO MAINTAIN SUIT.

A complainant, who shows no injury to himself, other than as a member of the general public, cannot maintain a suit for violation of the provisions of Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (Comp. St. 1916, § 8820 et seq.), prohibiting monopolies or combinations in restraint of interstate commerce.

2. CARRIERS ⇨34—INTERSTATE COMMERCE ACT—COMMODITIES CLAUSE—SUITS FOR VIOLATION.

A bill held not to show such personal wrongs or injury to the complainant as to entitle him to maintain a suit for the appointment of receivers for coal companies on the ground of violation of the commodities clause of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379, as amended by Act June 29, 1906, c. 3591, § 1, 34 Stat. 584, 585 [Comp. St. 1916, § 8563 (6)]).

Appeal from the District Court of the United States for the District of Utah; Tillman D. Johnson, Judge.

Suit in equity by Truman A. Ketchum against the Denver & Rio Grande Railroad Company and others. Decree for defendants, and complainant appeals. Affirmed.

E. A. Walton, of Salt Lake City, Utah (C. A. Boyd, of Ogden, Utah, and T. D. Walton, of Salt Lake City, Utah, on the brief), for appellant.

Henry McAllister, Jr., of Denver, Colo. (Waldermar Van Cott, E. M. Allison, Jr., and W. D. Riter, all of Salt Lake City, Utah, on the brief), for appellees.

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

CARLAND, Circuit Judge. Appellant, hereafter called plaintiff, commenced this action against appellees, hereafter called defendants, except when separately named, and in his complaint prayed that said defendants be perpetually enjoined from violating the provisions of the commodities clause of the Interstate Commerce Act, from violating the Sherman Anti-Trust Act, and also prayed that a receiver be appointed to take charge of the property and assets of the coal companies, to the end that they might be operated independently of the railroad company. Defendants filed motions to dismiss the complaint, and upon argument the same was dismissed for want of equity. From the judgment of dismissal, plaintiff appealed.

The complaint alleged: That plaintiff was a citizen of the state of Oregon; that the defendant the Denver & Rio Grande Railroad Company, hereafter called railroad company, was a corporation of the state of Utah, and was incorporated on or about June 9, 1909; that the defendant Utah Fuel Company was a corporation of the state of

New Jersey, having its principal place of business in Salt Lake City, Utah; that the defendant Pleasant Valley Coal Company was a corporation of the state of Utah; that the directors of the railroad company were Samuel F. Pryor, Edward D. Adams, George J. Gould, Kingdon Gould, David H. Taylor, Finley J. Shepard, Edward T. Jefferey, Arthur Coppel, Benjamin McAlphin, Thomas L. Chadbourne, Jr., and H. U. Mudge; that Mudge was president, Kingdon Gould vice president, and Jefferey chairman of the executive committee; that Jefferey directed, and for a long time had directed, the actual conduct of the business of said corporation, being the personal representative of the Gould interests; that the officers of the Utah Fuel Company were Edward T. Jefferey president, Kingdon Gould vice president, A. H. Cowie vice president, Jesse White treasurer, E. A. Greenwood assistant treasurer, and S. C. Matthews secretary; that Jesse White was also assistant treasurer of the railroad company; that E. A. Greenwood was also cashier of the railroad company and S. C. Matthews was assistant auditor of the railroad company; that the affairs and business management of said company for a long time had been, and now were, under the immediate direction and control of said Edward T. Jefferey, acting through the said A. H. Cowie, the chief executive officer of said fuel company in the state of Utah; that the officers of the said Pleasant Valley Coal Company were A. H. Cowie director and president, Edward T. Jefferey director, W. O. Williams director and vice president, E. A. Greenwood director, secretary, and treasurer, W. S. Cooper director; that said W. O. Williams was the auditor of the Utah Fuel Company, and W. S. Cooper was a clerk in the employ of the Utah Fuel Company; that all of the business and affairs of the said Pleasant Valley Coal Company for a long time had been, and now were, under the immediate direction and control of said Edward T. Jefferey.

That plaintiff was at the time of the bringing of the suit (June 14, 1916), and for some time theretofore had been, a stockholder of the defendant railroad company and the owner of 10 shares of the common capital stock of said company, of the par value of \$1,000 and of substantial market value; that the railroad company had no authority under its charter or the laws of Utah to own or hold corporate stock generally, nor corporate stock in coal-mining or coal-owning companies or corporations, nor to engage in the business of coal or coke producing; that by the articles of incorporation of said railroad company the ownership of stock in any coal owning, mining, or operating company was only permissible or authorized as a means or method of the railroad company to own the mine itself and the product thereof; that the defendant Pleasant Valley Coal Company was incorporated in the year 1882, and was engaged in the business of acquiring and holding coal lands as a mere arm, instrumentality, department, and agency of the railroad company; that the defendant Utah Fuel Company was incorporated about the year 1901, and since such time its sole business had been the same as that of the Pleasant Valley Coal Company, being the nominal owner of the entire capital stock of the Pleasant Valley Coal Company, and that the complete control of its

affairs and the beneficial ownership of its stock had at all times since June 9, 1909, been in the defendant railroad company; that the defendant railroad company is an interstate railroad, extending from the city of Grand Junction, in the state of Colorado, to the city of Ogden, in the state of Utah; that said railroad company was the owner of all the capital stock of the defendant Utah Fuel Company, aggregating \$10,000,000, and through said Utah Fuel Company the owner of the entire capital stock of the Pleasant Valley Coal Company, aggregating \$2,000,000; that the management of the railroad company had always elected and named the directors and executive officers of the two subsidiary coal companies, and caused to be directed and managed all of the affairs and business of the said subsidiary companies, not as independent companies, but wholly in the interest of the said railroad company, and as mere agencies and departments thereof; that said railroad company received all the profits, dividends, and earnings of every kind and nature arising from the business and property of said coal companies; that there is produced annually in the state of Utah about 3,000,000 tons of bituminous coal, a little over half of which is produced by the said railroad company through said coal companies in addition to which the said railroad company produces annually through its said subsidiaries over 300,000 tons of coke; being substantially all of the coke produced in the state of Utah, and that about 150,000 tons of said coke is annually transported to and used in other states; that over 500,000 tons of coal is annually shipped from Utah to other states; that said defendant railroad company, through its said subsidiaries, owns and operates, and for many years has owned and operated, seven mines in Carbon county, Utah, viz. Winterquarters, Castle Gate No. 1, Castle Gate No. 2, Clear Creek Utah mine, Sunnyside No. 1, and Sunnyside No. 2, with an annual production of over 1,500,000 tons; that said railroad company by means of its subsidiaries, fixes the price at which all coal is sold at the mines, thereby preventing competition among the producers of coal in the territory mentioned; that said railroad company favors and grants undue preferences to its said subsidiaries in the furnishing of cars and train service for the movement of coal of said defendants both as regards intra and interstate commerce.

That said railroad company maintains, and for a long time has maintained, a station known as Castle Gate, in Carbon county, Utah, and publishes tariffs showing traffic rates, both freight and passenger, thereto and therefrom; nevertheless it gives out and pretends that it has no real property at said point, and permits said subsidiaries to occupy, direct, and control all the railroad facilities and loading and unloading places at said point, and to prevent competitors in the coal business from unloading their freight at said station; that the Ketchum Coal Company was, and for several years had been, a corporation owning and attempting to operate a coal mine about 1,300 feet northerly from the railroad tracks of the defendant railroad company at said Castle Gate station; that said Ketchum Coal Company brought a suit against the defendants, and others, to condemn a right of way over ground claimed to be owned by said defendants from its said mine to the

tracks of the railroad company; that up to the time of the bringing of said suit the defendant railroad company had no competitors of any kind at or in the vicinity of said Castle Gate station, and the defendants were at such point operating the said railroad and two coal mines, and during all said times the said defendants had combined unreasonably and conspired in restraint of trade and commerce among the several states, and had confederated together to prevent the said Ketchum Coal Company from operating its said mine and shipping its product; that in said condemnation proceeding in the year 1913, the court in which such action was pending gave to the Ketchum Coal Company by order, exclusive possession of a strip of ground 60 feet in width and extending from its said mine to the tracks of said railroad company, except a joint possession with the said Pleasant Valley Coal Company of a certain crossing of a tramline of the said Pleasant Valley Coal Company, and said court at the same time enjoined the said coal companies from interfering in any manner with such possession; nevertheless the defendants have at all times, and especially since the 7th day of April, 1916, unlawfully and unreasonably combined and confederated together in restraint of trade and commerce among the several states and conspired to prevent the said Ketchum Coal Company from using said premises and such right of way for the purpose of transporting its coal to the tracks of said railroad company, notwithstanding at all said times said Ketchum Coal Company had orders for its coal to be shipped in interstate commerce from said mine to purchasers, and but for the said conspiracy and combination as hereinbefore stated the said Ketchum Coal Company would have filled such orders and shipped its coal in interstate commerce; that in furtherance of said unlawful combination and conspiracy the said defendants had continuously since April 5, 1916, maintained a large number of wires charged with electric current of a voltage of 4,400 volts over and across said premises and said right of way, in such manner and at such places as to wholly prevent the said Ketchum Coal Company from in any manner using the said premises and the said right of way for the transportation therefrom of its said coal; that the said Ketchum Coal Company had a developed mine at such place, and but for the wrongful acts aforesaid would have shipped many thousands of tons of coal, some of which in interstate commerce over the lines of the defendant railroad company to its advantage as a railroad company, if not to its advantage as the owner of the said subsidiary and competing coal companies.

That on or about November 24, 1915, at Salt Lake City, Utah, in a conference concerning facilities for the Ketchum Coal Company at Castle Gate, between Truman A. Ketchum and L. R. Eccles, representing the Ketchum Coal Company, and said Edward T. Jefferey and A. H. Cowie, representing the defendants herein, the said A. H. Cowie declared he would deplete the treasury of the Utah Fuel Company before he would allow the Ketchum Coal Company to ship one car of coal from that camp, and the said Edward T. Jefferey then and there declared that he would not agree to the Ketchum Coal Company operating at Castle Gate; that by reason of the constitution of

the board of directors of the said defendant coal companies the said railroad company makes and has continually made of such boards merely administrative officers of said railroad company; that neither of said boards of said coal companies acts, nor had acted, as an independent board, but, on the contrary, merely as dummies and clerks to record and carry out the will of the railroad company; that said railroad company uses the said coal companies as mere devices to enable the said railroad company to violate the provisions of the commodities clause of the Interstate Commerce Act, and to unduly and unreasonably restrain trade and commerce between and among the several states and to fix the prices of coal at the mines to the purchaser and in the markets to the consumer; that neither of said coal companies is a bona fide mining company, and neither of said coal companies fixes its selling price of coal at the mines solely upon those considerations which in the case of independent companies determine the price, but, on the contrary, at times they fix the selling price at the mines unreasonably low, while at the same time the said railroad company fixes the freight rate unreasonably high with the result that the consumer is not benefited, while the said railroad company, not only suffers no loss by reason of the low price at the mines, but reaps an undue and unconscionable advantage by reason of the excessive freight rate applying on independent coal which it collects from other shippers, and at the same time restrains and controls the usual and natural competition in the production of coal.

That said railroad company ever since its organization has been in legal effect the owner of and has had a pecuniary interest in the coal mines of said coal companies, and ever since the organization of said railroad company it has been largely engaged through the instrumentality of its said agencies and departments, namely, its said codefendants, in producing large quantities of coal and coke, and at all said times the said defendant railroad company has been transporting in interstate commerce for commercial purposes many hundreds of tons of said coal and coke daily, all in violation of the act of Congress commonly known as the Interstate Commerce Act; that by reason of the acts of said railroad company it continually and daily incurs a liability to suits and prosecutions under the laws of the United States, and of having its funds diverted from their proper purposes to the payment of heavy damages, costs, expenses, forfeitures, penalties, and fines because of the violation of said laws, and also the liability of having its charter revoked and to be dissolved as a corporation and lose its franchises, thereby rendering its shares of capital stock, especially its common stock, entirely and utterly worthless, to the great and irreparable damage and loss of the plaintiff and all other common stockholders in said corporation.

So far as the plaintiff is personally concerned, the case presented by the complaint does not appear to us to present any equity in his behalf. The relief prayed for is extraordinary. Before a court of equity would take charge through a receiver of the immense business detailed in the complaint, and break up the business combination as it now exists, it would require a very meritorious case. Plaintiff alleges

that he is the owner of 10 shares of the common stock of the railroad company of the par value of \$1,000 and of "substantial value." If the stock had any appreciable value, it is strange that it was not stated. The stock is quoted in the stock market reports at from \$5 to \$6.50 per share. It does not appear when plaintiff became the owner thereof, except that he has been the owner for some time. This is as indefinite as the words "substantial value." If the plaintiff had been the owner of the stock for any appreciable time, why was it not stated? According to the allegations of the complaint, the grievances of which plaintiff complains have existed since the organization of the railroad company in 1909, about seven years. If the plaintiff or his predecessors have known for this period of time of the acts complained of, the right to appeal to a court of equity for relief has been greatly weakened.

It does not appear from the complaint that the plaintiff has been damaged by the acts of the defendants in any sum whatever. On the contrary, it would seem that the arrangement complained of is very beneficial to the railroad company, and therefore to its stockholders. The plaintiff seems to rely upon the allegation that the acts of the defendant railroad company, if continued, will subject it to suits for penalties and forfeitures; but the fear of such a result is greatly lessened when we take into consideration that for about seven years the acts complained of have been committed, and no suits for penalties have yet been commenced. We think it also plainly appears from the complaint that the real trouble which has given rise to the present suit is the quarrel between the Ketchum Coal Company and the railroad company in regard to the shipment of coal, and, while this fact would not bar the plaintiff from instituting this action, it does bear strongly upon the equities alleged to exist in his behalf.

[1] We are of the opinion, however, that we are not authorized to consider the equities of the case so far as the alleged violation of the Sherman Anti-Trust Act is concerned, as the plaintiff, not having shown any injury to himself, other than as a member of the general public, may not prosecute this action. *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 70, 24 Sup. Ct. 598, 48 L. Ed. 870; *Wilder v. Corn Products Co.*, 236 U. S. 165, 174, 35 Sup. Ct. 398, 59 L. Ed. 520, Ann. Cas. 1916A, 118; *Union Pacific R. R. Co. v. Frank*, 226 Fed. 906, 141 C. C. A. 510; *Paine L. Co. v. Neal*, 244 U. S. 459, 37 Sup. Ct. 718, 61 L. Ed. 1256 (filed June 11, 1917).

[2] So far as the commodities clause of the Interstate Commerce Act is concerned, it would seem the same rule should prevail. The only cases which we know of that were brought for relief against a violation of said clause, were prosecuted by the United States, viz. *United States ex rel. Attorney General v. Delaware & H. Co.*, 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836, *United States v. Lehigh Valley R. R. Co.*, 220 U. S. 257, 31 Sup. Ct. 387, 55 L. Ed. 458, and *United States v. D. L. & W. R. R. Co.*, 238 U. S. 516, 35 Sup. Ct. 873, 59 L. Ed. 1438. The primary duty to enforce the Interstate Commerce Act in behalf of the public rests upon the Interstate Commerce

Commission. By section 12 of the act (Comp. St. 1916, § 8576) it is provided:

"And the Commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute, under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this act, and for the punishment of all violations thereof."

But, if we are in error in regard to this last proposition, we are satisfied that the plaintiff has not made a sufficient showing of wrongs suffered to authorize a court of equity to grant the extraordinary relief prayed for. *Dimpfell v. Ohio, etc., Co.*, 110 U. S. 209, 3 Sup. Ct. 573, 28 L. Ed. 121; *Taylor v. Holmes*, 127 U. S. 489, 8 Sup. Ct. 1192, 32 L. Ed. 179; *Corbus v. Gold Mining Co.*, 187 U. S. 455, 23 Sup. Ct. 157, 47 L. Ed. 256; *Dannmeyer v. Coleman (C. C.)*, 11 Fed. 97; *Venner v. A., T. & S. F. Ry. Co. (C. C.)* 28 Fed. 581; *Beshoar v. Chappell*, 6 Colo. App. 323, 40 Pac. 244; *Sparhawk v. Union Pass. Ry. Co.*, 54 Pa. 401.

The decree below is therefore affirmed.

BINDSEIL v. LIBERTY TRUST CO.

In re **DOONER & SMITH CO.**

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

No. 2312.

BANKRUPTCY ⇐355—RENT—RIGHT OF MORTGAGEE.

Rents collected by the trustee from premises mortgaged by the bankrupt, between adjudication and sale under foreclosure proceedings, go to the mortgagee under claim of deficiency, instead of the general creditors of the bankrupt represented by the trustee, for Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 544, deprives the mortgagee of his right to reach such rents by legal process, and it is equitable that in case of deficiency he should be protected, notwithstanding a mortgage does not entitle the mortgagee to collect the rents.

On Petition to Revise from the District Court of the United States for the District of New Jersey; J. Warren Davis, Judge.

In the matter of the bankruptcy of the Dooner & Smith Company. Petition of the Liberty Trust Company to require Nicholas W. Bindseil, trustee in bankruptcy, to apply in liquidation of its mortgage rents collected between adjudication and sale of the mortgaged property under foreclosure proceedings, was denied by the referee, and on proceedings to review, the referee's order was reversed, and the trustee was directed to make payment to the petitioner (243 Fed. 984), and the trustee petitions to revise. Order affirmed.

Bilder & Bilder, of Newark, N. J., for petitioner.

Archibald F. Slingerland, of Newark, N. J., for respondent.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This is a dispute between a mortgagee and general creditors. It involves the question: Do rents collected from mortgaged premises of a bankrupt between adjudication of bankruptcy and sale under foreclosure proceedings, belong to the mortgagee (under a claim of deficiency) or to the general creditors of the bankrupt?

The referee found for the general creditors; the District Court, on review, reversed the referee and found for the mortgagee. Its order is before us on petition to revise.

While courts in various jurisdictions regard this question differently, two courts in this circuit have decided it in favor of the mortgagee in two cases arising in Pennsylvania. The court below, feeling bound by these decisions, made a similar ruling in this case arising in New Jersey. The point has not been decided in Delaware. The question, now before us on appeal, calls for a review of the principle of three decisions rendered in this circuit.

The cases which hold against the allowance to the mortgagee of rents arising out of mortgaged property after bankruptcy, are based upon the general rule of law, that a mortgage, though in form a conveyance of land, is merely a high security for the payment of a debt or the performance of some other condition, *Fox v. Wharton*, 5 Del. Ch. 200, 225; *Ellison v. Dolbey*, 3 Penn. (Del.) 45, 52, 49 Atl. 178; *Rickert v. Madeira*, 1 Rawle (Pa.) 325; *Lenning's Estate*, 52 Pa. 135; *Wade v. Miller*, 32 N. J. Law, 296; *Colton v. Depew*, 59 N. J. Eq. 126, 44 Atl. 662; and that, as between mortgagor and mortgagee, the mortgagor retains the title and has the right to all rents, issues and profits of the mortgaged premises, so long as he is in possession. In connection with this rule, consideration is given the provision of the Bankruptcy Act, by which the trustee in bankruptcy acquires the mortgagor's possession of the mortgaged premises and succeeds to his title and rights. These cases hold in effect that until the mortgagee has reduced the mortgaged premises to his possession, or has attached or sequestered the rents (which, generally speaking, cannot be done after bankruptcy), the possession of the trustee is that of the bankrupt mortgagor, and rents from the mortgaged premises, which, but for bankruptcy, would belong to the mortgagor, after bankruptcy belong to the trustee by virtue of his title and possession, and are therefore applicable to debts due general creditors. In *re Foster*, Fed. Cas. No. 4963; *Foster v. Rhodes*, Fed. Cas. No. 4981; In *re Dole* (D. C.) 110 Fed. 926, 7 Am. Bankr. Rep. 21; In *re Bannar* (D. C.) 149 Fed. 936, 18 Am. Bankr. Rep. 61; *Matter of Cass*, 6 Am. Bankr. Rep. 721; *Remington*, section 993; *Brandenburg* (4th Ed.) section 846.

In these decisions the fact of bankruptcy is noticed, but its effect on the relative rights of creditors is disregarded. Creditors' rights are such as are conferred by the debtor's obligations; their remedies are such as are conferred by law. A mortgagee acquires his right to the payment of the debt and to its security from the mortgage instrument;

but the law confers upon him remedies for its enforcement. Before bankruptcy, various remedies are afforded the mortgagee to reach rents arising from the mortgaged premises; in Pennsylvania, by obtaining possession of the premises, and by attachment execution on any judgment recovered against the mortgagor otherwise than by *scire facias* and ejection; in New Jersey, by appointment of a receiver upon foreclosure proceedings on a showing that the mortgaged premises are not sufficient to pay the mortgage debt; in Delaware, by attachment execution on any judgment recovered against the mortgagor except by *scire facias*. But bankruptcy changes the whole situation, takes from the mortgagor his land and its income, and takes from the mortgagee the legal remedies which, but for bankruptcy, he might pursue in reaching rents arising from the mortgaged premises, and gives him in lieu thereof, only such remedies as may be found in a court of bankruptcy in the equitable administration of the bankrupt's assets.

When rents from mortgaged premises become bankrupt assets and can no longer be reached by legal process, what constitutes an equitable administration of a law that takes away such process? When bankruptcy cuts off a creditor's legal remedies, under the exigencies of the debtor's insolvency, it does not destroy his legal rights in the debt or in its security. Under the scheme of bankruptcy these are preserved to him; but they are enforced in a new way, made necessary by the bankrupt's financial collapse. In enforcing creditors' rights in the new way, it appears to us that equity should protect them in the same measure and preserve to them the same advantages, so far as practicable, that the law gave them before bankruptcy stepped in and interfered with them, having regard to their nature, their superiority, their priority. These are elemental considerations in the equitable application of assets to debts, which incline us to the view entertained by courts in this circuit, *In re Industrial Cold Storage & Ice Co.* (D. C.) 163 Fed. 390, and *In re Torchia*, 188 Fed. 207, 110 C. C. A. 248, which is, in effect, that for many purposes the relative rights of creditors are to be regarded as fixed when bankruptcy takes place; that after insolvency has taken the debtor's property out of his hands, its income or product belongs to the lien creditor, who has thus become its virtual owner; and that such income or product issuing from mortgaged property, should not be diverted from the mortgage creditor who has a lien to general creditors who have no lien.

This view is not based upon the notion that the mortgage confers a lien on rents; for, of course, it does not; but it is based upon what is conceived to be an equitable adjustment of rights, of which some are obviously superior to others. Such an application of income from encumbered property appears to be not only an equitable but a very practical way of administering bankrupt assets. It is pursued in principle by at least one court in the administration of property assigned for the benefit of creditors. In *Bausman's Appeal*, 90 Pa. 178, and in *Wolf's Appeal*, 106 Pa. 545, followed in *In re Industrial Cold Storage & Ice Co.* and *In re Torchia*, *supra*, where encumbered property was assigned for the benefit of creditors and rents were received by the assignee, the Supreme Court of Pennsylvania held, in substance, that, as between

lien creditors and general creditors, the income or product of lands should be applied to those claims which would be entitled to the proceeds of the lands, if sold, and should not be diverted to general creditors, who had no liens upon the lands and who would not be entitled to their proceeds until after lien creditors had been satisfied.

As we are dealing in this case with the equitable administration of bankrupt assets, where creditors' legal rights are preserved but where their legal remedies are lost and equitable remedies are substituted, equity requires that the new remedies be as effective as the old in protecting and enforcing such rights. We are of opinion, therefore, that rents, which have been collected by the trustee from the bankrupt's encumbered property, are applicable to the discharge of the debt for which the encumbrance was given as against debts due general creditors, if claim thereto be seasonably asserted.

The other objections to the order are not substantial and do not require discussion.

The order is approved.

In re WHITE.

PENTZ v. WHITE.

(Circuit Court of Appeals, Ninth Circuit. February 4, 1918.)

No. 2980.

1. BANKRUPTCY \Leftrightarrow 413(1/2)—DISCHARGE OF BANKRUPT—OPPOSITION.
Under Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 544, as amended by Act June 25, 1910, c. 412, 36 Stat. 838, a trustee can oppose the bankrupt's application for discharge only upon authority conferred upon him at a meeting of the creditors called for that purpose.
2. BANKRUPTCY \Leftrightarrow 413(8)—DISCHARGE—OPPOSITION—WAIVER OF DEFECTS.
The objection that the specifications and proceedings fail to show the trustee's authority to oppose the bankrupt's application for discharge was not waived because the bankrupt went to trial thereon.
3. BANKRUPTCY \Leftrightarrow 440—PROCEEDINGS—REVIEW.
An order denying a motion to set aside a discharge is one that can be reviewed on petition for revision, and therefore the question whether the court abused its discretion in denying the motion is not reviewable on an appeal from the order granting the discharge.

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

In the matter of the bankruptcy of H. S. White, doing business under the name of the H. S. White Machinery Company. The bankrupt's application for discharge was granted, the order of the referee denying discharge being reversed, on the ground that William R. Pentz, as trustee in bankruptcy, had not been authorized by the creditors to oppose the discharge (238 Fed. 874), the trustee appeals. Affirmed.

This is an appeal from the order of the District Court, reversing the order of the referee in bankruptcy, and directing the discharge of the bankrupt, on

the ground that the trustee had not been duly authorized to oppose the bankrupt's petition for discharge. The record shows that upon the filing of the bankrupt's petition the referee gave notice of a hearing thereon at a time and place named, at which time and place all creditors of the bankrupt and all other parties in interest might show cause, if any they had, "why such application should not be granted." The notice was duly served upon the creditors, and the trustee applied for an order authorizing him to interpose objections to the discharge, and an order was given accordingly; the referee's report reciting: "At the time set for the hearing no creditor appeared in opposition to the making of the order authorizing the trustee to oppose discharge." There was no certificate or order of the referee reciting that at the meeting the requisite number of the creditors voted in favor of authorizing the trustee to oppose the discharge. The trustee filed his specifications of objections to the discharge. On June 26, 1915, the bankrupt filed his answer thereto; but therein he raised no objection to the authority of the trustee to oppose the discharge. On the hearing thereafter had, counsel for the bankrupt, according to the report of the referee, interposed certain objections to "the legality of the authorization given the trustee to take the opposition," which were overruled. The referee reported that the point taken by the counsel was that the notice to creditors did not contain the statement that "a meeting of creditors was called for that purpose." The referee's report, filed December 28, 1916, contains the testimony taken, and his conclusion that the charges against the bankrupt had been proven, and that his discharge should be denied.

The District Court upon the hearing on the report of the referee found that the trustee had not been duly authorized to oppose the discharge, and upon that ground the discharge was ordered. Immediately thereafter the trustee gave notice to the bankrupt of his application for an order vacating the order of discharge, and for a further order referring the matter to the referee for the purpose of finding the facts constituting the authority of the trustee to oppose the application for discharge, and supported the same by affidavits of counsel for the trustee in which they stated that at the time and place of the meeting held pursuant to the notice to creditors, there were present creditors representing a majority in amount of the allowed claims, and that the trustee's application to oppose discharge was heard and considered by the creditors, and that they all announced and declared themselves to be in favor of authorizing the trustee to oppose the discharge. These affidavits stated also that, at the time of the hearing before the referee, the only objection made by counsel for the bankrupt was that the notice to creditors was insufficient. The trustee's petition for a rehearing also stated that the bankrupt's attorney did not question that actual authority had been given, but that he contended only that the authority was a nullity because the meeting had not been duly called, and that counsel for the trustee at that time stated that, if in the referee's opinion there was any question as to the authority of the trustee to oppose the discharge, they desired the case to be certified back, so that they might ask leave to correct the same; that the matter was taken under advisement, and thereafter the referee, at the next meeting, ruled that the notice and specifications were sufficient.

The opposing affidavit of the attorney for the bankrupt stated that the objection which he made at the hearing was that "the records in this case show no such authority, and further that no such authority existed in fact," and that he submitted a brief, which he also served upon counsel for the trustee, presenting the point that not only was it not alleged in the specifications of objection, but also that the records in the case failed to show that the trustee had been authorized to oppose the bankrupt's discharge by the creditors, and that such authority did not in fact exist, and the affidavit further states that the affiant "verily believes that the proceeding herein was not authorized by the creditors, at a meeting called for that purpose, to oppose the discharge of the bankrupt."

The motion to set aside the discharge came on to be heard before the court. It was denied on the ground that ample opportunity had been afforded the trustee to make proof of his authority to oppose the discharge, and that

he had not been taken by surprise, since the bankrupt urged the insufficiency of the specifications and the lack of authority from the first.

Clarence A. Shuey and Winfield Dorn, both of San Francisco, Cal., for appellant.

Wilder Wight, of Oakland, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts 'as above). [1, 2] The appeal presents the question whether the court below erred in ordering the discharge of the bankrupt. The record which came before the court failed to show that the trustee had ever been authorized to interpose objections to the discharge. His specifications of objection recited no such authority, and no proof was offered to show that it had been given. Under the amendment of 1910, the trustee could act only upon authority conferred upon him at a meeting of the creditors called for that purpose (In re Hockman [D. C.] 205 Fed. 330), and the objection that the specifications and the proceedings failed to show the trustee's authority was not waived by going to trial (In re Brown, 112 Fed. 49, 50 C. C. A. 118; In re Chandler, 138 Fed. 637, 71 C. C. A. 87; In re Servis [D. C.] 140 Fed. 222; In re Main [D. C.] 205 Fed. 421).

[3] The appellant assigns error, however, to the refusal of the court below to allow his motion to set aside the discharge and refer the case back to the referee for a finding on the question whether the creditors actually gave the trustee authority to object to the discharge, and the whole of the appellant's brief is devoted to that assignment. But that question is not before us. The order denying the motion to set aside the discharge was one that could have been reviewed by this court upon petition for revision (Thompson v. Mauzy, 174 Fed. 611, 98 C. C. A. 457; In re Chandler, 138 Fed. 637, 71 C. C. A. 87; In re Louisville Nat. Banking Co., 158 Fed. 403, 85 C. C. A. 513; In re Hawk, 114 Fed. 916, 52 C. C. A. 536; In re Ives, 113 Fed. 911, 51 C. C. A. 541; In re Vanoscope Co., 233 Fed. 53, 147 C. C. A. 123), and the question whether the court below abused discretion in denying the motion is not involved in an appeal from the order granting the discharge.

The order is affirmed.

GLADSTONE v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 4, 1918. Rehearing Denied April 1, 1918.)

1. CRIMINAL LAW ⇨42—DEFENSES—EXECUTIVE CLEMENCY—CONTINUANCE.

Where defendant, shortly after arrest under charge of having unlawfully in his possession, and transporting and concealing, opium prepared for smoking, contrary to law, made disclosure to the collector of customs pursuant to an understanding that, if he would make such disclosure and testify, the collector would recommend that the case against his associate should be dismissed, and that he could plead guilty and receive a nominal fine. The district attorney declined to nolle prosequi the in-

dictment against defendant, and he was placed on trial and convicted; nothing which he disclosed to the collector of customs being used against him. *Held* that, while a district attorney may promise immunity to accomplices in consideration of their turning state's evidence, and such a person acquires an equitable right to executive clemency, of which the court can take notice only when application to postpone the case is made in order to permit him to apply for pardon, defendant, being the principal offender himself, acquired no title to executive clemency, and his application for a continuance for the purpose of seeking a pardon was properly denied, particularly as eight months occurred between the date of the indictment and the trial.

2. CRIMINAL LAW ⇌680(2)—TRIAL—RECEPTION OF EVIDENCE.

The order in which evidence shall be received is largely within the discretion of the trial court, and defendant cannot complain that testimony as to a conversation had with the arresting officer was introduced before proof of the corpus delicti.

3. CRIMINAL LAW ⇌1086(14)—REVIEW—QUESTIONS PRESENTED.

Where no request for an instruction directing a verdict of not guilty appeared in the transcript, and it did not appear that any exception was taken to any of the instructions, or to the denial of requested instructions, an assignment of error complaining that the court erred in refusing to direct an acquittal cannot be considered.

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

Alexander Gladstone, alias William Vines, was convicted of having unlawfully in his possession, and transporting and concealing, opium prepared for smoking, contrary to law, and he brings error. Affirmed.

Benjamin L. McKinley, of San Francisco, Cal., A. J. Morganstern, of San Diego, Cal., and Paul W. Schenck, of Los Angeles, Cal., for plaintiff in error.

Robert O'Connor, U. S. Atty., and Clyde R. Moody, Asst. U. S. Atty., both of Los Angeles, Cal.

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

GILBERT, Circuit Judge. The plaintiff in error, Gladstone, was convicted on an indictment which charged him and one Friedlander with having unlawfully in their possession, and transporting and concealing, opium prepared for smoking, contrary to law.

[1] Error is assigned to the denial of the motion of the plaintiff in error for a continuance for the purpose of submitting to the President an application for pardon. The motion was based upon affidavits, the substance of which was that shortly after his arrest the plaintiff in error had an understanding with the collector of customs for the port of Los Angeles, to the effect that, if he would disclose to the collector all that he knew in regard to the transaction on which he was indicted, the collector would recommend that the district attorney dismiss the case against Friedlander, and that the plaintiff in error, upon his plea of guilty, receive a nominal fine, and that, acting upon that understanding, the plaintiff in error did disclose to the collector of customs all that he knew of the transaction. To this contention are cited Whisky

Cases, 99 U. S. 594, 25 L. Ed. 399, *United States v. Lee*, 4 McLean, 103, Fed. Cas. No. 15,588, and *People v. Whipple*, 9 Cow. (N. Y.) 707. In *Whisky Cases*, the court held that a district attorney has no authority to contract that one accused of an offense against the United States shall not be prosecuted if, when examined as a witness against his accomplice, he will disclose fully and fairly his and their guilt, but that the accused acquires merely an equitable title to executive clemency of which the court can take notice only when an application to postpone the case is made in order to give him an opportunity to apply for pardon. In *United States v. Lee*, the court cited from *Greenleaf* the rule that the admission of accomplices as witnesses for the government is justified by the necessities of the case, it being often impossible to bring the principal offenders to justice without them, and from *People v. Whipple*, 9 Cow. (N. Y.) 707, where it was said:

"If he appears to have been the principal offender, he will be rejected."

In *United States v. Hinz* (C. C.) 35 Fed. 272, it was said:

"That the authority to promise immunity to an accomplice upon his turning state's evidence is not vested in the prosecuting officer, but whether they will be admitted to testify, and thus secure an equitable right to clemency, is vested in the discretion of the courts, to be exercised cautiously, in view of all the circumstances of the case, and to promote the ends of justice."

In the case at bar, so far as is shown by the affidavits and by the evidence on the trial, the plaintiff in error was himself the principal offender. If in his disclosure which he made to the collector of customs, he implicated any other person, that fact was not made known to the court below. On the trial it was shown that the plaintiff in error, accompanied by Friedlander, went in an automobile from San Diego to El Centro, Mexico, taking with him two empty suitcases, and that on returning to California he was arrested while in possession of the suitcases, which were filled with opium prepared for smoking. The district attorney, when he was advised of the nature of the testimony which the plaintiff in error proposed to give on behalf of the government said:

"We cannot nolle pros. this case. * * * We cannot convict any one else on this testimony."

The statement so made to the collector of customs by the plaintiff in error must have been evidence only of his own guilt, and not that of another, and the record shows that nothing that he said at that time was used against him or against his codefendant on the trial, and that he did not testify on the trial. In brief, the plaintiff's contention amounts to this: That if a defendant in a criminal case shall disclose to some officer of the government all the facts which show his own guilt, and offer to testify thereto, he will be entitled to the clemency of the court, and to its aid in obtaining a pardon. Such is not the law. The plaintiff in error was given ample opportunity to apply for pardon between the date of the indictment and the trial, which occurred eight months later.

[2] It is assigned as error that the court below permitted the government to prove a conversation between the arresting officer and the

defendants at the time when they were taken from the automobile in which they were carrying the opium. The objection of the defendants was that such evidence was not admissible until the corpus delicti was established. To this it is sufficient to say that the order in which testimony shall be admitted is largely within the discretion of the trial court. *Thiede v. Utah Territory*, 159 U. S. 511, 519, 16 Sup. Ct. 62, 40 L. Ed. 237. And while it may be preferable to prove the corpus delicti before offering evidence to implicate the accused, "it is not error to receive evidence against the accused before the corpus delicti has been proved." 12 Cyc. 556; 7 R. C. L. 778.

[3] We need not discuss the assignment of error that the court erred in refusing to instruct the jury that the evidence adduced was insufficient to warrant conviction of the defendants or either of them, and "I therefore instruct you to find the defendants not guilty on said indictment." No such request for an instructed verdict appears in the transcript, nor does it appear that any exception was taken to any of the instructions, or to the denial of any requested instruction. It may be added that the point of law raised on this assignment was decided adversely to the contention of the plaintiff in error here by the decision of this court in *Ng Choy Fong v. United States*, 245 Fed. 305, — C. C. A. —.

We find no error. The judgment is affirmed.

TURNER CONST. CO. v. UNION TERMINAL CO. et al.
(Circuit Court of Appeals, Fifth Circuit. January 25, 1918.)

No. 3144.

1. EQUITY ⚡128—PLEADING—ADMISSIONS—EFFECT OF.

Where complainant's bill to enforce a mechanic's lien alleged that named persons had some interest in the premises, either as mortgagees or purchasers, but alleged that such mortgage was inferior to the lien, and the evidence indicated that the existence of the mortgage was uncontroverted, complainant cannot attack the decree because of the absence of formal proof of the mortgage; his pleading amounting to an admission of its existence.

2. EQUITY ⚡427(3)—PLEADING—PRAYER FOR RELIEF.

In suit to enforce mechanic's lien on mortgaged premises, where it appeared that the mortgagee advanced sums to the owner, and that a portion of this was deposited to the joint account of the owner and complainant, subject to withdrawal on their joint check, being so held as a guaranty of performance, complainant is, under his prayer for general relief, entitled to an order directing the owner to join in executing a check to enable complainant to withdraw funds.

Appeal from the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

Suit by the Turner Construction Company against the Union Terminal Company and others. From the decree, granting part only of the relief sought, complainant appeals. Modified and affirmed.

Sam R. Marks, of Jacksonville, Fla. (Marks, Marks & Holt, of Jacksonville, Fla., on the brief), for appellant.

J. T. G. Crawford, of Jacksonville, Fla. (H. B. Hurd, of Chicago, Ill., on the brief), for appellees.

Before WALKER and BATTIS, Circuit Judges, and EVANS, District Judge.

WALKER, Circuit Judge. [1] This is an appeal by the Turner Construction Company from a final decree rendered in a suit brought by it to enforce a builder's or mechanic's statutory lien for the balance alleged to be due and unpaid for labor and material furnished by the appellant under a contract between it and the Union Terminal Company (which will be called the owner). William T. Abbott and the Central Trust Company of Illinois were made defendants; the bill alleging:

"That the said William T. Abbott and the said Central Trust Company of Illinois have or claim some interest in the said premises as purchasers, mortgagees, mortgagees in trust for parties unknown, judgment creditors, or otherwise, the precise nature whereof is unknown to your orator; but such interests, if any there be, accrued with notice of your orator's said claim, and have so accrued as to be, and they are, subject to the lien of your orator as aforesaid."

The answer of Abbott and the Central Trust Company of Illinois to the bill averred the execution by the owner to them as trustees of a mortgage or deed of trust on the property described in the bill to secure \$240,000 of bonds and interest thereon, and set up that the claim asserted by the plaintiff is subject and subordinate to the lien created by the mortgage or deed of trust. A copy of that instrument, with a certificate thereon showing that it was duly filed for record, was made an exhibit to the answer. Formal proof of the mortgage was not made, but the record in the case shows that it was mentioned by plaintiff's counsel and in testimony for the plaintiff as if its existence was not questioned.

We think the pleading and evidence in the case were such as to preclude the appellant from now raising a question as to the existence of the mortgage or deed of trust. The above-quoted averments of the bill amounted to an admission that the defendants mentioned therein had an interest in the property sought to be subjected to the lien asserted by the bill, and no issue with reference to that interest was tendered, except by the averment to the effect that it was subordinate to the lien asserted by the bill. A party cannot be heard to impeach a judgment or decree because of the absence of formal proof of a fact which his pleadings and evidence in the case show was admitted or treated as uncontroverted.

[2] By dealings between the appellant and the Central Trust Company, the lien of the former was subordinated to that of the latter as to so much of the amount payable to the former under its contract as was in excess of \$205,000, the amount the Trust Company agreed to supply for the labor and material done or furnished. By the decree

appealed from the appellant was adjudged to have a lien, superior to that of the mortgage or deed of trust, for the amount of the difference between \$205,000 and the amount the Trust Company had actually paid. Part of the amount paid by the Trust Company to the owner was not received by the appellant, but, under an agreement between it and the owner, was deposited in their joint names in a bank, for the purpose of guaranteeing appellant's faithful performance of its contract; the agreement providing for the parties to it signing a check, payable to the order of the appellant, for the amount of the deposit when the final payment under the building contract should become due and payable to the appellant. The amount deposited in the bank was credited to the Trust Company as a payment made by it, and was included in the amount decreed against the owner; but the decree made no provision for withdrawal of the amount from the bank and the payment of it to the appellant. In that respect the decree failed to give the appellant relief to which its prayer for general relief entitled it under the findings made. The parties whose joint check was required to get the amount deposited in bank were before the court and subject to its orders.

The conclusion is that the decree appealed from should be modified, by inserting an order requiring the Union Terminal Company, one of the appellees, within 15 days after the filing in the District Court of the mandate of this court to join the appellant in signing a check on the Barnett National Bank of Jacksonville, Fla., for the amount on deposit therein to the joint credit of the two parties just mentioned. As so modified, the decree, in so far as it is brought into question by the appellant, is affirmed, with costs against the appellee Union Terminal Company. The disposition of the appeal of the Union Terminal Company from the same decree is shown in the opinion rendered in *Union Terminal Co. v. Turner Construction Co.*, 247 Fed. 727, — C. C. A. — (U. S. Circuit Court of Appeals, 5th Circuit, present term).

Modified and affirmed.

SABINE HARDWOOD CO., Limited, v. WEST LUMBER CO. et al.

(Circuit Court of Appeals, Fifth Circuit. January 29, 1918.)

No. 3093.

JUDGMENT ⇨675(1)—CONCLUSIVENESS—PERSONS CONCLUDED.

Where an attorney, having acquired his client's interest in land on his own behalf, resisted the second suit to reform a decree affecting title to the land, appearing in that litigation for his own benefit and preparing a plea of disclaimer for his client, such attorney, though not formally made a party, is concluded by the decree therein.

Appeal from the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge.

Suit by the Sabine Hardwood Company, Limited, against the West Lumber Company and others. From a decree for defendants (238 Fed. 611), complainant appeals. Affirmed.

W. D. Gordon and Henry G. Russell, both of Beaumont, Tex., for appellant.

C. L. Carter, of Houston, Tex., and Chas. T. Butler, of Beaumont, Tex., for appellees.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

WALKER, Circuit Judge. By this suit the appellant asserts an interest in land claimed to have been acquired by a conveyance of W. D. Gordon to it. Whatever interest Gordon had was involved in a suit in which a final decree was rendered on December 4, 1911. Gordon was the attorney for H. P. Weir, a party to that suit. After the rendition of the decree just mentioned, Gordon acquired Weir's interest in the land involved in the suit. In May, 1912, persons who had been parties to the suit in which the decree mentioned was rendered brought in the same court against Weir and others a suit, an object of which was to reform the decree rendered in the former suit. Gordon was not named as a party to that suit. Weir by a plea which was prepared by or at the instance of Gordon, set up that he was no longer interested in the subject-matter of the suit; that prior to the institution of that suit he had sold and conveyed all his interest to Gordon, and that Gordon, after the institution of that suit, sold and conveyed his interest to the Sabine Hardwood Company, the appellant. Gordon actively participated in the trial of the second suit, which resulted in a judgment or decree reforming the one previously rendered. He examined and cross-examined witnesses, prepared charges, and made an argument to the jury. He conducted such resistance as was made to the granting of the relief sought by the plaintiffs in the suit. It is not disputed that, if he was bound by the decree rendered in that suit, the claim asserted by the appellant cannot prevail.

Gordon had a property interest in defeating the relief sought in the second suit. It was plainly disclosed that Weir, his former client, was no longer concerned. A denial of the prayed-for reformation of the

former decree would have inured to the benefit of Gordon and his corporation grantee, practically all of the stock of which he owns. In assuming and managing the defense made, he was undertaking to protect an interest of his own. From the fact that he was not nominally a party to the suit, it does not follow that he was not bound by the result of it. When one who has a property interest in defeating relief sought in a suit openly takes substantial control of the defense made, he is bound by the judgment rendered, the same as if he were the nominal, as well as the real, defendant. *Bachelor v. Brown*, 47 Mich. 366, 11 N. W. 200; *Parr v. State*, 71 Md. 220, 17 Atl. 1020; *Anderson v. Watt*, 138 U. S. 694, 11 Sup. Ct. 449, 34 L. Ed. 1078; *Lovejoy v. Murray*, 3 Wall. 1, 18 L. Ed. 129; 1 *Freeman on Judgments* (4th Ed.) § 174; 2 *Black on Judgments*, § 540. To say that Gordon was not bound by the decree rendered in the second suit would amount to saying that one may have a trial by a court having jurisdiction of an issue in which he has a property interest, without affecting his right to raise the same issue in a subsequent suit. It was clearly disclosed to the court that Gordon was not representing another, who claimed to have an interest that could be adversely affected by the granting of the relief sought, and that his activities in the suit were in behalf of himself, and no one else. It could not have been made plainer that the defense attempted was his own, if he had been formally substituted as a defendant in the place of Weir, who made it known to the court that at the time the suit was brought he was not interested in the litigation, but that Gordon, who had succeeded to his interest, was. The only contest to which the suit gave rise was one in which Gordon took the part of the real defendant. Formal intervention was not necessary to make him a party bound by the decree rendered.

The decree appealed from is affirmed.

BLACKINGTON v. UNITED STATES et al.

(Circuit Court of Appeals, First Circuit. January 2, 1918.)

No. 1320.

ARMY AND NAVY ⇨20—ENLISTMENT—VALIDITY—MATERIALITY.

Where petitioner, after enlistment in the National Guard, became a soldier of the United States army, being drafted into the service pursuant to National Defense Act June 3, 1916, c. 134, § 111, 39 Stat. 211 (Comp. St. 1916, § 3045), and National Conscription Act May 18, 1917, c. 15, § 1, subd. 2, 40 Stat. 76, on August 5, 1917, at which time he was examined by the federal medical officers and accepted, and such examination was not shown to be irregular or unfair, his status is determined by the draft of August 5, 1917, and irregularities, if any, which might have occurred at the time of his previous examination and voluntary enlistment, are immaterial.

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

Petition by Carl A. Blackington for writ of habeas corpus against the United States of America and others. From an order discharg-

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

ing the writ, and remanding petitioner to custody of his commanding officer (245 Fed. 801), petitioner appeals. Affirmed.

Harvey D. Eaton, of Waterville, Me., for appellant.

Frederic Gilbert Bauer, Major Judge Advocate, of Boston, Mass. (Thomas J. Boynton, U. S. Atty., and Lewis Goldberg, Asst. U. S. Atty., both of Boston, Mass., on the brief), for appellees.

Before DODGE, BINGHAM, and JOHNSON, Circuit Judges.

PER CURIAM. In this case it appears that the appellant is now a soldier in the United States army, having been drafted into that service, pursuant to section 111 of the National Defense Act of June 3, 1916 (39 Stat. 166, 211), and of section 1, subd. 2, of the National Conscription Act of May 18, 1917, on August 5, 1917, at which time he was examined by the federal medical officers and accepted into said United States service, and said examination is not shown to have been in any manner irregular or unfair. In view of the above, we are of opinion that his present status as a soldier is determined by the draft of August 5, 1917; that irregularities, if any, which may have taken place in his previous examination and voluntary enlistment on June 29, 1917, in Battery E, First Maine Heavy Artillery, of the National Guard, are of no moment; and that it is unnecessary to consider whether the conduct of the medical examiner and recruiting officer in regard thereto was such as in any way to affect the validity of his enlistment on June 29, 1917, as a member of said National Guard. It follows that the District Court did not err in discharging the writ of habeas corpus and remanding the appellant to the custody of his commanding officer.

The order of the District Court is affirmed, and the appellees recover their costs in this court.

McKEE GLASS CO. et al. v. H. C. FRY GLASS CO.

(Circuit Court of Appeals, Third Circuit. January 29, 1918.)

No. 2310.

1. PATENTS ⇨324(5)—INFRINGEMENT—REVIEW—PRESUMPTIONS—OMISSIONS FROM RECORD.

In contempt proceedings for violation of an injunction against infringement of a patent, where an item of a penalty imposed for compensation additional to profits and royalty was clearly based upon evidence not before the appellate court, it must be assumed that it was sufficient upon which to base the award.

2. PATENTS ⇨318(6)—INFRINGEMENT—DAMAGES—PROFITS.

Where an infringer made profits on some sales and sustained losses on others, the patentee was entitled to recover the profits made, without deducting the losses.

3. PATENTS ⇨319(1)—INFRINGEMENT—DAMAGES—LOSSES.

Though an infringer sustained losses on infringing sales, they inflicted injury on the patentee, entitling it to damages.

4. PATENTS ⇨318(3)—INFRINGEMENT—DAMAGES—PROFITS.

A royalty, whether agreed to or imposed on an infringer, is an element of cost to be paid before profits can be made, and a patentee in case of

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

an infringement is entitled to the amount of the royalty and the amount of the infringing profits above the royalty; but where the royalty was not included as a factor of cost, and the profits were thereby increased by the amount of the royalty which should have been charged, the patentee was not entitled to a royalty, in addition to the profits as so increased.

5. PATENTS ↔319(1)—INFRINGEMENT—DAMAGES—LOSSES.

On infringing sales, on which the infringer sustained losses, the patentee was properly allowed as damages an amount equal to a royalty agreed upon at one time as a proper charge for using the patented process under a license.

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

Suit by the H. C. Fry Glass Company against the McKee Glass Company and others. From a decree imposing a penalty on defendants for violating an injunction, they appeal. Modified and affirmed.

Kay, Totten & Powell, of Pittsburgh, Pa. (James I. Kay and Robert D. Totten, both of Pittsburgh, Pa., of counsel), for appellants.

Marshall A. Christy, of Pittsburgh, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This matter arises out of contempt proceedings instituted against the defendants below for violation of a permanent injunction against infringement of the patent in suit (No. 628,027), and pertains to the amount awarded the complainant as compensation for its injuries.

This litigation was begun in 1906; it was bitterly fought through various state and federal courts (Fry Glass Co. v. McKee Glass Co., 239 Pa. 34, 86 Atl. 644; Blair v. Jeanette-McKee Glass Works (C. C.) 161 Fed. 355; Libbey Glass Co. v. McKee Glass Co. (D. C.) 216 Fed. 172, affirmed 220 Fed. 672, 136 C. C. A. 314); and it reached perhaps its final stage in a recent decree of the District Court (now before us on appeal) imposing upon the defendants a penalty for violating its injunction.

We are not concerned with this protracted litigation, except as it bears upon the proceedings for contempt of the court's final decree, in which violation of the injunction is admitted and entire contempt for the court's decree is shown.

The questions raised on this appeal are three: The first has to do with the principle upon which the court formulated a penalty against the defendants; the second and third relate to certain items in the amount of the penalty.

The defendants do not deny their liability to the complainant for injuries proven to have been sustained; but maintain, that in imposing the penalty, the trial court exceeded its powers by adding to the remedial amount ascertained a sum that is purely punitive. They argue that the purpose of a civil prosecution for contempt is remedial rather than punitive, and that the penalty to be imposed should correspond with and be no greater than the loss, expense, and injury which the complainant is shown to have sustained by reason of the

defendants' misconduct and disobedience; citing *Wells v. Oregon Ry. & Nav. Co.* (C. C.) 19 Fed. 20; *Christensen Engineering Co. v. Westinghouse Air Brake Co.*, 135 Fed. 774, 68 C. C. A. 476. We find that we are not called upon either to consider or decide any question of punitive and remedial penalties in contempt proceedings, because the record makes it very clear that the award in this case was within the principle contended for by the defendants, in that, it shows no attempt on the part of the court to impose a punitive penalty, but shows, on the contrary, that the court was careful to restrict its award to compensation for injuries actually sustained. The trial judge said:

"In fixing penalties for civil contempts, it seems to the court important that care should be taken to give the plaintiff full compensation for the injuries sustained, *and not more.*"

The only question, therefore, is: Whether the trial judge in awarding the complainant indemnity for its injuries, abused his discretion by making an award in excess of injuries proved.

The penalty imposed amounts to \$25,151.70. It is made up of several items, which in round numbers are as follows:

| | |
|---|-------------|
| Net infringing profits realized by defendants..... | \$ 8,000.00 |
| Royalty at 6 per cent. on defendants' entire sales of \$41,713.97.... | 2,500.00 |
| Complainant's expenses and costs, and master's fee..... | 4,700.00 |
| Additional compensation for complainant's injuries..... | 10,000.00 |

The assignments of error embrace all items except those of complainant's expenses and costs, and master's fee; but at the argument they were limited to the compensation item of \$10,000.00 and the royalty item of \$2,500.00.

The defendants charge that the court abused its discretion by allowing \$10,000.00 as compensation for the complainant's injuries, in that, it arbitrarily made the allowance without any evidence of injuries sustained by the complainant to which such compensation is applicable. The defendants base this contention upon the theory that all matters of the complainant's injuries and compensations were referred to a master, who showed by his report that all injuries sustained were compensated for in the items of profits, royalties, expenses, and costs, therein set forth, and, that, therefore, there was no evidence upon which to predicate the court's award of \$10,000.00 subsequently made for additional compensation. Of course, if this is the fact, the contention of the defendants is sound. What is the fact?

The contempt proceedings were conducted in open court and consumed three days. Many witnesses were heard, and there were offered in evidence the entire record of this case and of the case in the Pennsylvania state courts, in much of which litigation the trial judge had taken part and with all of which he was thoroughly familiar. It became clear at the hearing, that certain of the complainant's injuries arose from infringing profits which had enured to the defendants, and that an accounting of such profits was necessary. The trial judge, therefore, appointed a master to ascertain these profits and damages—"to assist [him] in arriving at proper pecuniary penalties which should

be imposed upon the defendants in relief of the plaintiff." After the master had filed his report, showing an accounting, the court said:

"The findings of the master as reported in aid of the court are based upon actual figures taken from books of the defendants and from the records of the case. They will not compensate the plaintiff for the injuries done it."

Continuing, the court said:

"The history of this litigation, shows that the defendants have been most persistent in their acts of infringement of the plaintiff's rights, and that they have in a marked degree treated not only the decrees but the jurisdiction of this court with contempt. It is plain from all the testimony in this case [by which we surmise the court meant that which was taken in open court as well as that which was taken before the master] that the plaintiff has suffered injury at the hands of the defendants to an extent which cannot be accurately measured in dollars and cents."

The court then added to the items of the master's report the disputed item of \$10,000.00.

[1] The record, as it appears before us on this appeal, embraces only the testimony taken before the master upon which alone his accounting and findings were based. But there was testimony heard by the trial judge which was not heard by the master, to which, manifestly the trial judge alluded when he said:

"It is plain from *all* the testimony in the case that the plaintiff has suffered injury at the hands of the defendants which cannot be accurately measured in dollars and cents."

That testimony is not before us in this record. As his opinion shows, not only by its general trend, but by positive expression, an effort on his part to limit the penalty to compensation for injuries sustained, and for *nothing more*, it is clear to us that the trial judge based the \$10,000.00 compensation item upon the evidence which he had heard and not upon the evidence which the master had heard. As there was evidence before the trial judge which is not before us, and as it is plain that in reaching his decree the trial judge considered that evidence, we must assume, on authority of *Pound v. Turck*, 95 U. S. 459, 24 L. Ed. 525, and *Wagner v. Standard Sanitary Mfg. Co.*, 244 Pa. 310, 91 Atl. 353, that there was sufficient evidence upon which to base the award of \$10,000.00.

[2] The subject-matter of the reference to the master was injuries sustained by the complainant arising directly from infringing sales. These were measured by profits earned and damages inflicted. As the infringing sales were of two classes, those creating profits and those carrying losses, the master's inquiry was directed to the amount of profits on the former, and the measure of damages on the latter, or on both. Against the defendants' contention that the complainant was entitled only to net profits on all sales after deducting losses on some from profits on others, the master held, we think correctly, that, as the complainant was not a quasi partner of the infringers, losses incurred by the defendants through their wrongful invasion of the complainant's patent were not chargeable to the complainant (*Crosby Valve Co. v. Safety Valve Co.*, 141 U. S. 441, 12 Sup. Ct. 49, 35 L. Ed. 809),

and, therefore, the complainant was entitled to all profits realized by the defendants without deduction of any losses they had sustained. We find no error in either the theory or amount of this finding.

[3] But the defendants made sales on which there were losses. Out of these, of course, there could arise no question of profits. But they were none the less infringing sales, which inflicted injury upon the complainant, entitling it to damages. The master did not distinguish between profit earning and loss incurring sales. He did not treat them separately, but awarded damages in the nature of a royalty against all sales. This he fixed at 6 per cent. on gross receipts from all sales by analogy to the royalty provided in a license previously agreed upon by the parties and afterwards cancelled. He justified his award upon the certainty of injuries inflicted as shown by the character and extent of the infringement, and by the fact that *the evidence before him* disclosed no other method of imposing damages.

[4] What the master did with respect to profit earning sales was to calculate profits without including a royalty as a factor of cost, and, after profits had been thus ascertained and awarded, he added thereto a royalty as an element of damage. We have the question, therefore, —Whether as between profits thus ascertained and the royalty subsequently added, the complainant has not received an award greater than its proven injuries? This question we must consider with reference to the part which a royalty plays in calculating profits, when a royalty is present, as it is in this case upon the master's award.

If there had been no infringement, and if the articles had been manufactured under a license to use the patented process, the royalty provided therein would have been a factor of cost to the licensee in the production of articles under the patent, and profits made thereon would be only so much as remained after paying the royalty. This is the way profits under a license are ascertained. As the articles here were produced not under license but by infringement of the patent, a like royalty is chargeable in the same way as a factor of cost in order to ascertain what profits were made by the infringement. A royalty, whether it be agreed to or be imposed, becomes an element of cost to be paid before profits can be made; so it must be included in a calculation before profits can be ascertained. If royalty is included as a cost, profits are reduced by the exact amount of the royalty; if excluded, profits are increased by the same amount. Therefore, it appears to us, that in compensating a patentee for what he has lost by the measure of what he would have earned but for the infringement, the patentee is first entitled to the amount of the royalty and then the infringing profits earned over and above the royalty; but, that he is not entitled to a royalty to cover what he himself would have earned or would have received from another but for the infringement, plus infringing profits above such royalty, and plus royalty again as damages. As the master in this case very properly found that the owner of the patent was entitled by way of damages to a sum which, but for the infringement it would have earned elsewhere as royalty, he should have included that as a factor of cost

(payable, of course, to the patent owner), and thereafter ascertained the correct infringing *profits*. As he did not do this, the profits he ascertained were greater than the exact infringing profits by just the amount of the royalty with which the infringers should have been charged, and being greater by that amount, we do not think that the subsequent imposition of a royalty on the profit earning sales was warranted. The real and primary damage to the owner of the patent was in being deprived of the royalty value of the invention. If that value is restored to it once, either in the shape and by the name of damages or embraced in profits which are swollen beyond their proper figure because of the improper omission of royalty as a factor of cost, the result is the same and the owner of the patent is compensated for that injury. Or, stated in another way, as the gross profits which were ascertained in this case without designating a royalty as a cost factor are the same in amount as the royalty plus correspondingly lesser profits, we do not find error in the master's item of \$7,945.93 for infringing profits. Our finding is, that a 6 per cent. royalty in the nature of damages should not be added thereto.

The difficulty which the master had in finding from the evidence *before him* a method of awarding damages for the infringing sales on which profits were earned, is explained perhaps by the fact that only a part of the evidence of the complainant's damages was before him; the other part had already been given before the court, and upon it, the court made its award of \$10,000.00.

[5] While we hold that the award of damages in the form of a 6 per cent. royalty on profit producing sales should be disallowed, the same reasoning applied to loss incurring sales leads to an opposite conclusion. There, the defendants inflicted injury upon the complainant by invading its patent rights. Whether they made or lost by it, they deprived the complainant of earnings equal at least to the royalty value of its invention. The result was an injury to the complainant for which the defendants must pay in some way and in some amount. The way which the master thought was proper, was that which the parties themselves had previously adopted and then abandoned. This was by paying a royalty equal to 6 per cent. on the sales. That was what the defendants and the complainant thought at one time was the proper charge for using the patented process under license whether the licensee made or lost thereunder. As the defendants used it without license, it would seem that the same charge would not be improper in ascertaining the damages they thereby inflicted. Therefore, we think that a royalty of 6 per cent. should be charged as damages against the gross sales of \$5,339.44 on which the defendants sustained losses, and, as we have said before, that a royalty of 6 per cent. charged as an item of damage in addition to profits as ascertained on the \$36,374.53 of sales, should be disallowed. With this modification, we direct that the decree below be affirmed.

In re GREER.

(District Court, W. D. Kentucky, at Paducah. January 29, 1918.)

1. BANKRUPTCY Ⓒ51.—ADJUDICATION—CONTEST.

There is no way open to creditors to contest an adjudication in voluntary bankruptcy, except as the Bankruptcy Act gives it.

2. BANKRUPTCY Ⓒ51.—ADJUDICATION—EFFECT.

An adjudication in bankruptcy is a caveat or notice to all the world, and creditors, if desiring to question the adjudication on the ground that it was induced by fraud, must act promptly, or their rights are lost, for the passage of the bankrupt's estate to the trustee will prevent a return to the status quo.

3. BANKRUPTCY Ⓒ413(4)—DISCHARGE—OBJECTIONS—SPECIFICATIONS.

Bankruptcy Act July 1, 1898, c. 541, § 14, 30 Stat. 550 (Comp. St. 1916, § 9598), declares that the application for discharge shall be granted, unless the bankrupt has committed an offense punishable by imprisonment, or has, with intent to conceal his true financial condition, destroyed or failed to keep books of account, or has obtained money or property upon credit by a materially false statement in writing, or has at a time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, etc., or concealed his property with intent to hinder, delay, or defraud his creditors, or in a voluntary proceeding has been granted a discharge within six years, or has refused to obey any lawful order, or to answer material questions. Section 29b, cl. 2 (section 9613), relating to offenses, declares that a person shall be punished by imprisonment for having made a false oath in, or in relation to, any proceeding in bankruptcy. One adjudicated a bankrupt in the Western district of Kentucky petitioned for discharge, whereupon a creditor filed a specification of objection, on the ground that the bankrupt was not a citizen of Kentucky, and was not at the time of the filing of his petition, and had not been for six months immediately preceding the filing of such petition, but was a citizen of Missouri, and had resided and voted there, prior to the filing of the petition in bankruptcy, and had also filed a petition in the District Court for the Eastern District of Missouri, describing himself as a citizen of Missouri. *Held*, that the specification of objection did not show that the bankrupt's principal place of business was not in Kentucky, and did not disclose that the bankrupt had been guilty of making false oath, but rather raised the inference that the bankrupt, being in doubt as to which court has jurisdiction, filed two petitions, it was insufficient, and discharge should be granted.

In Bankruptcy. In the matter of the bankruptcy of William A. Greer. On objection by E. W. Avey, creditor, to the bankrupt's petition for discharge. Objections overruled, and discharge granted.

E. T. Bullock, of Clinton, Ky., for creditor.

John R. Evans, of Clinton, Ky., for bankrupt.

WALTER EVANS, District Judge. The voluntary petition in this case was filed September 27, 1917, and the adjudication of bankruptcy was made on October 3d following. The trustee was seasonably elected and put in charge of the bankrupt's estate. On November 5th the bankrupt filed his petition for a discharge, and on December 4th an order was entered, setting it for hearing on January 12, 1918, upon which date all creditors were warned to show cause why the discharge thus

asked should not be granted. On that day E. W. Avey, a creditor, in writing specified a single objection to the discharge. It was in this language:

"The undersigned, E. W. Avey, one of the creditors of W. A. Greer, bankrupt, and who has proven his claim before E. W. Bagby, referee in bankruptcy, in Paducah, Ky., comes and objects to the granting of the discharge in bankruptcy for the following reasons: Because W. A. Greer is not a citizen of the state of Kentucky, and was not at the time of the filing of his petition in bankruptcy, and had not been for six months immediately preceding the filing of said petition, but was a citizen of the state of Missouri, Scott county, and had resided there since 1915, and voted in Scott county, Missouri, at the general election in 1916, listed his property for taxation in 1916 and 1917 in Scott county, Missouri, and further that on the 1st of January, 1918, the said W. A. Greer filed his petition to become a bankrupt in the District Court of the United States for the Eastern District of Missouri, at Cape Girardeau, Mo., where the same is now pending, and in which he declared himself to be a citizen of the state of Missouri. Wherefore E. W. Avey, as creditor of W. A. Greer, objects to the jurisdiction of the District Court of the United States for the Western District of Kentucky to grant to W. A. Greer a discharge from his debts as asked for in the petition for discharge, and which is set for hearing on the 12th day of January, 1918, before your honor."

In his petition for adjudication, which was sworn to and in all respects in proper form, the bankrupt stated:

"That he had his principal place of business, and has resided and has had his domicile for the greater portion of six months next immediately preceding the filing of this petition at Clinton, within said judicial district."

That petition, therefore, on its face clearly showed a case within the jurisdiction of the court under section 2, clause 1, of the act (Act July 1, 1898, c. 541, 30 Stat. 545 [Comp. St. 1916, § 9586]).

[1, 2] It was distinctly held by the Circuit Court of Appeals of this Circuit, in the Case of Ives, 113 Fed. 911, 51 C. C. A. 541, that there is no way open to creditors to contest an adjudication in a voluntary proceeding except as the act gives it. This ruling was followed by this court in the case of R. H. Pennington & Co. (D. C.) 228 Fed. 388, 35 Am. Bankr. Rep. 832, and we suppose, when the adjudication of bankruptcy was made on October 3d, the question of jurisdiction was finally adjudged, subject to allowable appellate proceedings, either by petition for a review under section 24 or appeal under section 25a of the act (Comp. St. 1916, §§ 9608, 9609). We say this because it may be conceivable that within a reasonable time a creditor might show grounds upon which an adjudication might be set aside, if there had been a fraud upon the jurisdiction of the court, and through this means or otherwise it might be that grounds for a review or for an appeal might be made available. Under the rule in *Mueller v. Nugent*, 184 U. S. 1, 14, 22 Sup. Ct. 269, 46 L. Ed. 405, the adjudication is a caveat or notice to all the world, and by that notice, it may be, that creditors, if they can act at all, are given their day in court and afforded the opportunity to make an effort to set aside the adjudication. This course, if available, might require that they should act promptly, as otherwise the title to the bankrupt's assets would have passed to the trustee, and the whole status might have been so radically changed as not to admit of disturbance. Section 70a (Comp. St. 1916, § 9654).

We conclude that the question of jurisdiction has not been raised in time.

[3] Besides, this case has reached the stage where the sole question is whether the bankrupt shall be discharged upon his petition for that relief filed November 5th. Section 14 of the act (Comp. St. 1916, § 9598) regulates and limits the proceedings at this stage, and in express terms requires that the court shall grant the discharge unless, first, the bankrupt had "committed an offense punishable by imprisonment"; or, second, had, with intent to conceal his true financial condition, destroyed or failed to keep books of account, from which knowledge of that condition might be obtained; or, third, had obtained money or property upon credit by a materially false statement in writing; or, fourth, had at a time subsequent to the first day of the four months immediately preceding the filing of the petition, transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors; or, fifth, in a voluntary proceeding, had been granted a discharge within six years; or, sixth, had refused to obey any lawful order made in his case, or to answer material questions approved by the court. Whether he has committed an offense punishable by imprisonment must be determined by the provisions of section 29 of the act (Comp. St. 1916, § 9613), only clause b(2) of which can have any bearing upon the question now before us. So far as applicable that clause is as follows:

"A person shall be punished, by imprisonment * * * upon conviction of the offense of having * * * (2) made a false oath * * * in, or in relation to, any proceeding in bankruptcy."

In his specification of objection the creditor does not in any way state that the bankrupt had been convicted of such offense or had made a false oath to the statement in his petition in bankruptcy regarding his "principal place of business," or regarding his place of "residence" in the state of Kentucky. The creditor only says that the bankrupt was then a "citizen of Missouri," which alone is not material, as he says nothing about the bankrupt's "principal place of business," or his residence, etc., during the preceding six months. Nor does the creditor state that the bankrupt knew or believed his statements to be false, or that they were in any respect made corruptly or fraudulently. We incline to think that, fairly construed, the creditor's objection only shows that the bankrupt might have been in doubt as to what was his principal place of business or residence within the meaning of section 2 of the act, and that he therefore filed two petitions in bankruptcy, so as to be sure that one or the other was within the jurisdiction of the proper court. To be sufficient as an objection to the discharge we think the creditor's specification should have made such statements as, if true, would have shown that the bankrupt had committed an offense punishable by imprisonment by showing a case of willfully making a false oath, for, otherwise, there could not have been any punishment under section 29b. The specification, therefore, fails to show the existence of factors that would have been indispensable in an indictment for making a false oath. *Daniels v. United States*, 196 Fed. 459, 116

C. C. A. 233, 27 Am. Bankr. Rep. 790, *Kovoloff v. United States*, 202 Fed. 475, 120 C. C. A. 605, 28 Am. Bankr. Rep. 767, *United States v. Lake* (D. C.) 129 Fed. 499, 12 Am. Bankr. Rep. 271.

With the exception indicated, no other of the objections specified in section 14 as a bar to a bankrupt's discharge is raised by the creditor now objecting to that relief. The single objection made, besides not being appropriate, under section 14, to the present status of the case, comes too late, inasmuch as the question of jurisdiction must be regarded as *res adjudicata* so far as this mistimed attack upon it goes. Nothing, therefore, is open to the court, except, under section 14, to grant the discharge, and that will be done.

A decree accordingly will be entered.

ATKINSON & CO., Inc., v. ALDRICH-CLISBEE CO.

(District Court, D. Massachusetts. August 9, 1915.)

No. 510.

1. RECEIVERS ⚡91—CHARGES—RENT.

After the expiration of its lease, the lessor of property largely increased the rent as a means of forcing a corporation to vacate. Receivers for the corporation were appointed, and though there was no evidence of appreciation in value of the premises, the landlord claimed the increased rent for the period of the receivers' occupancy. *Held*, that as the amount claimed was more than a fair rental, the receivers should be charged only for an amount corresponding to the rent reserved in the old lease.

2. RECEIVERS ⚡86—CLAIMS—EVIDENCE.

Where a landlord, whose premises had been occupied, while receivers of a corporation continued its business, asserted a claim for damages, but there was no evidence as to what damage had occurred during the receivership and what occurred while the premises were in possession of the corporation prior thereto, the whole item must, as against the receivers, be disallowed.

3. RECEIVERS ⚡196—COMPENSATION—DUTIES.

Receivers are bound to use the utmost care not to contract bills which they may be unable to pay from the property in their hands, and the existence of such bills throws on the receivers a heavy burden to exonerate themselves from personal liability therefor, and a still greater burden to establish a right to compensation for services as receivers; therefore, where receivers at the unanimous request of corporate creditors conducted the business of the corporation knowing that it was being conducted at a loss, they cannot, where the funds in their hands were insufficient even to discharge all of the bills they incurred, be allowed compensation.

4. RECEIVERS ⚡153—OBLIGATIONS OF RECEIVERS—TAXES.

Taxes assessed against a corporation prior to the appointment of receivers are debts due from the corporation and not the receivership, and must be postponed to debts incurred by the receivers.

5. RECEIVERS ⚡154(2)—CLAIMS—COUNSEL FEES.

Where receivers were appointed who took over the property and continued the business of a corporation, no allowance to counsel for legal services rendered the corporation during the receivership proceedings can be made until after the expenses of the receivership have been paid, the claim being a charge against the funds of the corporation instead of against the receivership.

In Equity. Bill by Atkinson & Co., Incorporated, against the Aldrich-Clisbee Company, on which receivers were appointed. On petition by the receivers for a decree fixing their fees and for partial distribution, in which the attorney for the respondent corporation claimed compensation for services and expenses rendered and incurred during receivership. Distribution directed in accordance with memorandum filed.

Stone & Stone, of Boston, Mass., for plaintiff.

Henry B. Roberts, of Boston, Mass., for defendant.

MORTON, District Judge. *As to the rent:*

[1] This was never fixed by order of court, nor by any formal and approved action of the receivers. The amount now charged against them by the landlord, \$30 per day, was originally put to the Aldrich-Clisbee Company as a means of forcing it to vacate. It is plainly more than a fair rental value of the premises. It does not appear that there has been any marked increase in such value since the termination of the lease in September, 1913. At that time the landlord charged \$20 per day. This seems to me the best basis for fixing the amount of rent. I see no reason why the receivers should pay more. The claim of the landlord for rent is to be reduced to \$20 per day for the time which the receivers occupied, viz. 294 days; and the receivership is to be credited with the payments of \$210, and \$4,120, leaving a balance due of \$1,550.

As to the damage to the building:

[2] It is not claimed that this was all done during the receivership. It is said in the brief for the landlord that "a part of the damages for which the very moderate claim is made were done while the premises were in the control of the respondent corporation or its receivers," and again that "the landlord cannot state at what precise time any particular part of the damage was done in the bakeshop." As the only portion of this charge properly payable by the receivers would be the damage done during the receivership, and as that amount cannot be separated, the whole item must be disallowed, as against the receivers.

As to the compensation of the receivers:

[3] The receivers operated the business from January 20, 1914, to November 4, 1914, and incurred during that period bills for materials, rent, insurance, supplies, etc., incident to such operation. None of these bills was specially authorized by order of court; they were contracted under the general authority to continue the business. As I understand the facts, the total amount available for distribution, as of November 4th, is \$10,756.99. The bills against the receivers, as above modified, and without their own claim for services, amount to slightly more than that sum. The receivers request that their compensation be fixed at \$5,000, and that it should be made a preferred claim against the funds in their hands. It is apparent that whatever sum is allowed to them must be paid at the expense, not of creditors of the Aldrich-Clisbee Company, but of creditors of the receivership itself.

Receivers are bound to use the utmost care not to contract bills which they will be unable to pay from the property in their hands. The

existence of such bills throws on the receivers a heavy burden to exonerate themselves from personal liability therefor, and a still greater burden to establish a right to compensation. The court itself has a duty to see that persons who deal properly with its officers get their money. *Gutterson et al. v. Lebanon I. & S. Co. (C. C.)* 151 Fed. 72; 23 Ency. of Law, p. 1096, collecting authorities. See, too, *Atlantic Trust Company v. Chapman*, 208 U. S. 360, 28 Sup. Ct. 406, 52 L. Ed. 528, 13 Ann. Cas. 1155.

In this case, yielding to the unanimous vote of the creditors, the receivers, against their better judgment, continued the business at a loss. There was also a large shrinkage below the inventory on the final sale of the assets, which was unexpected by the receivers, or by the creditors of the Aldrich-Clisbee Company, and which more than accounts for the slight deficiency in the funds on hand to meet the receiver's bills. As between the receivers and the creditors who assented to and urged the course taken, the former would probably be entitled to reasonable compensation. But as between receivers and persons who dealt with them as officers of the court, if under any circumstances compensation would ever be awarded to the former at the expense of the latter, this is not a case of that extraordinary and exceptional character. The operating losses, incurred by the receivers after they knew that the business was losing money, amount to more than the deficiency of assets to meet the receivers' bills. The receivers' request for compensation must therefore be disallowed.

[4] The taxes for 1914, assessed against the property while in the receivers' possession, are to be paid in full for such amount as may be justly due. The taxes assessed prior to the appointment are due from the corporation, not from the receivership. They are postponed to debts incurred by the receivers.

[5] Mr. Roberts' claim for legal services to the respondent in these proceedings is not, it seems to me, a charge of the receivership itself. It is rather a charge against funds of the corporation after the expenses of the receivership for the preservation of those funds have been paid. It must therefore be postponed behind the claims against the receivers.

After payment of taxes for 1914, as above directed, all valid claims against the receivers are to share equally in the distribution of the assets. A decree for distribution in accordance with this memorandum may be presented.

In re SUBPŒNAS DUCES TECUM.

(District Court, E. D. Tennessee, S. D. November 3, 1916.)

1. WITNESSES ⇨16—“SUBPŒNAS”—SUBPŒNAS DUCES TECUM.

Rev. St. § 876 (Comp. St. 1916, § 1487), authorizing subpœnas for witnesses in criminal cases to run into other districts, includes subpœnas duces tecum, as well as the ordinary subpœnas ad testificandum.

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

2. WITNESSES ⇨16—SUBPŒNAS—SUBPŒNAS DUCES TECUM.

While, under Rev. St. §§ 868, 869 (Comp. St. 1916, §§ 1479, 1480), a subpœna duces tecum, commanding witness to produce documents before a commissioner authorized to take testimony under a dedimus potestatem, is only issued upon application to a judge and order to the clerk, that requirement is unnecessary in case of a subpœna duces tecum in criminal proceedings, for it is a common-law writ, which may be issued by the clerk, just as an ordinary subpœna, because, no matter whether the witness is called on to testify in open court or before the grand jury, he may in either case refuse to disclose privileged communications, and disclosure will not be directed, save on order of the court.

In the matter of a request by the clerk of the court as to instructions as to the issuance of subpœna duces tecum in criminal proceedings. Clerk directed to issue same.

SANFORD, District Judge. [1] The clerk has requested instructions from me as to whether he is authorized to issue subpœnas duces tecum to run in this or any other district, requiring the witness to bring documents to be used as evidence in a criminal proceeding.

R. S. § 876 (Comp. St. 1916, § 1487), authorizes subpœnas for witnesses in criminal cases to run into any other district. This includes, in my opinion, subpœnas duces tecum as well as the ordinary subpœnas ad testificandum.

[2] I perceive no reason why the clerk may not issue, as of course, upon proper application, subpœnas duces tecum for witnesses in criminal proceedings to appear and bring documents either before the grand jury or the court, just as he issues, as of course, ordinary witness subpœnas in such causes. The subpœna duces tecum is a recognized common-law writ. In 22 Enc. Plead. & Pract. 1330, it is said:

“Unless the statutes so provide there is generally no necessity for obtaining leave of court to issue a subpœna duces tecum, but in some jurisdictions and under special circumstances it is provided that a subpœna duces tecum can be issued only by the court, after application to it founded on affidavit setting forth the necessity for the production of the documents and after due notice to the adverse party.”

Under R. S. §§ 868 and 869 (Comp. St. 1916, §§ 1479, 1480), a subpœna duces tecum, commanding a witness to produce documents before a commissioner authorized to take testimony under a dedimus potestatem, is only issued upon application to a judge and order to the clerk. And this requirement as to a preliminary order of the court seems to have been frequently followed in equity practice in the Federal courts, where the document is to be produced before an exami-

ner or other officer taking a deposition de bene esse under R. S. § 863 (Comp. St. 1916, § 1472), or under the equity rules. *Simk. Fed. Eq. Suit* (2d Ed.) 552, 553, and cases cited. This rule, in so far as not dependent upon statute, is apparently based upon the practical inconvenience, if not impossibility, of otherwise adequately protecting a witness appearing before such officer from producing and making public privileged matters. Obviously, however, it has no application where the witness is merely required to produce the document before the grand jury or the court itself, since in either case he may claim his privilege when called upon to produce the document before the grand jury or the court, and upon application to the court will be protected in any privilege he may have before being required to make the disclosure sought.

Direct authority is furthermore found, by necessary implication, in *Wilson v. United States*, 221 U. S. 361, 370, 376, 31 Sup. Ct. 538, 540, 542 (55 L. Ed. 771, Ann. Cas. 1912D, 558). In this case a subpoena duces tecum had been issued, apparently as of course, requiring a corporation to produce certain documents before the grand jury. The president of the company having appeared with the documents, declined to permit them to be inspected by the grand jury, and upon application to the court was committed for contempt. Among other objections relied on by him to the sufficiency of the subpoena, as stated in the opinion, was the fact that the subpoena duces tecum "was not issued pursuant to an order of court." The court, after reviewing the several other objections thus interposed, but without referring again to this specific objection, said that "no ground appears upon which the corporation could have resisted the writ"; and again, that it concluded "that the subpoena was valid and that its service imposed upon the corporation the duty of obedience." It must hence be taken as conclusively determined that no preliminary order of the court is essential to the validity of a subpoena duces tecum for a witness required to appear before a grand jury in a criminal proceeding; but that the same may be issued by the clerk, as of course, upon due application. And a fortiori, this is true as to a subpoena duces tecum requiring a witness to produce documents before the court itself.

The clerk is accordingly instructed that he is authorized, on proper application, to issue, as of course, in criminal proceedings subpoenas duces tecum, to run in this or any other district, requiring witnesses to produce documents before the grand jury or the court.

BANK OF COMMERCE & TRUST OF RICHMOND, VA., v. McARTHUR et al.

(District Court, S. D. Florida. January 29, 1918.)

1. COURTS ⇨273—FEDERAL COURTS—JURISDICTION—DISTRICT.

Under Judicial Code (Act March 3, 1911, c. 231) § 52, 36 Stat. 1101 (Comp. St. 1916, § 1034), declaring that, when a state contains more than one district, every suit not of a local nature against a single defendant must be brought in the district where he resides; but, if there are two or more defendants residing in different districts, it may be brought in

either district, a suit against several defendants some of whom resided in the Northern and some in the Southern district of Florida, though not a local suit, may be maintained in the Southern district.

2. COURTS ⇨269—JURISDICTION OF FEDERAL COURTS—ENFORCEMENT OF LIENS.

A creditor cannot, where he was given no lien by contract, justify the maintenance of a suit in district other than that of the debtor's residence, on the ground that it was one to enforce a lien on specific personal property in the district, and within Judicial Code, § 57 (Comp. St. 1916, § 1039), where such creditor had not acquired any lien by levy of execution.

3. COURTS ⇨269—FEDERAL COURTS—JURISDICTION—SUIT TO REMOVE CLOUD ON TITLE.

Judicial Code, § 57, authorizing suits to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance, lien, or cloud upon, title to real and personal property to be begun in the district where the property is located, does not authorize a suit to set aside transfers of personalty by a debtor, and to have the property declared that of the debtor and subjected to the payment of his debts, in the district wherein the property was located, where neither complainant nor the debtor resided therein.

4. COURTS ⇨269—FEDERAL COURTS—JURISDICTION.

A suit, which was not one to enforce a lien or remove a cloud from the title to property, must, where the basis of jurisdiction was diversity of citizenship, be begun, in accordance with Judicial Code, § 51 (Comp. St. 1916, § 1033), either in the district of the residence of complainant or defendant, and cannot be instituted in the district wherein the property of the defendant, the transfer of which was attacked, was located.

5. FRAUDULENT CONVEYANCES ⇨255(1)—SETTING ASIDE—NECESSARY PARTIES.

Though complainant in the courts of North Carolina, in which the debtors reside, recovered a judgment against them, such debtors are necessary parties in a suit in the federal District Court for Florida, wherein transfers of property by the debtors were sought to be set aside, and the property subjected to complainant's demand, for the debtors in that proceeding might question the validity of the debt and the amount.

In Equity. Suit by the Bank of Commerce & Trust Company of Richmond, Va., against Adam McArthur and others. Defendant D. W. McArthur and W. E. Bell moved to quash the subpoena and service, while defendants Wade and Ray moved to dismiss the complaint. Motion to quash subpoena and service denied, and motions to dismiss the complaint granted.

E. J. L'Engle and M. H. Long, both of Jacksonville, Fla., for plaintiff.

H. L. Anderson, of Jacksonville, Fla., and H. M. Hampton, of Ocala, Fla., for defendants.

CALL, District Judge. [1] In this case D. W. McArthur and W. E. Bell entered a special appearance and motion to quash the subpoena and service; they being residents of the Northern district of Florida and the suit pending in the Southern district. Other defendants reside in the Southern district, and, even though the suit was not of a local nature, it might be maintained in this district, under section 52 of the Judicial Code. In addition to this special appearance and motion to quash the subpoena and service, the defendants filed a motion to

quash the subpoena and service without such special appearance. It is a grave question whether this last-mentioned motion does not amount to a general appearance, in the event the motion is denied. I do not think the grounds stated are sufficient to quash the subpoena or the service of same, and these motions will therefore be denied.

Two of the defendants, residents and citizens of this district, move to dismiss the bill on various grounds. The principal are:

First, because the three debtor defendants in the bill are citizens and residents of North Carolina and the complainant a foreign corporation, and the suit is not brought in the district of the residence of either complainant or defendant under section 51 of the Judicial Code.

Second, because the complainant has not commenced suit against the debtor defendants in this district on the debt, nor recovered any judgment therefor.

Third, because the complainant has no lien or title to the property sought to be subjected to the payment of its debt.

[2-4] The bill of complaint in this case seeks to have certain transactions by one of the debtor defendants, claimed to be fraudulent, set aside, and certain of the defendants account for the proceeds; the property sought to be reached being personal property. The bill shows an indebtedness due from three persons, citizens and residents of North Carolina, to the complainant. It shows a judgment in the North Carolina courts in favor of the complainant against these three defendants. It alleges their noncitizenship, nonresidence, and their insolvency. It then proceeds to show certain transactions between one of the three nonresidents with the other defendants, which are claimed to be fraudulent and void against it. The bill prays for a decree ascertaining the indebtedness to it from the three nonresident defendants, and to have these several transactions declared fraudulent and void, and to subject the personal property involved to the payment of such decree.

The first question to be decided is: Is this a local action? If it is, then the provisions of section 51 of the Judicial Code do not apply. If it is a suit to enforce any legal or equitable lien upon, or remove a cloud upon, the title to real or personal property within this district, it is local, and the provisions of section 57 of the Judicial Code apply.

Is this a suit to enforce a lien upon any specific personal property in this district? The only way I know to acquire a lien upon personal property, other than by contract, is by an execution issued upon a judgment and placed in the hands of the sheriff. This admittedly has not been done in this case. Is it a suit to remove a cloud from the title of the personal property involved? The principal object of the suit is to set aside the transfers from the debtor defendant to the other defendants, and have it declared the property of such debtor defendant, and as such subjected to the payment of his debts. In that sense it may be said to be a suit to remove a cloud. But the judicial construction of words "remove a cloud" is that it is a proceeding to remove a cloud on the title of the party bringing the suit. It is in this sense I think the words in section 57 must be understood. It follows, therefore, that this is not a suit of a local nature.

The jurisdiction of this court can therefore be invoked only on the fact of diversity of citizenship, and section 51 of the Judicial Code requires that suit can be brought only in the district of the residence of either the plaintiff or defendant. This brings me to the consideration of the question of whether the debtor defendants, citizens and residents of North Carolina, are necessary parties or only formal parties.

[5] As before stated, the bill prays for a decree against them adjudicating the amount due from them to the complainant. While there may be some diversity of decisions on the question of whether such debtors are necessary parties, in my judgment there can be no question that, when the creditor is a contract creditor with his demand not reduced to judgment, the debtor is such necessary party, without whose presence the court could not enter a decree against him. Nor do I think the fact that a judgment had been obtained in North Carolina against him changes the necessity. He would still in this court be entitled to be heard upon the questions of validity and amount, and for this purpose he is a necessary party. This being true, the North Carolina debtor is a necessary party to this suit, and cannot without his consent be brought into this court for the purpose of entering a personal decree against him.

The resident defendants, Wade and Ray, have moved to dismiss the bill of complaint, and for the reasons given above the motions will be granted. The case of *Hultberg v. Anderson* (C. C.) 170 Fed. 657, does not militate against the views above expressed, for the reason that in that case the complainant had a lien by virtue of the attachment sued out and final judgment entered thereon.

I have not considered the motions to dismiss for want of prosecution, for the reason that the questions involved in the motions passed upon were fully covered in the briefs filed.

UNITED STATES *ex rel.* PASCHER *v.* KINKEAD *et al.*

(District Court, D. New Jersey. March 4, 1918.)

1. ARMY AND NAVY ⇨20—SELECTIVE DRAFT ACT—AUTHORITY OF BOARDS.

Though Selective Draft Act May 18, 1917, c. 15, § 2, 40 Stat. 76, declares that aliens who have not declared their intention to become citizens and alien enemies shall not be drafted into military service and under proclamation of the President, the latter cannot be accepted, though willing; yet, as section 4 gives the local and district boards jurisdiction to hear and determine all questions of exemption and all questions of or claims for including or discharging individuals or classes of individuals from the selective draft, and section 5 requires all male persons within prescribed ages, including nondeclarant and enemy aliens, to register, as well as citizens, the local and district boards have jurisdiction to determine whether a registrant is an enemy alien, not subject to be drafted into military service.

2. CONSTITUTIONAL LAW ⇨80(2)—SEPARATION OF POWERS—AUTHORITY OF EXECUTIVE.

Congress may make decisions of executive departments, or subordinate officials thereof, to whom it has committed the execution of certain acts,

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

final on questions of fact; and the decisions of those officials cannot be reviewed, unless contrary to law or a fair hearing has been denied.

3. ARMY AND NAVY ⚡20—SELECTIVE DRAFT ACT—DECISIONS OF DISTRICT BOARD.

As the Selective Draft Act provides that the decision of district boards on questions of exemption shall be final, save only as the President may see fit to modify or reverse them, the courts cannot disturb a decision of the district board on a question of fact, such as whether a registrant is an enemy alien, not subject to draft, unless a fair hearing has been denied, or there is no evidence to support the determination of the board, in which event it will be deemed contrary to law.

4. ARMY AND NAVY ⚡20—SELECTIVE DRAFT ACT—DECISIONS OF DISTRICT BOARD.

On habeas corpus to obtain discharge from compulsory military service on the ground that relator was an enemy alien, evidence held to support finding by the local and district draft boards that relator, by reason of the naturalization of his father, had become a citizen, and hence the question cannot be reviewed.

5. EVIDENCE ⚡82—PRESUMPTIONS—CORRECTNESS.

There is a presumption that an executive board exercising quasi judicial functions acted according to law.

Habeas Corpus. Application by the United States, on the relation of Max Pascher, for a writ of habeas corpus against Eugene F. Kinkead and others, acting as Local Board for Division No. 1, County of Hudson, State of New Jersey. Writ discharged, and relator remanded to custody of respondents.

William S. Bennet, of New York City, for relator.

Andrew J. Steelman, Asst. U. S. Atty., of Jersey City, N. J., for respondents.

HAIGHT, District Judge. The relator seeks to be discharged from compulsory military service, on the ground that he is a subject of the emperor of Austria, and hence an alien enemy. His claim for exemption on this ground was denied by the local exemption board, and, on appeal, by the district board. As appears by the return to the writ, the decisions of both boards were based on a finding that the relator is a citizen of this country.

[1] It is urged primarily that neither of these boards is vested by the Selective Draft Act of May 18, 1917, with jurisdiction to determine the question as to whether he is a citizen or an alien, and hence that their decisions can have no binding or other effect on this court. The argument to support this contention is that as, under section 2 of the Act, aliens who have not declared their intention of becoming citizens and all alien enemies are not only not subject to be drafted into military service, but, under the regulations promulgated by the President, pursuant to the act, alien enemies may not even be accepted, although they may be willing to serve, and as section 4, which specifies the classes of persons who are exempt or may be discharged from the draft, does not include either alien enemies or nondeclarant aliens, and as local boards and district boards are vested with jurisdiction only "to hear and determine * * * all questions of exemption under this act, and all questions of or claims for including or discharging

individuals or classes of individuals from the selective draft," the boards have no jurisdiction over questions arising in respect to alien enemies or nondeclarant aliens.

With this contention I am unable to agree. While nondeclarant aliens and alien enemies are not subject to be drafted, it is clear that jurisdiction to determine whether any given person is within those classes, and hence not subject to compulsory military service, must reside in some tribunal or officer. The whole scheme of the act is to lodge the decision of all questions respecting liability and nonliability to military service, primarily, in the local and district boards created by the act. Section 5 of the act provides that "all male persons" (this includes nondeclarant and enemy aliens, as well as citizens) between certain ages shall be required to register (*Ruthenberg v. United States*, 245 U. S. 478, 38 Sup. Ct. 168, 62 L. Ed. —), and that "all persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this act provided." The only method provided in the act for exempting or excusing registered persons is through the local and district boards. I think, therefore, that when the provision last above quoted is read in connection with that which confers jurisdiction upon the boards (heretofore quoted), that the conclusion is irresistible that it was the intention of Congress to commit to such boards the determination of whether any person, otherwise liable to military service, is an alien, either nondeclarant or enemy.

Such is the construction which has been given to the act by those charged with its administration, and also by the courts to which the question has in any way been presented. *Angelus v. Sullivan*, 24 Fed. 54, — C. C. A. — (C. C. A. 2d Cir.); *United States ex rel. Koopowitz v. Finley*, 245 Fed. 871 (D. C. S. D. N. Y.); *In re Hutflis*, 245 Fed. 798 (D. C. W. D. N. Y.); *United States ex rel. Troiani v. Heyburn*, 245 Fed. 360 (D. C. E. D. Pa.); *Summertime v. Local Board Div. No. 10*, 248 Fed. 832 (D. C. E. D. Mich.); *United States ex rel. Cubyluck v. Bell*, 248 Fed. 995 (D. C. E. D. N. Y.). I conclude, therefore, that the local board and the district board had jurisdiction to determine whether or not the relator is a subject of the emperor of Austria, as he claims, and hence an alien enemy not subject to be drafted into the military service.

[2, 3] The next question is whether their decision may be reviewed in this proceeding. The act provides that decisions of the district boards shall be "final," save only as the President may see fit to modify or reverse them. I think it may be considered as settled beyond all question that Congress may make the decisions of the executive departments or subordinate officials thereof, to whom it has committed the execution of acts similar in their general nature to this, final on questions of fact which arise in administering such acts; and, when it has done so, the courts may disturb such decisions only when it appears that the party involved has not been afforded a full and fair hearing, or that the executive officers have acted contrary to law, or have manifestly abused the discretion committed to them by the statute. It has been so held in respect to the present act in *Angelus v.*

Sullivan, *supra*; Koopowitz v. Finley, *supra*; In re Hutflis, *supra*; United States ex rel. Troiani v. Heyburn, *supra*; Summertime v. Local Board Div. No. 10, *supra*; Ex parte Beck, 245 Fed. 967 (D. C. Mont.) Such conclusion is the necessary result of a long line of decisions of the United States Supreme Court, some of which are as follows: Nishimura Ekiu v. United States, 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146; Fong Yue Ting v. United States, 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905; Gonzales v. Williams, 192 U. S. 1, 24 Sup. Ct. 171, 48 L. Ed. 317; Chin Yow v. United States, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369; Low Wah Suey v. Backus, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165; Zakomaite v. Wolf, 226 U. S. 272, 33 Sup. Ct. 31, 57 L. Ed. 218; Lewis v. Frick, 233 U. S. 291, 34 Sup. Ct. 488, 58 L. Ed. 967; Gegiow v. Uhl, 239 U. S. 3, 36 Sup. Ct. 2, 60 L. Ed. 114; United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040. The Supreme Court has very recently held that the act in question is not repugnant to the Constitution, because it confers semijudicial powers upon administrative officers. Arver v. United States, 245 U. S. 366, 38 Sup. Ct. 159, 62 L. Ed. —.

It is a necessary outgrowth of the above rule that if, in any given case, there was no evidence before such executive officers upon which they could reach a given conclusion, their decision can be reviewed by the courts, because in such a case they would have acted contrary to law, and, in effect, have denied a fair hearing. And so it has been uniformly held that, if there was any evidence before such officers to justify their conclusion, the courts could not disturb their findings of fact. No question is raised in this case that the relator did not have a fair hearing, in the sense that every opportunity was afforded to him to present evidence in support of his claim. The return of the local board is to the effect that they considered all of the evidence which is now before this court. It is permissible, therefore, to inquire in this proceeding only as to whether there was any evidence before the boards from which they could have found that the relator is a citizen of the United States.

[4, 5] The facts which were before them are these: When the relator registered on June 5, 1917, he stated that he was a naturalized citizen, and on August 16, 1917, presented to the local board a claim for discharge on the ground that his father and mother were dependent upon him for support. He did not then claim exemption on the ground that he is an alien. His claim for discharge was supported by the affidavit of his father, which contained a statement that the relator was then 29 years of age, as did also the relator's own affidavit. This claim was disallowed by both the local and district boards. Subsequently, in October, 1917, on an application to reopen his case, he presented to the local board affidavits of his father and mother to the effect that he had been born in Austria on May 15, 1887, and that his father was naturalized on the 29th of June, 1908. Accompanying the affidavit was a copy (which it must be considered that the boards treated as a true copy) of his father's petition for and certificate of naturalization. In the petition the father set forth that the relator was born on May 15, 1887, and in the certificate of naturalization, his name does

not appear as one of his father's children who was then under 21 years of age. There was presented to the board at the same time a clear argument by the petitioner's attorney, in which the pertinent provision of the Naturalization Act was quoted, to show that the petitioner did not become a citizen through his father's naturalization. Subsequently, in the questionnaire which he was recently required to file, the relator made a claim for exemption on the ground that he is an alien enemy. In this he also stated that he had voted, and had not made any declaration of his intention to become a citizen. It thus appears that the board had before it, as evidence that the relator is a citizen of this country, his own declaration to that effect, the fact that he had voted, as well as one affidavit of his father; and as evidence that he is not a citizen, the statement in the father's petition for naturalization, made nearly ten years before, as to the date of his birth, and the fact that the certificate of naturalization did not contain the petitioner's name as one of his minor children. There was thus presented to the board a primary question of fact as to the relator's age at the time his father was naturalized. If he was then under 21 years of age, he became a citizen of this country by virtue of his father's naturalization; but, if he was then over 21 years of age, he did not. As before stated, there was evidence from which the board could find that he was under 21 years of age when his father was naturalized. I think I must conclude, from the return to the writ, strengthened as it is by the presumption that the board acted according to law, especially in the light of the letter of the relator's attorney to the local board, calling their attention to the law in respect to naturalization of children of aliens, that the boards decided, as a fact, that the relator was under 21 years of age when his father was naturalized. It appears from the questionnaire that the petitioner had never made any declaration of intention to become a citizen, and consequently that he could not have been naturalized in his own right. There being, therefore, some evidence before the boards from which they could find as a fact that the relator was a naturalized citizen, through the naturalization of his father, I am not permitted to weigh the evidence which was before them and determine whether or not their decisions were contrary to the weight of evidence, but am bound by their finding.

Hence it follows that the writ must be discharged, and the relator remanded to the custody of the respondents.

In re AMERICAN CANDY MFG. CO.

(District Court, E. D. New York. February 11, 1918.)

1. BANKRUPTCY — 205 — TRUSTEE — CREDITORS — RIGHTS.

Save in so far as the trustee is given the rights of a judgment creditor as of the date of the filing of the petition, and levies, judgments, attachments, or other lien obtained through legal proceedings within four months of bankruptcy are invalidated by Bankruptcy Act July 1, 1898, c. 541, § 67f, 30 Stat. 564 (Comp. St. 1916, § 9651), the trustee in bankruptcy, and

the creditors through him, obtain no greater rights against those having enforceable liens than the bankrupt would have had in their place.

2. BANKRUPTCY ⚡205—LIENS—PRIORITIES.

If a judgment or other lien has been acquired within four months of bankruptcy, and is vacated, the claim of the trustee is superior to that of any person claiming under some other subsequent transfer or lien, even though the latter be innocent of any intent to obtain a preference, for such claimant would take subject to the lien invalidated by the adjudication in bankruptcy.

3. BANKRUPTCY ⚡188(3)—CONSTRUCTIVE TRUSTS—EQUITABLE LIEN—NATURE OF.

The equitable rights of claimants, as creditors of another corporation whose property the bankrupt acquired, on the theory that it was transferred subject to a trust *ex maleficio*, cannot be treated as a valid lien superior to the right of general creditors of the bankrupt, until by some legal proceeding it has become attached to the property of the bankrupt.

4. BANKRUPTCY ⚡198—LIENS—PRIORITIES.

The bankrupt, with knowledge of its liability for false representations, acquired the property of another corporation. Claimants within four months of bankruptcy recovered judgment against the bankrupt's transferor and execution was returned *nulla bona*. Meantime all of the property of the bankrupt was attached, and the attachment lien was discharged by the bankruptcy proceeding, because perfected within four months of bankruptcy. *Held* that, as claimant's right to follow such property into the hands of the bankrupt after transfer on the theory of a trust *ex maleficio*, was, until perfected by some legal process against the bankrupt and return *nulla bona* of execution against the transferor corporation, inferior to the rights of general creditors of the bankrupt, claimant's lien depending as it did on judicial process had within four months was under Bankruptcy Act, § 67f, discharged by the adjudication.

In Bankruptcy. In the matter of the bankruptcy of the American Candy Manufacturing Company. On exceptions of the trustee to the report of the special master, sustaining the contention of certain claimants to an equitable lien on property in the possession of the bankrupt. Report set aside, and claimants held to be general creditors of the bankrupt.

Merchant, Olena & Merchant, of New York City, for petitioner.
Harry H. Schutte, of Brooklyn, N. Y., for trustee.

CHATFIELD, District Judge. This application presents a close question of law upon an admitted state of facts. Franklin's Incorporated transferred all its assets to the American Candy Manufacturing Company on the 12th day of April, 1915. Each corporation had the same officers, the same directors, and the same stockholders. The American Candy Manufacturing Company had knowledge, therefore, of all equities attaching to the property purchased. In addition, the American Candy Manufacturing Company, by action of its board of directors, agreed to assume all liabilities of the Franklin's Incorporated; but this agreement was not included in the bill of sale and does not in any event enter into the question presented.

It appears that the Franklin's Incorporated had sold so-called gold notes upon fraudulent representations, and soon after the time of transfer to the American Candy Manufacturing Company proceedings

were sought to recover because of the fraud involved in the sale of these gold notes. Other creditors of the Franklin's Incorporated also were seeking to collect therefrom, and these facts were of course known to the same men as officers and directors of the American Candy Manufacturing Company.

It appears from the record that substantially all of the creditors of the American Candy Manufacturing Company, in bankruptcy, were creditors of the Franklin's Incorporated, who have proven their claims in bankruptcy against the American Candy Manufacturing Company as the successor of Franklin's Incorporated, and have acted upon the theory, which was in fact correct, that the American Candy Manufacturing Company and all its property was liable for all claims which had been existing against its predecessor. Of the Franklin's creditors, however, two have refused to make claim against the American Candy Manufacturing Company directly, and have sought to follow the property transferred to it as property of the Franklin's Incorporated, as transferred subject to a trust *ex maleficio* or subject to equitable liens by virtue of judgments and executions issued against Franklin's Incorporated.

Upon the foregoing statement, a short calendar of events may make the position clear:

April 12, 1915. Franklin's Incorporated transferred to American Candy Manufacturing Company.

October 14, 1915. Judgment in Albany county, N. Y., by *Moore v. Franklin's Incorporated*.

October 20, 1915. Judgment docketed in Queens county, where the property of the American Candy Manufacturing Company was located.

October 24, 1915. Execution against Franklin's Incorporated issued to sheriff of Queens county.

November 5, 1915. Judgment against American Candy Manufacturing Company by York Bradford Company, in Supreme Court, Kings county.

November 6, 1915. Judgment docketed in Queens county.

November 9, 1915. Execution issued to sheriff of Queens county against American Candy Manufacturing Company.

November 9, 1915. Attachment in suit by Giles Company *v. American Candy Manufacturing Company* in Queens county levied upon all property of American Candy Manufacturing Company.

November 19, 1915. Petition in bankruptcy filed against American Candy Manufacturing Company, followed on December 2, 1915, by adjudication. Under this a receiver took possession upon December 4, 1915.

January 6, 1916. Trustee in bankruptcy elected.

December 24, 1915. Sheriff of Queens county returned the execution against Franklin's Incorporated *nulla bona*.

On January 1, 1916, a second execution was issued, which was also returned unsatisfied on February 29, 1916, and in the meantime, on January 18, 1916, a petition of the judgment creditor, Moore, was presented to this court, asking that the property in the hands of the receiver, and subsequently the trustee in bankruptcy, be declared her property to the extent of paying the amount of her claim in the sum of \$2,271.12, with interest. A subsequent sale by the trustee has produced a fund for distribution, and Mrs. Moore's and Mrs. Hanrahan's claims, as well as those of the other creditors, are now urged against this fund.

The second creditor, Mrs. Hanrahan, obtained her judgment upon the 14th day of October, 1915, and issued execution to the sheriff of

Queens county against Franklin's Incorporated on November 16, 1915, which, it will be noted, was seven days after the attachment and levy thereunder upon the property of the American Candy Manufacturing Company.

In general, the claim of the two creditors who are seeking the property under their rights through Franklin's Incorporated is based upon the proposition that the trustee and the creditors of the estate stand in the shoes of the bankrupt, that they take the property subject to all equities which were valid as against the bankrupt, up to the time of filing the petition in bankruptcy, and that the amendment of 1910, giving the trustee the position of a judgment lienor, and the provision by which a lien obtained within four months, and voidable in the bankruptcy proceedings, may be preserved for the benefit of the estate, upon the application of the trustee, do not affect Mrs. Moore and Mrs. Hanrahan as prior equitable lienors, and do not give the trustee a superior equity to those obtained by these two judgment creditors of Franklin's Incorporated, through their equitable lien arising from the transfer of the property of Franklin's Incorporated to the American Candy Manufacturing Company, under the circumstances previously stated. It is admitted that these were of such a nature as to impress a trust *ex maleficio* in the hands of any person except a bona fide holder, if bankruptcy had not intervened, and if no superior or prior equity attached.

The trustee contends that Moore and Hanrahan are entitled at most, to equality with those creditors who have presented their claims against the American Candy Manufacturing Company, and that these ladies have no superior lien to that of the trustee. The special master has reported in favor of the claimant's contention, the trustee has excepted, and the present motion comes here upon his exceptions to these reports.

[1] It is well settled that the trustee, as such, and the creditors through him, obtain no greater rights against those having title or liens enforceable in bankruptcy than the bankrupt would have had in their place. In other words, they stand in the shoes of the bankrupt, except in so far as the trustee is given the rights of a judgment creditor, as of the date of filing the petition (section 67f) and in so far as the bankruptcy wipes out their liens. Hence property to which title has not actually passed, or vested in the bankrupt, cannot be added to the bankrupt estate, either by the trustee or the creditors, any more than a sheriff, by levying execution upon the bankrupt's property, could take that of a third party, which happened to be in the bankrupt's possession.

[2] It is also settled that, if a judgment or other lien has been acquired within four months of bankruptcy and is vacated by bankruptcy, the claim of the trustee would be superior to that of any person claiming under some other subsequent transfer or lien, even though the latter be innocent of any intent to obtain a preference. Such a claimant would take subject to any lien which would pass to the trustee in bankruptcy, and which could be preserved by order of the court: Such a claim would still be liable to all the rights of other creditors created by the adjudication in bankruptcy.

[3, 4] It will be immediately noted that the issuance and return unsatisfied of an execution against the original judgment debtor would be a prerequisite of success in an action to set aside the transfer, for there would be no need of such action if the judgment could be paid in any other way from the property of the debtor. But the issuance of the execution or the return unsatisfied would not change the relations between the person claiming the equitable lien, who was seeking to trace the property affected, and the trustee in bankruptcy, who admittedly had the property. In other words, if in the present instance the judgments could have been satisfied from any other property, there would be no claim on the judgment against the bankrupt. But there was no other property of the Franklin's Incorporated, and hence the issuance of execution is merely proof that the two claimants have provable claims in bankruptcy against the American Candy Manufacturing Company.

The question comes down to a proposition upon which both counsel have agreed, viz., which equity was prior, or whether an equity now exists making the two claimants first entitled to the property in the hands of the trustee. A lien otherwise voidable, and which under section 67f may be preserved for the benefit of the estate, must be a lien obtained against the bankrupt. In the present instance, the attachment by the Giles Company upon November 9th, and the judgment of the Bradford Company, with execution issued the same day, would be a superior lien to any other levy or legal lien by which possession of the property of the American Candy Manufacturing Company could have been taken before the filing of the petition in bankruptcy. This would be true, even if the other lien had been that of an execution against the American Candy Manufacturing Company itself, but such subsequent lien would also have been vacated—that is, discharged by the adjudication in bankruptcy; and it is difficult to conceive of a situation where the preservation of the prior lien for the benefit of the estate would be of any advantage, unless it had to do with the possession of the property to defeat claims which had not yet advanced to a point where they could be treated as valid legal liens and subject to execution or attachment.

In the present case all liens created by legal proceedings within four months of bankruptcy were vacated. If the legal lien of the attachment was not vacated, it would be superior, for the protection of the estate against any other legal lien, using that term in distinction from the so-called equitable lien, and it is much superior to the so-called equities of the equitable lien, for otherwise the equitable lien would attach through proceedings at law, but would not be vacated or discharged by the adjudication in bankruptcy.

We come back to the fundamental questions, as to whether the bankrupt's property is subject, in the hands of the trustee, to all equities which would have been enforceable against the bankrupt itself, if bankruptcy had not intervened, and whether those equities are wiped out by the four months provision, in the present case.

As to the first question, it is evident that the equitable rights of the claimants to follow the assets of Franklin's Incorporated could not be treated as a valid levy, superior to the general creditors, until by some

legal proceeding they became attached to the property of the American Candy Manufacturing Company. No such rights were perfected by legal process until within four months of the bankruptcy proceeding, and hence were wiped out as liens by bankruptcy.

The right of the trustee to thus avoid such liens was not increased by his ability to enforce the attachment lien for the benefit of the estate, as he was not pursuing property to which any such lien had attached by actual levy. But the existence of the attachment, which was also wiped out by bankruptcy, shows that the four months period affects the equitable liens as well, for their date of enforcement was established by the date of those legal proceedings; i. e., the issuance of executions or the obtaining of judgments, giving the right to proceed by suit or levy directly against the property of the American Candy Manufacturing Company. These dates were all within the four months period, and the person seeking to acquire superior rights on those dates lost any claim to a preference or priority when bankruptcy intervened.

This is not a case of following a specific res subject to an admitted lien. It is rather a determination of the extent or effect of one lien as against others, all of which are traced to the general fund.

The report must be set aside, and the claimants held to be general creditors of the American Candy Manufacturing Company.

UNITED STATES v. HALL.

(District Court, D. Montana. January 27, 1918.)

No. 597.

1. WAR ⚡4—SEDITION—OFFENSES—"FALSE REPORTS"—"FALSE STATEMENTS."

Under Espionage Act June 15, 1917, c. 30, § 3, 40 Stat. 219, declaring that whoever, when the United States is at war, shall willfully make or convey false reports or false statements, with intent to interfere with the operation or success of the military or naval forces of the United States, shall be punished, false reports and false statements import reports and statements of facts, and not accused's beliefs, intentions, and arguments; but slanders of the President and of the nation are false reports and statements within the act.

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

2. WAR ⚡4—SEDITION—OFFENSES—"ATTEMPT."

The oral utterance of false statements and reports concerning the cause of war, together with slanders of the President and nation, in the presence of persons registered for the draft, is not, where there were no military forces in the vicinity, a violation of Espionage Act, § 3, declaring that whoever, when the United States is at war, shall willfully make or convey false reports or false statements, with intent to interfere with the operation or success of the military or naval forces of the United States or promote the success of its enemies, and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination or disloyalty in the military or naval forces shall be punished, the statements not being calculated to cause disloyalty in the military forces; for, while the statute makes the offense substantive, and intent can be inferred from the natural consequences of one's act,

the offense is not consummated where the means adopted were not calculated to have the effect desired, the offenses denounced being analogous to attempts which are efforts with specific intent to commit specific crimes.

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

3. WAR ⚡—4—SEDITION—ESPIONAGE ACT—“MILITARY AND NAVAL FORCES”—“NAVAL FORCES.”

Within Espionage Act, § 3, the term “military and naval forces” is used in its ordinary significance, as including only those organized and in service, and not persons merely registered and subject to future organization and service.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Military Forces; Naval Forces.]

4. WAR ⚡—4—SEDITION—OFFENSES.

Espionage Act, § 3, declaring that whoever shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished, does not denounce a mere attempt to obstruct; this being shown by the fact that Congress, when intending that a mere attempt should be a crime, plainly so declared, as in Penal Code (Act March 4, 1909, c. 321) § 135, 35 Stat. 1113 (Comp. St. 1916, § 10305), relating to attempts to obstruct the due administration of justice.

5. WAR ⚡—4—SEDITION—ESPIONAGE ACT.

Espionage Act, § 3, denouncing the willful circulation of false reports or false statements with intent to interfere with the operation or success of the military forces of the United States, is not intended to suppress criticism or denunciation, truth or slander, argument or loose talk, but only false facts willfully put forward as true, and with the specific intent to interfere with army and navy operations, and mere slanderous or disloyal remarks furnish no basis for a prosecution.

6. CRIMINAL LAW ⚡—95—OFFENSES—JURISDICTION OF STATE COURTS.

In so far as disloyal slanders or libels cause or tend to cause breaches of the peace, they are offenses against the state, and can be prosecuted only in the state courts.

Ves Hall was indicted for violation of Espionage Act, § 3. On motion for directed verdict of acquittal. Motion granted.

B. K. Wheeler, U. S. Atty., of Butte, Mont., Homer G. Murphy, Asst. U. S. Atty., of Helena, Mont., and James H. Baldwin, Asst. U. S. Atty., of Butte, Mont.

Dan T. Malloy and Matt F. Canning, both of Butte, Mont., for defendant.

BOURQUIN, District Judge. On yesterday, granting defendant's motion for a directed verdict, the court stated that, because of the grave issues involved and the necessity for interpretation of the Espionage Act, to the end that a precedent be established, it would incorporate its reasons and views in a written decision and opinion, made a part of the records of the case and of the court. It accordingly does so as follows:

The indictment charges that defendant violated section 3 of the Espionage Act, in that (1) he did “make and convey false reports and false statements with intent to interfere with the operation and success of the military and naval forces of the United States and to promote

the success of its enemies"; and (2) that he did "cause and attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States, and obstruct the recruiting and enlistment service of the United States, to the injury of the service of the United States," specifically as follows: At divers times, in the presence of sundry persons, some of whom had registered for the draft, defendant declared that he would flee to avoid going to the war, that Germany would whip the United States, and he hoped so, that the President was a Wall Street tool, using the United States forces in the war because he was a British tool, that the President was the crookedest — ever President, that he was the richest man in the United States, that the President brought us into the war by British dictation, that Germany had right to sink ships and kill Americans without warning, and that the United States was only fighting for Wall Street millionaires and to protect Morgan's interests in England.

Having in mind the rule applicable to this motion for a directed verdict, the evidence would justify a finding that defendant did so make the declarations charged. But it would not support a verdict of guilty of any of the crimes charged. It appears the declarations were made at a Montana village of some 60 people, 60 miles from the railway, and none of the armies or navies within hundreds of miles, so far as appears. The declarations were oral; some in badinage with the landlady in a hotel kitchen; some at a picnic; some on the street; some in hot and furious saloon argument.

[1-3] Adverting to the crimes designated (1), false reports and false statements import reports and statements of facts, and not accused's opinions, beliefs, intentions, and arguments. Hence defendant's beliefs, opinions, and hopes are not within the statute. But his slanders of the President and nation are false reports and false statements, and are within the Espionage Act. While the act makes the (1) offenses substantive, they are of the nature of attempts, like in principle, and largely and to the extent indicated governed by the law of attempts. It is settled law that attempts are efforts with specific intent to commit specific crimes, which efforts fail, are apparently adapted to accomplish the intended crimes, and are of sufficient magnitude and proximity to the object of their operation that they are reasonably calculated to excite public fear and alarm that such efforts will accomplish the specific crimes if they do not fail. These slanders by defendant satisfy magnitude and apparent adaptation, but, in view of all the facts and circumstances in proof, neither the specific intent to interfere with, nor proximity to, the military and naval forces appears.

When facts and circumstances will justify a finding that accused intended the natural and ordinary consequences of his acts, the intent may be inferred. There are two fatal objections to such inference here, viz.: Interference with the operation or success of the military or naval forces is not the natural and ordinary consequences of said slanders, but rather breach of the peace and a broken head for the slanderer are, and the facts and circumstances, times and places, oral kitchen gossip and saloon debate, the impossibility of far-distant military and naval forces hearing or being affected by the slanders, and

all else, render the inference unjustified, absurd, and without support in the evidence. Military and naval forces, in the Espionage Act, mean the same as in the declarations of war, the ordinary meaning, viz. those organized and in service, not persons merely registered and subject to future organization and service. Furthermore, even if the slanders were with the specific intent denounced by the Espionage Act, they fail of the required proximity to constitute attempts and the said (1) offenses. Under the circumstances they were not reasonably calculated to create public fear and alarm that they would interfere with the operation and success of far-distant armies and navy. Rather would they create anger, disgust, and desire to punish the slanderer. It is as if A. shot with a .22 pistol with intent to kill B., two or three miles away. The impossibility would prevent public fear and alarm of homicide, and A. could not be convicted of attempted murder.

There is now no claim of intent to promote enemy success. Otherwise, the foregoing also applies to those crimes charged. It is admitted no insubordination, disloyalty, mutiny, or refusal of duty by the military or naval forces was caused by the slanders, and, in view of the law and reasoning aforesaid, the charges of attempts thereto likewise are not sustained by the evidence.

[4] Nor does the evidence sustain the charge of "willfully obstructing the recruiting or enlistment service of the United States, to the injury of the service of the United States." To sustain the charge, actual obstruction and injury must be proven, not mere attempts to obstruct. The Espionage Act does not create the crime of attempting to obstruct, but only the crime of actual obstruction, and when causing injury to the service. Whenever Congress intended that attempted obstructions should be a crime, it plainly said so, as may be seen in the statute making it a crime to attempt to obstruct the due administration of justice. Section 135, Penal Code.

[5] The Espionage Act is not intended to suppress criticism or denunciation, truth or slander, oratory or gossip, argument or loose talk, but only false facts, willfully put forward as true, and broadly, with the specific intent to interfere with army or navy operations. The more or less public impression that for any slanderous or disloyal remark the utterer can be prosecuted by the United States is a mistake. The United States can prosecute only for acts that Congress has denounced as crimes. Congress has not denounced as crimes any mere disloyal utterances, nor any slander or libel of the President or any other officer of the United States.

United States attorneys throughout the country have been unjustly criticized because they do not prosecute where they cannot. In instances their proper failure to prosecute has been made subject of complaint to the Department of Justice to oust them or to defeat re-appointment. The patriotism that inspires such criticism and complaints is less a passion than passionate. In the main, the government's attorneys are of good judgment, and will not be coerced by such criticism and complaints to futile prosecutions or persecutions.

[6] In so far as disloyal slanders or libels cause or tend to cause breaches of the peace, they are offenses against the state of Montana,

and can be prosecuted only in the courts of the state, by the state's prosecutors. Slanders like those herein are unspeakable. (Incidentally, the defendant denies them.) They should be made crimes against the United States, at times like these, at least. But, since the sedition law had its share in the overthrow of the Federalists and in the elevation of Jefferson to the Presidency and his party to power, Congress has not ventured to denounce as crimes slanders and libels of government and its officers. The genius of democracy and the spirit of our people and times seem yet unable to avoid greater evils than benefits from laws to that end.

Any attempt to define all that will or will not constitute the crimes denounced by said section 3 would be difficult—yes, impossible. Every case will depend on its own facts and circumstances, as various as human conduct.

The motion to direct a verdict of acquittal of defendant is granted, and the clerk will enter such a verdict of record.

STARK BROS. NURSERIES & ORCHARDS CO. v. STARK et al.

(District Court, W. D. Missouri, S. W. D. January 30, 1918.)

No. 18.

1. TRADE-MARKS AND TRADE-NAMES ⚡20—REGISTRATION OF TRADE-MARK.

Where a corporation, long engaged in the nursery business, registered under Act Feb. 20, 1905, c. 592, 33 Stat. 724, its trade-mark, previously adopted, consisting of the words "Stark Trees," the first word being superimposed upon the latter in a striking manner, such trade-mark is valid, and entitled to protection under the statute.

2. TRADE-MARKS AND TRADE-NAMES ⚡59(4)—PROTECTION—SCOPE.

Where complainant registered a trade-mark, consisting of the words "Stark Trees," the former being superimposed on the latter, and defendants sold trees under the label "William P. Stark Nurseries" in which the word "Stark" appeared on the dark background of a fruit tree, defendants were guilty of an infringement of the trade-mark; the protection extending not merely to the precise manner in which complainant used it on its label.

3. TRADE-MARKS AND TRADE-NAMES ⚡65—VIOLATION—DEFENSES.

Where it was the custom of complainant to brand its trade-mark on boxes or packages containing trees, and not on the trees themselves, defendants, who infringed complainant's trade-mark and followed the same practice, cannot defeat relief on the ground that the deception would not occur until after the purchaser had received the goods, for the purchaser at all events has the right to verify the source of the articles purchased, and it was an infringement for defendant to use a trade-mark which would convey to the mind of the purchaser the impression that he was acquiring trees from complainant.

4. TRADE-MARKS AND TRADE-NAMES ⚡97—INFRINGEMENT—UNFAIR COMPETITION.

Defendants, though they bore the name "Stark," which was part of the corporate name of complainant, which had long been established in the nursery business, while entitled to do business under their own name, will be enjoined from using an infringing trade-mark, or the word "Stark," on their labels, save in such a manner as would not indicate to the trade that their goods were those of complainant, or that they were complainant's successors.

5. COURTS 292—FEDERAL COURTS—JURISDICTION—TRADE-MARKS.

Where complainant's trade-mark, registered under the act of 1905, was valid and had been infringed, the federal court has jurisdiction of a suit to enjoin defendant's infringement of its trade-mark, as well as unfair competition in connection with the infringement, notwithstanding defendants and complainant were both citizens of the same state.

In Equity. Bill by the Stark Bros. Nurseries & Orchards Company against William P. Stark and William H. Stark, trustees, doing business under the name and style of William P. Stark Nurseries. Decree for complainant.

John W. Matson, of Louisiana, Mo., and Andrew B. Remick, of St. Louis, Mo., for plaintiff.

Wilfley, McIntyre & Nardin, of St. Louis, Mo., and Pearson & Pearson, of Louisiana, Mo., for defendants.

VAN VALKENBURGH, District Judge. The complainant is a nursery corporation of long standing, located at Louisiana, Mo. It and its predecessors have been engaged in this business for approximately a century. It and its products have been widely known for many years and enjoy a national reputation. About 35 years ago it adopted the words "Stark Trees" as its trade-mark, and all its shipments have long been marked by a label in which the word "Stark" is superimposed upon the word "Trees" in striking and characteristic arrangement. June 24, 1913, this mark was duly registered under the 10-year clause of the act of 1905.

Defendant William P. Stark is one of the Stark brothers, and was for many years and still is a stockholder in the plaintiff corporation; and the defendant William H. Stark, son of William P. Stark, was formerly in the employ of the plaintiff, severing his connection therewith in April, 1912. Shortly thereafter, defendants formed the William Stark Nurseries, operated at first at Louisiana, Mo., and later under the present name, and at present, at Neosho, Mo. Defendants adopted a label, exploited in their catalogues and also attached to nursery and orchard stock shipped to purchasers, containing the following words:



On this label the word "Stark" appears prominently in white letters upon the dark background of a fruit tree; the balance of the label being printed in black letters. In this manner the word "Stark" is given special emphasis, and from its position the term "Stark Trees" is vividly suggested. Complainant brings its bill to enjoin this alleged infringement of its trade-mark, and prays an injunction, damages, and accounting for profits therefor, and also for unfairness in trade incidental thereto. Inasmuch as both plaintiff and defendants are citizens and residents of this state, the charge of unfair trade can be

sustained, if at all, only through the jurisdiction acquired by reason of the technical trade-mark involved.

[1, 2] That the plaintiff's trade-mark is a valid and subsisting one under the act of 1905 admits of no debate. Complainant had the right to register it, and, having registered it, is entitled to its protection as a valid trade-mark under the statute. *Thaddeus Davids Co. v. Davids Mfg. Co.*, 233 U. S. 461, 34 Sup. Ct. 648, 58 L. Ed. 1046, Ann. Cas. 1915B, 322; *Rossman v. Garnier* (C. C. A.) 211 Fed. 403, 128 C. C. A. 73; *Schueler et al. v. Manitou Springs Mineral Water Co.* (C. C. A.) 239 Fed. 593-602, 152 C. C. A. 427. Nor is that protection limited to its use when standing alone and the precise manner in which complainant has used it on its label. As said by Mr. Justice Hughes in *Davids v. Davids*, supra:

"The statutory right cannot be so narrowly limited. Not only exact reproduction, but a 'colorable imitation,' is within the statute; otherwise, the trade-mark would be of little avail, as by shrewd simulation it could be appropriated with impunity."

It is equally apparent that the defendants' device falls within this prohibited category and constitutes a palpable infringement. The substitution of the drawing of a tree for the written word is so obvious in the connection in which the marks are used as to afford little room for hesitation; nor does writing "William P." before the surname "Stark" legitimize the unwarranted appropriation, any more than the initials "C. I." before the word "Davids" were effectual in the case before the Supreme Court. There the name "Davids," as a label for ink, was the important word which had acquired a secondary meaning subsequently ripened into the technical trade-mark. Here the name "Stark," in connection with fruit trees, is the term which stamps the origin and ownership of the product. The case at bar differs radically from that of *Pittsburgh Crushed-Steel Co. v. Diamond Steel Co.* (C. C.) 85 Fed. 637, and same case under title *Kann v. Diamond Steel Co.* (C. C. A.) 89 Fed. 706, 32 C. C. A. 324, both as to the similarity of the respective marks, the circumstances of their respective use, and the element of confusion which, by this record, is shown to have been created.

[3] It is urged by defendants that the purchasers from complainant and defendants alike do not buy upon the faith of this trade-mark, and do not see it, if at all, until the trees have been shipped and reach their destination; that then the mark is found attached to the box or package containing the trees, and not to the trees themselves. This defense is unsound. Given a valid trade-mark, its use by another than the owner cannot be excused upon the ground that the purchaser in any case did not happen to see it and rely upon it prior to the initial act of purchase. He has the right to verify the desired origin of his goods by examination upon receipt. Complainant affixes its mark to its goods, or to the packages containing the same, as it said it would do in its statement to the Patent Office upon which that mark was registered, and it is a like use by any other than the owner that the law of trade-marks prohibits, irrespective of who may or may not make ocular examination thereof. In *Moet v. Pickering*, 6 Ch. Div. 770, Jus-

tice Sir Edward Fry sustained a charge of infringement and granted an accounting where the mark was branded on the cork of a champagne bottle, and could not be seen until the cork was drawn. There the same contention was made, and at first challenged the attention of the Justice, who said:

"How can a brand which is not visible till the cork is drawn be the subject of protection as a trade-mark? The spurious brand cannot be the means of inducing any one to purchase the defendant's wine, as the purchaser would not see it until after he had made the purchase."

Nevertheless, upon mature consideration, he had no difficulty in sustaining the mark and granting the relief prayed. Since this controversy arose, defendants have discontinued the exploitation of the mark in their catalogues and claim to have abandoned the use of the label in shipments. There is some evidence, however, that the shipping label has been employed since the period of such claimed abandonment.

[4] There can be no doubt that the defendants, for some time prior to the dates on which they severed their active connection with the complainant company, were exploiting their individual names and personalities through the literature of the complainant corporation and otherwise, and were engaging in other activities with a view to setting up a competitive business and of appropriating a portion of the prestige which had been acquired and which was being enjoyed by complainant. Since the establishment of defendants' business, their literature has pointedly aimed at such appropriation of the high reputation of the Stark name in connection with nursery products in Missouri—a reputation acquired by and identified with the complainant in this case. This statement, as well as the ruling of the court upon the issue of technical trade-mark, is supported and confirmed by the language of defendants themselves, taken from their catalogues and advertising matter:

"The name of 'Stark' has for nearly a century been associated with the nursery business of America, and for the last quarter of a century William P. Stark has made the name a sort of a trade-mark for big things in the nursery world. Now, with William P. Stark's great name and lifelong experience to direct affairs, and William H. to assist, the William P. Stark Nurseries are in a better position than ever to continue and broaden the Stark Nursery business in Missouri at their Stark City plant."

This statement was published while the nurseries of the defendants were newly established and comparatively in their infancy.

Again:

"Four generations of William Stark nurserymen. The commission men of South Water street looked sideways when William P. Stark commenced over 10 years ago to tell us of Delicious, Stayman, Winesap, Black Ben, Liveland Raspberry, and others.

"William P. Stark certainly knows what varieties for the commercial grower to plant, and what not to plant. Of course, the Starks have been doing just this sort of thing for 90 years or more, so it is no new thing to have the trade come around and back up Stark's judgment, as they have in the case of Delicious, Stayman, and others.

"William P. Stark is a real nurseryman and fruit grower. He doesn't pretend to be anything else. Of the four generations of William Starks, three are living to-day, and there was still another generation of Starks before the first William Stark engaged in horticultural work."

For a number of years prior to the inception of defendants' enterprise, the Delicious apple had become widely known as a fruit of very superior excellence. It had practically been discovered and the control of its propagation had been secured by the complainant company, by which it had been placed before the public, and under whose auspices its high reputation was builded and established. So close is the relationship between this fruit and its producer that this apple is rarely, if ever, spoken of other than as "Stark's Delicious." Defendants in their literature, after dealing with the origin of this fruit in an Iowa tree, in connection with which no credit is given to complainant, say:

"Two or three years after this two barrels were shipped to William P. Stark, who was ever on the lookout for something meritorious, and, immediately recognizing their superiority, commenced negotiations for their propagation. Only for William P. Stark, the Delicious apple might never have been known. It was William P. Stark who came to the rescue, saved the apple, and gave it to the pomological world."

"William P. Stark was the first to recognize the merits of this great apple. He named it 'The Delicious' and had the foresight and courage to propagate it and to urge growers to plant it."

While it may not now be true that any single nurseryman may claim the exclusive privilege of propagating and exploiting this apple upon the market, nevertheless, read in connection with the known history thereof, the language quoted is obviously intended and calculated to confuse the public respecting the identity of these rival nurseries. William P. Stark claims to have been the representative of complainant, through whom this fruit was originally acquired. This is denied by complainant. He further claims to have named the fruit because of its flavor and the impression made upon him when he first tasted it. It is undoubtedly true that at that time this defendant was one of the active members and an officer of the complainant corporation. His position is that he is a Stark, and that he was actively engaged in the operations which built the reputation of the Stark name in the nursery business. Conceding all this to be true, nevertheless it cannot be denied that whatever he may have accomplished in this regard was as a representative of the complainant corporation, in its name, and for its benefit, as one of others of that family and corporation similarly engaged. He cannot now draw to himself individual credit therefor, to the extent of invading the property rights of complainant, and of substituting himself for complainant, to the confusion of the public. He may not be denied the legitimate use of his name in business. He should observe the tests laid down by Judge Amidon in *Stix, Baer & Fuller Dry Goods Co. et al. v. American Piano Co.* (C. C. A.) 211 Fed. 271, 127 C. C. A. 639:

(1) "He may not affirmatively do anything to cause the public to believe that his article is made by the first manufacturer."

(2) "He must exercise reasonable care to prevent the public from so believing."

(3) "He must exercise reasonable care to prevent the public from believing that he is the successor in business of the first manufacturer."

The defendants' warnings to the public, to wit:

"We have heard of a man in your community who claims to be our agent. He is a fake.

"Look out for agents claiming to represent us. They are frauds.

"No connection with any other concern.

"The William P. Stark Nurseries is not connected or related in any way with any other nursery with similar name"

—so far from absolving defendants from the charge of unwarranted encroachment, in point of fact, under the circumstances revealed by this record, really invite the public to regard the defendants as the original Starks, and all others of similar name as interlopers in the nursery business in Missouri.

As further evidencing the efforts of defendants to avail themselves of the established reputation of the Stark name in the nursery world, it should be noted that, for some years prior to the establishment of the William P. Stark Nurseries, the complainant company had widely featured in its advertisements the addresses "Stark, Missouri," "Starkdale, Missouri," and "Stark Station, Missouri." The defendants, after leaving Louisiana, located their offices at a small town named Chester. Thereafter the name of this town was changed to Stark City, and within a short time defendants moved their offices to Neosho, Mo., where they are now located, and where their packing house is maintained. Stark City has been practically, if not entirely, abandoned, and yet, upon the infringing label the address "Stark City, Missouri," appears.

It is urged by counsel for defendants that complainant never maintained an office at Stark or Starkdale, Mo., and that neither these names nor that of Stark Station have any concrete connection with complainant's business. That, however, is not the point involved in this controversy. Those names were used in advertising to distinguish and localize complainant's business. The adoption of so similar a name as Stark City by defendants was obviously intended to introduce another element of confusion in the public mind. Counsel say in their brief:

"This name was changed by the Post Office Department upon the petition of the citizens of Chester, which was a little town on a new railroad that had been in existence only a short time."

It is true that a petition of citizens was lodged with the Post Office Department; but it was transmitted for that purpose by the defendant William H. Stark. The testimony of the defendants with respect to this incident was most unsatisfactory, and it was apparent to the court that the change of name was brought about at their instance and for the purpose charged in the bill.

The court has no doubt that the defendant William P. Stark is a nurseryman of experience and ability. It has no disposition to deny to him the proper use of his name in his business; but he should use it with such limitations as the circumstances and conditions presented by this record demand. The decision of the Supreme Court in the Davids Case seems peculiarly applicable here. On this point the opinion says:

"It is not necessary that, in exercising the right to use their own name in trade, they should imitate the mark which the complainant used, and was entitled to use under the statute, as a designation of its wares, or that they

should use the name in question upon their labels without unmistakably differentiating their goods from those which the complainant manufactured and sold."

[5] The complainant's trade-mark having been found valid, this court has jurisdiction of the parties and of the subject-matter, for the purpose of enjoining, not only the infringing of that trade-mark, but also all wrongful acts in the nature of unfair trade done in connection with the infringement which augment and aggravate the wrong. *Jacoway v. Young* (C. C. A.) 228 Fed. 630, 143 C. C. A. 87. The defendants will be enjoined from the use of the infringing label charged, or any colorable imitation of complainant's trade-mark in suit, from using the name "Stark City" upon its labels or tags attached to nursery stock, or packages containing the same, and from putting the word "Stark" prominently at the top of its labels, or elsewhere in connection with the business of producing and selling nursery stock, in such manner as will not unmistakably differentiate their goods from those which the complainant produces and sells.

Defendants will be required to account to complainant for damages sustained and for profits accruing during the period within which complainant's trade-mark is shown to have been infringed. A decree may be prepared accordingly.

CHAPMAN v. HUNT.

In re SYRACUSE CANDY WORKS, Inc.

(District Court, N. D. New York. January 24, 1918.)

1. BANKRUPTCY ⇨159—PREFERENCES—"CREDITORS"—WHO ARE.
A surety or indorser for a bankrupt is a "creditor," within the meaning of Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 544.
2. BANKRUPTCY ⇨166(1)—PREFERENCE—RECEIPT OF PREFERENCE.
Where an indorser or surety on the note of a bankrupt, within four months of bankruptcy, knowing of the bankrupt's insolvency, induces him to pay the note, with the intent of escaping liability and thus obtaining a preference over other creditors of the same class, such surety or indorser receives a preference, which may be recovered by the trustee in bankruptcy.
3. BANKRUPTCY ⇨175—PREFERENCES—FRAUDULENT TRANSFER.
A transaction by a bankrupt may be invalid, both as a preference and as a fraudulent transfer, to hinder, delay, or defraud creditors.
4. BANKRUPTCY ⇨166(1)—PREFERENCES—WHAT ARE.
Defendant, the president and one of the directors of a corporation, sold his stock and resigned his offices. At that time he was an indorser of certain notes of the corporation. To protect him on his contingent liability the corporation assigned to him certain accounts; the agreement allowing the corporation to collect the accounts and substitute others. This plan was continued for over a year, at which time defendant, ascertaining that the corporation was in financial difficulties, induced its manager to cease operations, curtail expenses, and turn in the book accounts to him as fast as they were collected. Shortly thereafter defendant advanced the corporation a sum of money, which with a small portion of its own funds was used in discharging notes on which defendant was contingently liable. As part of the same transaction the corporation executed in favor of defendant a note for the sum advanced and deposited

new accounts as security. At this time defendant knew of the corporation's insolvency, and his intention was, not to assist the corporation to continue business, but to save himself. *Held*, that the second assignment of accounts, which occurred within four months of bankruptcy, was subject to attack by the trustee as preferential; defendant by that means obtaining a preference over other creditors, and the transaction not being an independent one, which could be sustained as a purchase of the accounts or loan to the corporation.

5. BANKRUPTCY ⇨175—TRANSFERS TO HINDER, DELAY, AND DEFRAUD.

In such case, as the transfer would necessarily deprive other creditors of the benefit to be secured by the Bankruptcy Act, it was invalid, as one to hinder, delay, and defraud creditors.

6. BANKRUPTCY ⇨188(3)—TRANSFERS SUBJECT TO ATTACK—EQUITABLE LIEN.

In such case, defendant is not entitled to an equitable lien for, or to offset against, the recovery on account of the preferential and fraudulent transfer of sums collected, and which he allowed to be used for running the business of the bankrupt, and payment of rent, etc.

7. BANKRUPTCY ⇨95—REFERENCE—COMPLICATED ACCOUNTS.

Where a bankrupt's last assignment of accounts was preferential, and the transaction was very complicated, the accounts should be submitted to a special master, to determine the disposition and state the same.

8. BANKRUPTCY ⇨175—PREFERENCES—WHAT ARE.

Where defendant, the president and director of a corporation, sold his stock and resigned, and to protect him from his contingent liability as indorser of corporate notes, the corporation assigned to him accounts due, the agreement allowing the corporation to collect such accounts and substitute others, such agreement, defendant having collected and reduced some of the accounts to possession, is not, the corporation thereafter becoming a bankrupt, subject to attack; it appearing that when it was entered into the corporation was solvent, and there was no intention to prefer defendant or to hinder, delay, and defraud creditors.

9. BANKRUPTCY ⇨188(3)—EQUITABLE LIENS—RIGHT TO.

In such case, where defendant, on discovering that the bankrupt was in financial difficulties, advanced funds to enable it to discharge the notes on which he was contingently liable as indorser, and the sum advanced was commingled with the general property of the corporation, although the notes were discharged, defendant is not, the whole transaction having been in fraud of creditors, entitled to any equitable lien on account of the amount advanced.

In Equity. Suit by George D. Chapman, as trustee in bankruptcy of the Syracuse Candy Works, Incorporated, against Edward A. Hunt. Finding for plaintiff, and cause directed submitted to special master to state accounts, with decree to be entered on the master's report.

The action is in equity to recover of the defendant certain money alleged to have been received by him of the bankrupt as a preference, and also in fraud of the creditors of said bankrupt, and also to determine title and right to certain money in the hands of the said trustee in bankruptcy, and in a certain deposit known as "Partial Payment Account" claimed by defendant to belong to him. The case is submitted on two stipulations as to the facts accompanied by the voluminous exhibits in the case.

Lee & Brewster, of Syracuse, N. Y., for plaintiff.

Levi S. Chapman, of Syracuse, N. Y., for defendant.

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

RAY, District Judge. June 5, 1916, the Syracuse Candy Works, a New York corporation having its place of business at Syracuse, N. Y., where it was engaged in the business of manufacturing and selling candy, was duly adjudicated a bankrupt, and George D. Chapman was thereafter in due course appointed trustee of the bankrupt's estate and duly qualified as such. The petition was filed May 13, 1916.

The Syracuse Candy Works, which for brevity may be called Candy Works, was incorporated in 1912. The defendant, Edward A. Hunt, was one of the incorporators, and acted as president and one of the directors thereof until January, 1915, when he sold his stock and resigned as president and director. At the time of such resignation by Hunt he was indorser on certain promissory notes of the Candy Works, held by the City Bank of Syracuse, N. Y., aggregating in amount \$9,900. Hunt was contingently liable thereon for the full amount thereof because of such indorsements.

On the 13th day of January, 1915, an agreement was made between the said Candy Works and said Hunt, of which the following is a copy:

"For value received, we, the undersigned, Syracuse Candy Works, Inc., a domestic manufacturing corporation, having its principal place of business in the city of Syracuse, N. Y., does hereby sell, assign and transfer and set over unto Edward A. Hunt, of the city of Syracuse aforesaid, the accounts owned by this corporation against the persons, firms and corporations set forth in the annexed schedule and for the amounts set opposite the name of each. And we do hereby give unto the said Edward A. Hunt full power and authority to collect and enforce the same and for that purpose to take any steps that we might take had this assignment not been made.

"The purpose of this agreement is to secure the said Edward A. Hunt by reason of his indorsement of certain notes of said corporation at the City Bank of Syracuse, and this assignment shall remain as continuing collateral security for the protection of the said Edward A. Hunt on account of such indorsement and on account of any further indorsements he may make on any of the notes of said company or any renewals thereof in whole or in part. It is further agreed, on the part of said Edward A. Hunt and on the part of said Syracuse Candy Works, Inc., that Miss Thelma Smith, who is now the treasurer of said corporation, shall act as the representative of the said Edward A. Hunt in receiving and collecting said accounts, and that she may turn over to said company the proceeds of any account collected by her, by assigning to said Edward A. Hunt an equal amount, or as near an equal amount as practicable, of new and good accounts in favor of the said Syracuse Candy Works, Inc., so that there shall always be and remain in the name of said Edward A. Hunt good accounts in favor of said Syracuse Candy Works, Inc., and assigned to him in the aggregate amount of about \$6,000.

"For the purpose of carrying this agreement into execution, for each new account created in favor of said Company and against any of the persons, firms or corporations mentioned in said schedule, or against any other persons, firms or corporations, duplicate statements shall be made out, one of which shall be delivered to the said Edward A. Hunt with the following stamped thereon.

"For value received the undersigned, Syracuse Candy Works, Inc., does hereby sell, assign and transfer the within mentioned accounts to Edward A. Hunt in accordance with the terms and conditions of our agreement with said Hunt, bearing date January 13, 1915."

"Dated Jan. 13, 1915.

Syracuse Candy Works, Inc.,

"By G. F. Rowe, President.

"Thelma M. Smith, Treasurer."

"We do also agree that we will execute any other or further papers or agreements that may be necessary to carry this assignment or the assignments

of any other accounts substituted for these accounts or substituted for any accounts that may be substituted for these accounts.

"In witness whereof, we have hereunto caused this instrument to be signed by the president and treasurer of its company and its corporate seal affixed the day and year above written.

"[Seal.]

Syracuse Candy Works, Inc.,

"By G. F. Rowe, President.

"Thelma M. Smith, Secretary."

It is seen by the terms of this agreement that it was the purpose to have the Candy Works continue business, have the money applied to the conduct and running of the business when collected on the assigned accounts, and other and new accounts due the Candy Works substituted from time to time. This agreement was not filed or recorded, and the then and subsequent creditors of the Candy Works were not notified of its existence. Annexed to the agreement at the time of its execution was a list of accounts aggregating in amount \$5,931.85. Thereafter, up to April 1, 1916, on or about the 1st day of each month, similar lists of accounts, Exhibits 2 to 16, inclusive, were made out and delivered, with assignments thereof, to the defendant.

| | | | | |
|-----------|------------|----|--------|-------------|
| Exhibit 2 | aggregates | in | amount | \$5,438.56. |
| " 3 | " | " | " | \$4,964.66. |
| " 4 | " | " | " | \$4,362.92. |
| " 5 | " | " | " | \$3,712.40. |
| " 6 | " | " | " | \$4,044.81. |
| " 7 | " | " | " | \$4,043.42. |
| " 8 | " | " | " | \$4,015.99. |
| " 9 | " | " | " | \$3,667.91. |
| " 10 | " | " | " | \$4,044.75. |
| " 11 | " | " | " | \$4,639.82. |
| " 12 | " | " | " | \$4,121.50. |
| " 13 | " | " | " | \$4,541.54. |
| " 14 | " | " | " | \$4,549.78. |
| " 15 | " | " | " | \$3,818.79. |
| " 16 | " | " | " | \$3,669.74. |

April 18, 1916, another assignment of accounts, with a list attached, aggregating in amount \$3,002.18, was executed and delivered by said Candy Works to the defendant, of which agreement the following is a copy:

"For value received, we do hereby sell, assign and transfer to Edward A. Hunt, of the city of Syracuse, Onondaga county, N. Y., all of the following accounts due and owing to us and do hereby give unto said Hunt full right and authority to receive and collect the same and for that purpose to take any and all steps in our name or otherwise that we could take had this assignment not been made. This assignment is given to said Hunt as collateral security for the payment of our notes to him bearing even date herewith in the amount of \$8,600, payable on demand to his order at the City Bank of Syracuse, and for any and all renewals thereof in whole or in part.

"In witness whereof we have hereunto caused this instrument to be signed by our president and our corporate seal to be affixed this 18th day of April, 1916.

"[Seal.]

Syracuse Candy Works, Inc.,

"By G. F. Rowe, President.

"In the presence of."

This stipulation of facts then reads:

"The debtors of the Syracuse Candy Works, Incorporated, whose accounts were assigned to Edward A. Hunt as above stated, were not notified of these assignments. No record of them was made upon the books of the Syracuse Candy Works, and the moneys which were collected upon such accounts were deposited to the credit of the Syracuse Candy Works, Incorporated, in the City Bank of Syracuse, where the corporation had an account, and the moneys were used for the purpose of the corporation business, without interference or objection upon the part of defendant, until about April 3, 1916. The defendant had frequent reports as to the financial condition of the Candy Works and knew for three or four months previous to April, 1916, that the corporation was in financial difficulties. The defendant is a director of the City Bank of Syracuse and a member of the discount committee. Levi Chapman, one of defendant's attorneys, is attorney for the City Bank, and was also attorney for the Syracuse Candy Works, Incorporated.

"On or about the 3d day of April, 1916, George F. Rowe, the president and general manager of the Syracuse Candy Works, Incorporated, met defendant by appointment at the office of defendant's attorney, where the affairs of the corporation were discussed. Defendant's attorney stated to Rowe that the defendant was not satisfied with conditions and that defendant thought he should be protected, and Rowe was instructed to close down the factory, curtail expenses, and turn in the book accounts to defendant as fast as they could be collected. As a result Rowe returned to the factory and arranged his work to carry out these instructions, and on Friday night, April 7, 1916, he laid off all the factory help, except Thelma M. Smith, who was in the office, and one man and one woman worked in the factory a few days after that, to finish up some of the work which was on hand."

April 1, 1916, the Candy Works owed the City Bank \$9,800 on a series of notes, on which the interest had been paid in advance, but April 13, 1916, one of these notes due that day was reduced from \$2,500 to \$1,800 by a payment of \$700 taken from the account known as the "Partial Payment Account," and which account was opened by said Candy Works with said City Bank at the instance of the defendant on the 11th day of April, 1916, and into which thereafter was deposited all moneys received and deposited by the Candy Works or by defendant, except as follows: Deposit of April 11, 1916, of \$568.41, against which a check of \$473.68 was drawn the same day, and which represented a sugar transaction by which the Pennsylvania Sugar Company was paid said \$473.68 for sugar, which brought \$568.41, and the difference, the profit in the transaction, went into the general bank account of the Candy Works; April 18, 1916, defendant gave the Candy Works his check for use by it in payment of its notes held by the City Bank for \$8,600, and on the same day the Candy Works drew its check to the City Bank for \$8,622.50 for such purpose; April 22, 1916, a deposit of \$576.59 was made by the Candy Works, and on the same day a check was drawn against this for \$509.75, payable to the Pennsylvania Sugar Company. This sugar transaction was similar to the one heretofore mentioned. All moneys received on accounts which had been assigned to the defendant by the Candy Works, money derived from the sale of tools, furniture, and fixtures, sales of candy, and also currency and a few items, the source of which is not fixed, were deposited in this partial payment account. The balance of said \$2,500 note was paid by a demand note of the Candy Works for \$1,800, dated April 13, 1916, and indorsed by Hunt. In addition to the note of \$1,800, heretofore and above mentioned, the

Candy Works owed the City Bank \$7,300 on its notes, making \$9,100. These notes were dated and for the amounts following:

| | | | |
|-------------|-------------|-------|------------|
| Exhibit 22, | February 6, | 1916, | \$1,600. |
| " | 23, | " 11, | " \$ 650. |
| " | 24, | " 21, | " \$1,200. |
| " | 25, | " 28, | " \$2,350. |
| " | 26, March | 1, | " \$1,500. |

Each was a time note, due three months from date, and indorsed by E. A. Hunt, the defendant. On said 18th day of April, 1916, Mr. G. F. Rowe, the president and general manager of said Candy Works, was called into conference by the defendant and his attorney, and this conference resulted: (1) The defendant gave his said check for \$8,600, hereinbefore mentioned, to the said Syracuse Candy Works, taking therefor its demand note for \$8,600 and also the assignment of accounts heretofore mentioned, made that day. This check, as in effect hereinbefore stated, was deposited in the general account of the Candy Works in said bank, and the check for \$8,622.50, payable to the City Bank, was drawn against it, and \$477.50 in addition was taken from this "Partial Payment Account," without a check (evidenced by a charge slip), making in all \$9,100, and this \$9,100 was paid to the said City Bank in payment of the notes then held by said bank, made by said Candy Works. Neither one of the said notes so held by the bank was then due, except the \$1,800 demand note above mentioned. Says the stipulation of facts:

"This transaction was carried through by defendant at the request and suggestion of the City Bank."

It is evident that the transaction resulted in the payment of all notes of the Candy Works on which this defendant was contingently liable as indorser or otherwise. The defendant was now owing the City Bank \$8,600, and the Candy Works was owing defendant that sum on such note. April 29, 1916, the Candy Works drew a check reading as follows:

"The City Bank, Syracuse, New York, 4/29, 1916. Pay to the order of Partial Payment Account \$1,400, fourteen hundred and ⁰⁰/₁₀₀ dollars. Syracuse Candy Works, T. M. Smith, Treasurer. G. F. Rowe, President. No. 2074."

This check was delivered to the said City Bank, and thereupon \$1,400 was taken from the partial payment account at defendant's direction and the money applied on the indebtedness of defendant to the City Bank and credited by defendant on the \$8,600 demand note, which defendant still held. May 9, 1916, \$728.26 was withdrawn from the partial payment account at defendant's direction, without a check, and applied in part payment of defendant's indebtedness to the City Bank, who in turn credited that amount on said \$8,600 note. All payments and withdrawals from the partial payment account were made solely upon defendant's direction, and the Candy Works had no control over such account.

By stipulation dated September 27, 1917, it is agreed that the said Syracuse Candy Works was in fact insolvent from December, 1915,

until the filing of the petition in bankruptcy, May 13, 1916, its condition of insolvency growing constantly worse; also that "defendant Edward A. Hunt knew for the entire period from December, 1915, until the Syracuse Candy Works, Incorporated, was petitioned into involuntary bankruptcy on the 13th day of May, 1916, that the Syracuse Candy Works, Incorporated, was in financial difficulties." April 18, 1916, the said City Bank held the said notes of the Candy Works for said \$9,100, on all of which Hunt was indorser.

The facts stipulated, in connection with the exhibits in evidence, show and establish:

I. That at all times from December, 1915, down to the date of the filing of the petition in bankruptcy, May 13, 1916, the Syracuse Candy Works, Incorporated, was actually insolvent, and well knew the fact.

II. The defendant, Edward A. Hunt, during all of that time, from December, 1915, to the date of the filing of the petition May 13, 1916, well knew the said Syracuse Candy Works was insolvent, in financial difficulties, and unable to pay its debts in full. This fact is established beyond all possible controversy as to the period of time from and after April 11, 1916.

III. During all of the time from December, 1915, down to the day the petition in bankruptcy was filed, the defendant, Edward A. Hunt, within the meaning of the Bankruptcy Act, was a creditor of the Syracuse Candy Works, now bankrupt, by reason of his indorsements and liability as indorser on its said promissory notes held by the City Bank of Syracuse, and from and after April 18, 1916, by reason of his giving his check for \$8,600 to said Syracuse Candy Works, Incorporated, and taking its promissory note therefor, and his indorsement on its notes.

IV. Virtually he took possession of the financial affairs of the said Syracuse Candy Works and controlled and directed them, and directly in the manner stated procured and caused the payments of money hereinbefore and hereafter mentioned to be made by the Syracuse Candy Works, Incorporated, to said bank, for the purpose of reducing and to that extent extinguishing his liability to said City Bank of Syracuse as such indorser, as well as the liability of said Syracuse Candy Works, Incorporated, on such notes held by the bank, on which he was indorser, and on and after April 18, 1916, took or procured to be taken the money of said Syracuse Candy Works, Incorporated, in such partial payment account, and applied it or caused it to be applied, directly or indirectly, on such notes and on the note held by him, so given by said Syracuse Candy Works, for \$8,600, thus obtaining the benefit of all such payments in reduction of the liability of said Syracuse Candy Works, Incorporated, to the bank and to himself. This was his purpose.

V. When such moneys were taken, and so used and applied, said defendant, Edward A. Hunt, had reasonable cause to believe, and in fact well knew, that such payments and applications of such moneys so directed, caused, and procured by him would operate as a preference, and that he was to be benefited thereby, and that such transfer and payment of such money to said bank would cause and effect a preference. I discover no escape from these conclusions.

[1] A surety or indorser for a bankrupt is a creditor within the meaning of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544. *Kobusch v. Hand*, 156 Fed. 660, 84 C. C. A. 372, 18 L. R. A. (N. S.) 660; *Brown v. Streicher* (D. C.) 177 Fed. 473; *In re Silvernail Co.* (D. C.) 218 Fed. 979; *Paper et al. v. Stern*, 198 Fed. (C. C. A. 8th Circuit) 642, 644, 117 C. C. A. 346; *McAtee v. Shade*, 185 Fed. 442, 447, 107 C. C. A. 512; *Swarts v. Siegel*, 117 Fed. 13, 17, 54 C. C. A. 399; *Amundson v. Folsom*, 219 Fed. 122, 125, 135 C. C. A. 24; *Huntington v. Baskerville*, 192 Fed. 813, 817, 113 C. C. A. 137.

[2] And when a surety or indorser on the note of a person or corporation who is insolvent knows of such insolvency within four months of bankruptcy, filing the petition, causes or procures him or it to pay the note or notes upon which he is indorser, in whole or in part, for the purpose of or with the intent to relieve or exonerate himself from liability, and thus obtain a preference over other creditors of the same class, he receives a preference, which may be recovered by the trustee in bankruptcy. *Kobusch v. Hand*, 156 Fed. 660, 84 C. C. A. 372, 18 L. R. A. (N. S.) 660; *Brown v. Streicher* (D. C.) 177 Fed. 473; *In re W. A. Silvernail Co.* (D. C.) 218 Fed. 979; *Paper v. Stern*, 198 Fed. 642, 117 C. C. A. 346; *McAtee v. Shade*, 185 Fed. 442, 447, 107 C. C. A. 512; *Huntington v. Baskerville*, 192 Fed. 813, 817, 113 C. C. A. 137; *Stern v. Paper et al.* (D. C.) 183 Fed. 228, 231.

[3-7] There is no evidence that when the first agreement above recited, providing for the assignment of accounts to Hunt, the defendant, as security for his indorsements, and the use of the money collected on such accounts by the Candy Works in carrying on its business, and the assignment of other subsequently accruing accounts in their place, that Hunt knew of the insolvency of the Candy Works, or even that that company was then insolvent. The agreement was good as between the parties thereto. The Candy Works received the money on the accounts assigned and collected from time to time, and used them. Once each month, and on or about the 1st of each month, assignments of other accounts were made. The petition in bankruptcy was not filed until May 13, 1916. In the meantime, and up to April 18, 1916, certainly, the parties were operating under the agreement of January 13, 1915, so far as appears, although not in strict compliance therewith, and in the meantime the Candy Works became insolvent, and defendant knew this fact. The assignment of accounts, made on the 18th day of April, 1916, was a new arrangement and agreement. On that day defendant gave the Candy Works his check for \$8,600, for the purpose, evidently, of taking up and paying all its notes held by the bank and releasing defendant as indorser thereon, and which had been reduced to \$8,622.50, and the proceeds of this check were used by the Candy Works, with \$22.50 of its own money, for that purpose, so that the liability of defendant as indorser was canceled and the liability of the Candy Works on the old notes held by the bank, not then due, except as to one, was extinguished. The direct relation of debtor and creditor then came into existence between defendant and the Candy Works by the loan of this \$8,600 by defendant and the execution and delivery to him of the note of the Candy Works for that amount. As a part of this transaction of April 18, 1916, the assignment of accounts

of that date was made "as collateral security" for the payment of said note of \$8,600. This note was given, however, to represent a loan that day made by defendant, to be used to extinguish his liability as indorser for the Candy Works at the bank on the notes mentioned. In this indirect way the defendant was using his own money to extinguish the obligations of the Candy Works to the bank, and thereby his own liability thereon as indorser. By assignment of accounts belonging to the Candy Works, he took security for this loan, represented by this note of the Candy Works of \$8,600.

If this loan, a present full consideration for the note and assignment of accounts as security, had been a present and an independent transaction had in good faith, even if made to relieve the Candy Works in its financial difficulties, it could not be impeached or questioned. *Dean v. Davis*, 242 U. S. 438, 37 Sup. Ct. 130, 61 L. Ed. 419. But it was a transaction had for the purpose of and intended to release the obligation of defendant to the bank as indorser for the Candy Works, and transfer the accounts due and owing to the Candy Works, its property, to defendant as security for the money of defendant used in this indirect way to take up the notes. The amount of the liability of the Candy Works remained the same, less the \$22.50; but the obligation of this defendant to the bank was released or canceled, and he received the note of the Candy Works, with the assignment of accounts due and owing the Candy Works as security. Suppose Hunt, the defendant, had gone to the bank and paid the notes on which he was indorser with his own money, and then as owner and holder thereof had taken the assignment of accounts as security, how would the transaction differ in legal effect from what was actually done? The defendant was in effect obtaining, and did obtain, by means of such assignment of accounts, security for his pre-existing liability as indorser at a time when he knew the Candy Works was insolvent. He was in fact securing a preference by obtaining this assignment of accounts. The estate of the bankrupt was not benefited or increased by the loan of the defendant's check, and its application to the payment of the notes at the bank, and the giving of the note to Hunt. The only one actually benefited was Hunt, this defendant, as the transaction resulted in his release as indorser, the application of \$22.50 of the Candy Works' money to the purpose, and the assignment of these accounts to defendant by the Candy Works at a time when Hunt knew this Candy Works was insolvent.

But it is asserted that the defendant was thus obtaining the assignment of accounts under and pursuant to the agreement of January 13, 1915, entered into at a time when the Candy Works was perfectly solvent, so far as appears or is claimed; that no filing, record, or publication of such assignment was necessary to its validity as against general creditors or creditors without a specific lien; that there was an equitable lien created in favor of the defendant, which ripened into actual possession of some of the accounts pledged or assigned, or their proceeds, prior to the filing of the petition in bankruptcy; and that the preference thus obtained is not voidable by the trustee in bankruptcy.

It must be remembered that this is not a case where the defendant advanced money to purchase specific property, upon which he was to

have a lien as security, or to pay or release a lien or charge on property purchased by the Candy Works, with an agreement that he should have a lien on such property, when obtained, for such advance or loan. The indorsements were made to enable the Candy Works to obtain money at the bank to use generally in carrying on its business. The defendant, Hunt, had no lien on the merchandise purchased or manufactured. There was no attempt to create one thereon. If it had been mortgaged or pledged, the business to continue, such mortgage or pledge on such merchandise, unless accompanied by delivery, would have been void as to creditors and the trustee in bankruptcy. Hence resort was had to the assignment of, and agreement to assign, accounts as security for the indorsements. It seems to me that on the authority of *Dean v. Davis*, 242 U. S. 438, and the cases cited in the note, page 445, 37 Sup. Ct. 130, 61 L. Ed. 419, it is my duty to hold, and that I am required to hold, and do hold and find, that the transfer or assignment of accounts made by the Syracuse Candy Works, Incorporated, to the defendant, Edward A. Hunt, on the 18th day of April, 1916, was not only a preference, but void as in fraud of the creditors of the Candy Works, and that the transaction of April 18, 1916, was intended to hinder, delay, and defraud the general creditors of the Syracuse Candy Works, Incorporated. Clearly the Syracuse Candy Works on that day was not assigning, and the defendant Hunt was not seeking an assignment of, accounts which it already owned, or to which it had and asserted a right under the agreement of January 13, 1915. Besides this, the assignment made April 18, 1916, was not made to secure the defendant for his indorsements on notes made by the Candy Works and held by or discounted at the bank, but as security for a new obligation, the note of \$8,600, given for the check of Hunt, and given under the circumstances recited. Clearly it was the intent and purpose of both parties to the transaction to release the defendant as indorser, and to pay him, a creditor, to the exclusion of the other creditors of said Candy Works. These notes at the bank, with one exception, were not due, and the assignment included practically all the property of the Candy Works. Says the court in *Dean v. Davis*, supra:

"A transfer, the intent (or obviously necessary effect) of which is to deprive creditors of the benefits sought to be secured by the Bankruptcy Act, 'hinders, delays or defrauds creditors,' within the meaning of section 67e" of that act.

Also:

"A transaction may be invalid both as a preference and as a fraudulent transfer."

Here there was no hope or expectation that the Candy Works could or would extricate itself from its financial difficulties or continue business. In point of fact, says the stipulation of facts, as already quoted, April 3, 1916, the president and general manager of the Candy Works was instructed to close down the factory, curtail expenses, and turn in the book accounts to defendant as fast as they could be collected. Rowe carried out the instructions, and April 7, 1916, laid off all the factory help, except Thelma Smith, who was in the office and had charge of the accounts, and one man and one woman, who worked a few days to close up some of the unfinished work on

hand. This was practically a cessation of business at the instigation and procurement of the defendant and with the assent of the Candy Works.

I think and hold the trustee in bankruptcy is entitled to recover and receive the proceeds of all the accounts assigned April 18, 1916, and also the proceeds of some which were not in either assignment, including both the proceeds thereof paid over or applied and those remaining either in the partial payment account or collected and not placed in that account; also the profits on three sugar deal transactions, \$94.73, \$66.84, and \$301.88, and also the \$22.50 taken from the general account to take up the notes at the bank in excess of the \$8,600 represented by the check of Hunt, and \$21.60 recovered on account of L. K. Liggett. As near as I can ascertain, the collections on accounts not in any assignment, which went into the partial payment account, aggregated \$1,154.31. The defendant's claim of an equitable lien on and offset of items, \$100, \$43.35, \$342.53, \$393.95, and \$124.80, cannot be allowed. The defendant consented to and acquiesced in the use of the money collected for running the business and payment of rent, etc., and cannot recover same of the trustee on any theory. The plaintiff is entitled to recover the collections, amounting to \$702.76, now in the special deposit account, and which came from the accounts, as I understand, assigned April 18, 1916.

From the mixed accounts and date before me I am unable to fix the amount collected from the accounts assigned April 18, 1916, without great danger of error and duplication, and this matter should go to a special master to determine same, and also the disposition and whereabouts of same, and generally to take and state an account of the sums recoverable under this decision. For that purpose it is referred to Hon. C. L. Stone as special master.

[8, 9] I discover no theory on which I can hold the first agreement, and the assignments of accounts made pursuant thereto, invalid. Clearly the defendant had an equitable claim thereto and an equitable lien thereon, and by deposit and actual application to the purposes contemplated before bankruptcy had reduced much of same to possession. If any of the proceeds of such account remained in the partial payment account at the time of the filing of the petition in bankruptcy, the special master will report that fact and the amount thereof, as the trustee may recover it. The proceeds of those accounts was to be applied on the notes indorsed by Hunt. Such notes were otherwise paid, and Hunt took the note of the Candy Works. That agreement was made when the Candy Works was solvent, and there is nothing to show it was made to cheat, hinder, delay, or defraud creditors. The fact that the Candy Works become insolvent long prior to April 18th, and that the parties continued to operate under that agreement, cannot make it invalid.

To make the position and holding of the court perfectly clear as to the assignment of accounts made April 18, 1916, perhaps this should be added. In *Dean v. Davis*, 242 U. S. 438, 37 Sup. Ct. 130, 61 L. Ed. 419, *supra*, the Supreme Court held:

"A transfer of property by an insolvent, made to secure a contemporaneous loan of money which the lender advances, and the insolvent obtains and uses,

for the discharge of a pre-existing debt of the insolvent to a third party, in which the lender has no interest, is not a preference of the lender within section 60b of the Bankruptcy Act, as amended February 5, 1903, 32 Stat. 797, 800."

In the instant case the defendant, Hunt, the lender, who advanced the money, \$8,600, to take up the notes at the bank on which he was indorser, did have an interest in the pre-existing debt of the Candy Works and in the payment thereof, as he was liable therefor, and in legal effect, because of such indorsements, it was his own debt to the bank, as well as the debt of the Candy Works. Both were liable therefor. Therefore, when Hunt loaned the money to the Candy Works by his check to that company to take up such notes, on which he was indorser, taking the note of the Candy Works for such loan of money and the assignment of accounts of the Candy Works as security for the payment thereof, he, the lender, was preferred over the other creditors of the bankrupt, inasmuch as, because of his indorsements, he was a creditor of the bankrupt, as we have seen. See cases cited supra.

He first made the Candy Works the owner of the \$8,600, and then directed and procured its application to the payment of his obligation as indorser. The accounts due and owing to the Candy Works under the agreement of 1915 were assigned to the defendant for a specific purpose, and no other—as security for his indorsements on the notes of the Candy Works held by the bank. Hunt was not the absolute owner of those accounts. If the notes indorsed by him were paid before the money due on such accounts was collected, his right there-to ended. He furnished money to the Candy Works, \$8,600, by his check to the Candy Works, payable to it, and that company placed and commingled this money with its other funds in bank, and the identity was lost. It, with \$22.50, other money of the Candy Works, was paid to the bank in payment of such notes by defendant's direction and procurement. Many of the accounts remained uncollected, and perhaps some of the money already collected was in the "Partial Payment Account" in the name of the Candy Works and subject to its check. It was not used to pay the notes indorsed by Hunt, and the transaction was being carried on for the purpose of securing an assignment of accounts by way of security for the note of \$8,600, in fraud of creditors and to secure a preference. By what right could the defendant, Hunt, thereafter appropriate that money in the partial payment account, or thereafter collected on accounts to any other purpose than that specified in the agreement of 1915? If he owed the bank, and it seems from the stipulated facts that he did, could he appropriate the "Partial Payment Account," or the proceeds of the collection of accounts assigned as security for his indorsements, which had been extinguished in other ways, to the payment of his indebtedness at the bank, as against the general creditors of the Candy Works, and do this at a time when the Candy Works had become insolvent and the fact was well known to him? I think not. All trace of the \$8,600 was lost when it entered the stream of the Candy Works' general property in its bank account, and there could be no subrogation, or transfer of the defendant's lien on the accounts, or their proceeds, as security for his indorsements, to him, as security for the liability

of the Candy Works to defendant on the note of \$8,600. There was no agreement that this should be done. Aside from this, the whole scheme of April 18, 1916, was in fraud of the creditors of the Candy Works. By the loan of the \$8,600 to the Candy Works defendant expected and intended to have the notes held by the bank paid, and his liability as indorser extinguished, and also secure additional security.

In *National City Bank v. Hotchkiss*, 231 U. S. 50, 34 Sup. Ct. 20, 58 L. Ed. 115, it is held:

"Although a loan may be made for a specified purpose, if the lender places it in the stream of the borrower's general property, there is no right of subrogation. A general creditor may increase the bankrupt's estate by his advances and lose the right to take them back."

This case is not in point exactly, but I think the principle applies here. Clearly the defendant cannot be allowed to better himself by this transaction of about April 18, 1916, planned and consummated at a time when he was knowingly seeking to obtain a preference over the other creditors of the Candy Works forbidden by the Bankruptcy Act.

It may be said that Hunt, the defendant, should not lose any equitable right he had in the accounts assigned prior to April 18, 1916, or the collections made and placed in the "Partial Payment Account," by reason of what was done at that time; but if he saw fit to abandon any rights he had by what was then done, or did, he, and he alone, is responsible. The general creditors are not to suffer.

On the coming in of the special master's report, a decree can be entered.

AMERICAN SMELTING & REFINING CO. v. BUNKER HILL & SULLIVAN MINING & CONCENTRATING CO.

(District Court, D. Oregon. January 14, 1918.)

No. 7555.

1. MINES AND MINERALS ⇨83—SMELTER CONTRACTS—CONSTRUCTION.

Where a mining company agreed to sell and a smelting company to purchase all the output of the former's mines which shall have a lead assay ranging from 30 per cent. to 75 per cent., and there were separate agreements as to low and high grade ores, the contract must, there being a stipulation that the ores should be of approximately the same yearly analysis and lead assay as the shipments made by the mining company during previous years, be construed as including only the average ores of the mining company and not allowing it to work its output into high or low grade to suit its convenience; this being particularly true, as that construction was long followed by the parties.

2. MINES AND MINERALS ⇨83—SMELTER CONTRACTS—CONSTRUCTION.

Where a contract between a mining company and a smelter company providing for purchase by the latter and sale by the former of its ores of certain percentages declared that such ores should be shipped to the smelting company's smelter at a specified point, and it appeared that such clause was inserted in the contract when prior agreements were consolidated, and other paragraphs of the contract clearly disclosed that there

was no agreement that the ores should in all cases be shipped to the designated point, the contract cannot be construed as requiring shipments thereto, particularly as the mining company long acquiesced in the diversion of the shipments to other points.

3. INJUNCTION ⇨136(3)—PRELIMINARY INJUNCTIONS—ISSUANCE.

A preliminary injunction may issue to maintain the status quo, where the questions of law or fact to be ultimately determined are grave and difficult, and injury to the moving party will be great if denied, while loss to the opposing party will be comparatively small, and hence defendant may, by preliminary injunction, be restrained from disposing of its ores to any person or corporation other than complainant pending a suit for specific performance of a contract to sell such ores to complainant, where a breach of the contract would greatly damage complainant.

4. INJUNCTION ⇨135—PRELIMINARY INJUNCTION—DISCRETION.

Along with the fixed rules of law as to the issuance of a preliminary injunction, it is essential that the court exercise sound discretion in view of the attendant facts and conditions.

5. SPECIFIC PERFORMANCE ⇨68—CONTRACTS ENFORCEABLE—PERSONALTY.

A suit will lie for specific performance of a contract respecting personality, where the suitor has no plain, speedy, adequate, and complete remedy at law.

6. SPECIFIC PERFORMANCE ⇨69—CONTRACTS—PERSONALTY.

When ores produced by the defendant mining company have a peculiar value for smelting purposes and are not readily obtainable elsewhere, so that it would be practically impossible to measure their value in determining the loss a smelting company would sustain were it not able to obtain them under a contract with defendant, specific performance of the contract may be decreed.

7. SPECIFIC PERFORMANCE ⇨75—CONTRACTS—AGREEMENTS SUSCEPTIBLE.

Where a mining company agreed to dispose of certain ores to a smelting company during a term of years and to operate all its mines, specific performance of the contract may be decreed, it not appearing that such decree would necessitate supervisory control by the court in requiring performance of the contract, this being particularly true, as the contract itself provided for submission of controversies as to disputes over assays to umpires specified.

8. MINES AND MINERALS ⇨83—SMELTER CONTRACTS—CONSTRUCTION.

A mining company and a smelter company, having agreed to sell and purchase certain ores, entered into a supplemental agreement, declaring that in case smelting companies other than one designated should make rates that the smelting company did not desire to meet, then the mining company might accept such rates, and might ship to other smelters after giving 60 days' notice, but on termination of such arrangements the smelting company should continue to buy in pursuance of the principal contract, and that the smelting company should have the right to resume the purchase of any product so diverted by giving 60 days' notice to the mining company of its willingness to meet the terms of other smelters. Another paragraph of the supplemental agreement declared that the terms governing the price should be those made by a designated smelter corporation to a majority of ore shippers in the district, unless such corporation should go out of existence, or cease to purchase a majority of those ores, in which event the terms given by other smelting companies for a majority of the ores purchased in that district should govern. *Held* that, as all the terms of the agreement should be construed together, the supplemental agreement must be construed as providing, in event the designated corporation should go out of existence or cease to purchase a majority of the ores of the district, that the mining company should have, in case other smelters purchasing a majority of the ores should fix terms

that the smelting company did not desire to meet, the option to accept them and the smelting company the option to subsequently meet those terms.

9. SPECIFIC PERFORMANCE ⇔59—CONTRACTS—OPTION.

Specific performance of a contract to sell and purchase ores cannot be denied because it contained an option feature; the contingency on which the option might be invoked being extremely remote.

10. SPECIFIC PERFORMANCE ⇔57—CONTRACTS—OPTION.

Though a contract between a mining company and a smelting company for the sale and purchase of ores was optional as to high and low grade ores, specific performance of the agreement to sell average ores may be enforced by the smelting company.

11. ASSIGNMENTS ⇔18—CONTRACTS.

Ordinarily a contract is assignable unless the assignment is forbidden by statute or by the terms of the contract itself.

12. ASSIGNMENTS ⇔19—CONTRACTS ASSIGNABLE—PERSONAL NATURE.

Contracts involving relations of personal confidence or for personal service are not assignable, but the question whether a contract falls within the exception must depend upon the intention of the parties and the nature of the contract itself.

13. ASSIGNMENTS ⇔18—CONTRACTS—VALIDITY.

Where defendant, when it contracted to sell ores to a smelter company, recognized the probabilities that the contract would be assigned to the parent or principal company which had acquired the stock of the smelter company, and the contract itself provided that deliveries of ores by the mining company should be made to any smelting plant owned by the company, its successors or assigns, and that the agreement should be binding and inure to the benefit of the successors and assigns of the respective parties, the contract is assignable; it being apparent that the parties so intended.

14. SPECIFIC PERFORMANCE ⇔20—ASSIGNMENT—EFFECT.

Where a contract for the sale of ores by a mining company and their purchase by a smelting company provided for assignment, the assignment of the contract, did not relieve the assignor of liability so as to prevent specific performance.

15. SPECIFIC PERFORMANCE ⇔51—CONTRACT—REASONABLENESS.

Where a contract between a smelting company and defendant provided that the price paid for ores should be that paid to a majority of the ore shippers in the district, by complainant smelting company to which the contract was assigned, specific performance of the contract after assignment cannot be denied because complainant in a sense fixed the price, for it could not act arbitrarily, but was governed by the price paid certain other ore shippers.

In Equity. Bill by the American Smelting & Refining Company, a corporation, against the Bunker Hill & Sullivan Mining & Concentrating Company, a corporation. On motion for preliminary injunction. Preliminary injunction granted.

Carey & Kerr, of Portland, Or. (George Donworth, of Seattle, Wash., F. H. Brownell, of New York City, F. W. Lehmann, of St. Louis, Mo., and Root, Clark, Buckner & Howland, of New York City, of counsel), for plaintiff.

Myron A. Folsom, of San Francisco, Cal. (Curtis H. Lindley, of San Francisco, Cal., George F. Holman, of Portland, Or., and George Hatfield, of San Francisco, Cal., of counsel), for defendant.

WOLVERTON, District Judge. The purpose of this suit is for specific performance and to restrain the defendant company (herein to be called the Mining Company) from selling or delivering any of its lead-silver ores, concentrates, or slimes to any person or corporation other than the plaintiff (to be called the A. S. & R. Company herein). The present inquiry is whether a preliminary injunction shall issue pending the final determination of the cause.

It is only necessary at this time to get an understanding of those features of the agreement between the Mining Company and the Tacoma Smelting Company (to be called the Smelting Company) that seem to be controlling where the parties are not in accord. These features must be construed in the light of the events attending the consummation of the agreement which show the motives that induced it and the purposes which it was intended to subserve. In this we may be aided somewhat by the treatment accorded by the parties themselves to particular provisions.

The Smelting Company has a capital stock of 5,000 shares, of the par value of \$100 per share. On March 20, 1905, it entered into and had contracts with the Alaska-Treadwell Gold Mining Company, Alaska-Mexican Gold Mining Company, and Alaska United Gold Mining Company, and with the Mining Company, the defendant herein, previously signed, for the purchase of ores from each of the several companies, for smelting purposes. The plaintiff company had also at the same time a contract with the Mining Company for the purchase of some of its ores. All these mining companies, either by direct holding or through their stockholders, were owners of shares of stock in the Smelting Company, the defendant Mining Company being the owner of 1,567 shares. The A. S. & R. Company, acting through Bernard M. Baruch, effected a purchase of the whole of the capital stock of the Smelting Company, at a price exceeding \$5,000,000. The stock was transferred to the American Smelters Securities Company, a New Jersey corporation, of the voting stock of which the A. S. & R. Company held, and now holds a controlling interest, so that it dominates the action of such New Jersey corporation. The defendant Mining Company was aware of all these relationships.

On March 20, 1905, the Mining Company entered into an agreement with the Smelting Company, which action was within the contemplation of the Baruch purchase, whereby the former agreed to sell and the latter to purchase all the lead-silver ores, slimes, and concentrates mined from all the properties owned or leased by the Mining Company, delivered f. o. b. cars at or near Wardner, Idaho, at sales prices agreed upon, with certain stipulated deductions. It was stipulated that the products to be delivered should be of a lead assay of between 30 per cent. and 75 per cent., and that the average product should be of approximately the same yearly average analysis and lead assay as the shipments made from the mines during any year of the 12 years immediately preceding the date of the agreement, unless the Smelting Company should give its written consent to the shipment to it of products varying from that standard in analysis and in lead assay, as to which it was given the option to purchase at the best going market rates

and terms. For the purpose of determining the net sales prices, the contract provides that the values of the contents of the product shall be ascertained as follows (omitting silver and gold): "Lead. The value of ninety per centum of the lead contents at ninety per centum of the average sales price in the city of New York for common desilverized domestic lead, in lots of fifty tons or more, for shipment within thirty days, as made by the American Smelting & Refining Company, during the week preceding the week of shipment of the lot in question" (subsequently changed, by agreement of February 28, 1907, to read "on the date of shipment of the ore"), whenever the selling price does not exceed \$4.10 per one hundred pounds, and when the price exceeds that sum, 90 per cent. of \$4.10 and one-half of the excess.

From such values, deductions are to be made as follows: "From the value of each lot of ore, slimes, or concentrates (not containing less than a daily average of 27 tons, nor more than a daily average of 37 tons of metallic lead, the tonnage between the minimum and the maximum to be entirely at the option of the Mining Company), shipped to the Smelting Company's smelter at Tacoma, Washington, there shall be deducted a freight and treatment charge, when the lead quotation is \$4.35 per hundred pounds or over, of \$15.75, and, when the lead quotation is less than \$4.35 per 100 pounds, of \$16 per net dry ton f. o. b. cars at or near Wardner when the gross value is not over \$60 per ton, said value to be arrived at by counting silver at New York quotations and lead at \$3.50 per hundred pounds. If, however, any ore or concentrates should contain less than 53 per cent. lead, a deduction is to be made from the freight and treatment charge of one-half cent for each pound of lead under 53 per cent.;" but should the ore or concentrates contain more than 53 per cent. lead, there shall be added to the freight and treatment charge one-half cent per pound above that percentage. It is further provided that: "The Mining Company, in making shipments, may exercise its option as to lead contents of ores, slimes, and concentrates, wherever the same may be shipped." This is known as the differential clause. From the value of each lot of products shipped, in addition to above-mentioned Tacoma shipments, except as provided in article 1, "there shall be deducted a freight and treatment allowance, figured on dry weight, equal (without regard to the actual destination of the ores shipped under this contract) to the sum of the tariff railway charge for freight from the mines of the Mining Company to Pueblo or Denver," plus an allowance for smelting of \$8 per ton.

The fourth paragraph provides that deliveries shall be made to any smelting plant owned by the Smelting Company, its successors or assigns. Should the Mining Company, however, desire to ship greater amounts of ore than the smelting plant or plants of the Smelting Company can conveniently smelt, the Smelting Company shall have the right to sell or divert such excess shipments, at same rates, prices, and conditions as in the agreement provided for. Then follow provisions for the payment for the ores.

By the eighth article, the provisions are made to extend for a period of 25 years from February 1, 1905, except as subsequently provided.

By the eleventh paragraph it is stipulated that:

"This agreement shall be binding upon and inure to the benefit of the successors and assigns of the respective parties hereto, and all its provisions relating to the sale of ore shall, as to the Mining Company, be deemed to be and considered as a covenant running with the land."

By the twelfth paragraph, the terms of the agreement were to continue in any event until June 1, 1910, and it is further stipulated that thereafter the Mining Company shall, during the remainder of the period, receive at least the same terms, and, in addition thereto, shall receive the benefit of any and all direct and indirect reductions in charges, and any and all direct and indirect concessions in methods of determining values, in methods of per centum deductions, in methods of making quotations, and in any other way whatsoever, that may be made at any time after the date of the contract by the A. S. & R. Company, and be in effect after June 1, 1910, to a majority of Cœur d'Alene shippers.

The agreement was ratified by the stockholders of the Mining Company.

By a supplemental agreement, made on the same day between the parties, the Mining Company undertook to terminate its ore contracts, which it then had, with the Pennsylvania Smelting Company, and the Ohio & Colorado Smelting Company, and, on the other hand, the Smelting Company agreed to use its best endeavors to procure the cancellation of a contract then in force between the Selby Smelting & Lead Company and the Mining Company.

The terms of section 12 of the agreement were modified by a second supplemental agreement, whereby it is stipulated that, in case smelting companies other than the A. S. & R. Company make rates that the Smelting Company does not desire to meet, then the Mining Company may accept such rates, and may ship to such other smelters after giving 60 days' notice to the Smelting Company, but that, on the termination of such arrangements, the Smelting Company agrees to continue to buy in pursuance of the principal contract. It was further agreed that the Smelting Company should have the right to resume the purchase of any products so diverted by giving 60 days' notice to the Mining Company of its willingness to meet the terms of the other smelters for the period for which the other smelters had offered to contract.

And it was also further agreed that the terms that are to govern under clause 12, unless the A. S. & R. Company shall cease to do business or to purchase a majority of the Cœur d'Alene ores, shall be those made by the A. S. & R. Company to a majority of Cœur d'Alene shippers, and that, in determining such majority, the Mining Company's ores and the ores of mines owned by the Smelting Company shall be included; but in case the A. S. & R. Company shall cease to purchase a majority of the tonnage, then the terms given by the other smelting companies for a majority of the Cœur d'Alene ores, after excluding the ores produced by mines of the Mining Company and mines owned and controlled by any smelting company, shall govern, provided the same amounts to an average of at least 1,000 tons per month; and it

is stipulated that in any event the Mining Company is to receive as good terms and prices as are granted to mines owned directly or indirectly by the A. S. & R. Company.

On November 17, 1910, the parties entered into a further supplemental agreement, which was to apply from June 1, 1910, to June 1, 1915, whereby it was agreed that in addition to the terms of payment stipulated for in the principal agreement, the Mining Company should receive 85 cents per ton for each ton of ore delivered containing a lead assay of between 30 and 75 per cent. By the fourth paragraph, it was further stipulated that the Smelting Company should not assign nor transfer the said original or supplemental contract prior to November 17, 1915, without the written consent of the Mining Company.

Prior to the date of the contract here in controversy, the Mining Company had contracts for smelting with the following smelting companies: Tacoma; Ohio & Colorado; Pennsylvania; Selby; and American Smelting & Refining Company, the plaintiff herein. The present agreement superseded, as was the intention and purpose of the parties, the contract with the Tacoma Company. The first supplemental agreement provides for a termination of the contracts with the three companies, as aforementioned, following the Tacoma. And it was further the purpose of the present agreement to wholly supersede the agreement with the A. S. & R. Company. So that, in the end, the Smelting Company acquired the right to purchase all the ores of the Mining Company. That such an arrangement, to culminate in the agreement that was finally entered into between the Smelting Company and the Mining Company, superseding all other agreements on the part of the Mining Company for disposing of its ores, was in the minds of the parties concerned, including the Mining Company and the A. S. & R. Company, at the time Baruch consummated the purchase of the stock of the Smelting Company, can scarcely be questioned. Whatever part the Mining Company may have had in the consummation of the Baruch enterprise to acquire, in the interest of the A. S. & R. Company, the corporate stock of the Smelting Company, it surely was wholly cognizant of what was taking place, and was acting in pursuance of the plan, to the purpose of finally obtaining from the Smelting Company an agreement for disposing of the major part of its ores, if not the entire output. The Mining Company knew that the hand of the A. S. & R. Company was in the enterprise, and that it was really the controlling factor in bringing about the agreement of the Smelting Company of March 20, 1905, to purchase the Mining Company's ores.

[1] As I construe the agreement, it is that the Mining Company shall sell, and the Smelting Company shall purchase, all the output of the mines which shall have a lead assay ranging from 30 per cent. to 75 per cent. By way of further specification, it is stipulated that the average product shall be of approximately the same yearly analysis and lead assay as the shipments made during any year of the 12 preceding years. The purpose, no doubt, of this latter stipulation was to secure, as nearly as practicable, a uniform product, one which Mr. Newhouse thinks would average around 53 per cent. lead assay.

Prior to the date of the agreement, by far the greater proportion of the output of the mine had been shipped by the Mining Company in a proportion containing between 30 per cent. and 75 per cent. lead; and it is asserted by Mr. Rust, who was until 1916 manager of the smelter, that there never was a time until the later controversy that the Mining Company claimed the right of so compounding its products as to reduce to low grade or increase to high grade beyond that resulting from the usual and normal operations of the mining and milling plants as they had theretofore and were then being carried on. Mr. Bradley disagrees with this view, and asserts that:

"The idea of providing for the same yearly average analysis and lead assay as the ore shipped in any 1 year of the preceding 12 was to be sure of being able to deliver to the smelter any possible mixtures of ore. That is, if an ore carrying 30 per cent. of lead and under could not be sold locally and if an ore carrying 75 per cent. in lead and over could not be sold at a distance, then these two products could be mixed to fit the average of any 1 of 12 preceding years."

Thus it will be seen that diametrically opposed views as to the meaning of the paragraph in question are maintained. The view dictated by reason, however, is that, as the usual and normal product of the mine ranged between a lead assay of 30 per cent. and 75 per cent., which constituted by far the larger proportion of the output, it was the intention of the parties, and is the intendment of the agreement, that the Mining Company shall sell and the Smelting Company shall purchase the whole of this product, the average analysis of which shall approximate the average of any 1 year of the 12 preceding years, and not that the Mining Company shall be privileged to work the output into a high or a low grade, to suit its convenience and purpose.

The clause under the head of "Deductions," extending to the Mining Company the exercise of its option as to lead contents of ores, etc., has relation only, as we shall see hereafter, to the Tacoma shipments, as to which a price differential is applicable. Any other interpretation would defeat the primary and moving spirit of the agreement, namely, that the Mining Company should have a continuing and stable market for its normal and usual output, constituting the bulk thereof, and that the Smelting Company should have a dependable source of supply of a reasonably uniform commodity for the smelting operations of itself and its associate companies.

It was contemplated, however, and within the minds of the parties, that there would be some of the Mining Company's ores that would not, in the usual course of concentration, comport with the normal standard; that some of them would fall below the minimum of assay and some above the maximum comprising the normal grade; and as to these the parties concurred in a different contractual treatment. The Smelting Company was accorded the option to purchase these products at the best going market rates and terms, and also any ores, slimes, and concentrates that might carry copper, zinc, or other metals of commercial value, the payment for which was not provided for in the agreement. As to the meaning and intendment of this part of the agreement, Judge Lindley has given a very clear and lucid interpreta-

tion. Addressing a letter to Mr. Rust on the subject, of date March 7, 1906, he says:

"The Tacoma Company had an absolute right to and was required to take all ore, slimes and concentrates whose lead contents were not 30 per cent. and less nor 75 per cent. and more. The price to be paid for this product between the maximum and minimum was fixed by the contract. As to the product varying from the above analysis, the Tacoma Smelting Company had the option to purchase at 'best going market rates and terms,' and it is quite clear that until some notice was given of the exercise of this option the Bunker Hill Company had the right to deal with such product as it saw fit. It is also quite clear that you could not have been compelled to take any product of 30 per cent. and lower or 75 per cent. and higher. I understand that this interpretation of the contract is concurred in by Mr. Chickering, your counsel in this city and the counsel of the American Smelting & Refining Company in New York. To say that the spirit of the contract was that the Tacoma Smelter should have all the product of the mine regardless of the lead contents is to practically nullify the express letter of the instrument. I know of no rule of law which sanctions this method of interpretation."

The parties have since acted in pursuance of this interpretation until the coming on of the differences giving rise to the present controversy. Of these I will have more to say later.

[2] Referring to the provision in the agreement, under the head of "Deductions," which requires that from the value of each lot of products containing not less than a daily average of 27 tons, nor more than 37, of metallic lead shipped to the Smelting Company's smelter at Tacoma, there shall be deducted certain freight and treatment charges, with certain differentials for ore the lead assays of which range above or below 53 per cent., it is insisted that it is the intentment of the agreement that this ore shall be shipped to Tacoma, and that it constitutes a breach of the agreement to divert it elsewhere. That the parties did not so understand it is apparent from their disposition of these ores, for since entering into the agreement they have been diverted to suit the convenience of the Smelting Company to smelters of the A. S. & R. Company, with the knowledge of the Mining Company, and it was not until the present controversy arose that it was claimed it was obligatory upon the Smelting Company to receive this class of ore at Tacoma.

It is quite obvious, from a consideration of the history of the draft of this agreement, how the particular sentence "shipped to the Smelting Company's smelter at Tacoma" came to be written in in that way. By the previous agreement of May 31, 1904, known as "Exhibit F," the Smelting Company's entire purchase consisted of 27 tons minimum and 37 tons maximum of lead per day under the identical terms incorporated in the present agreement. The A. S. & R. Company's agreement, of date April 11, 1904, Exhibit G, was to purchase a minimum of 40 tons per day, on terms coinciding with the general terms of purchase of ores running from 30 per cent. to 75 per cent. under the present contract; and so, in formulating the present agreement, the parties have put it together from the two previous agreements, and the words above quoted were run in as descriptive of the particular shipments rather than as a condition obligatory. This construction is in harmony with the provisions of the fourth paragraph, while the one

contended for renders the two clauses repugnant. Another clause in the same paragraph supports this view. It reads:

"The Mining Company, in making shipments, may exercise its option as to lead contents of ores, slimes, and concentrates, wherever the same may be shipped."

Evidently the option as to the lead contents relates to the shipments of 27 to 37 tons daily, carrying the differentials as to price, and not to the general shipments of ore concentrates ranging between 30 per cent. and 75 per cent. lead assay, and the words "wherever the same may be shipped" are indicative of a mutual understanding that they may be shipped anywhere. This is borne out, not only by the context and arrangement, but by the manifest wording and language of the agreement. The price that the Mining Company is to receive for its normal and usual output, as well as for what are termed its Tacoma shipments, being fixed, it is obvious that it is a matter of no concern whatever to it where the ores may go for smelting purposes.

Other clauses of the agreement will receive attention later.

A controversy arose in 1910 with reference to the clauses under discussion, wherein it was claimed by the Mining Company that it should receive a higher rate for its normal ores. This resulted in the agreement of November 17, 1910, whereby the Smelting Company agreed to pay, in addition to the price agreed upon under the original contract, the sum of 85 cents per ton, to extend from June 1, 1910, to June 1, 1915. Since the latter date—I take it from statement of counsel for complainant—the Smelting Company has been paying the increased rate.

The ores not included by the normal grade have a different history. Those falling below 30 per cent. lead assay have been relatively small in amount, and not a great deal of dispute has arisen concerning them. As to those containing 75 per cent. lead assay and above, there has been considerable controversy. These controversies were adjusted from time to time in pursuance of Judge Lindley's interpretation of the agreement, and the parties continued in mutual accord concerning them until June 5, 1915, the date when the Smelting Company notified the Mining Company that after June 7th this particular grade of ore would be settled for on regular contract rate, namely, \$16 treatment basis, and 90 per cent. of lead at 90 per cent. of New York quotations up to \$4.10, plus one-half the excess above \$4.10. No adjustment between the parties followed this notification. The Mining Company thereupon insisted that the Smelting Company receive the whole of the 37 tons of lead maximum shipment per day at Tacoma. This being refused, it declared that the Smelting Company had breached its agreement. Matters have so remained up to the present time; the Mining Company continuing its shipments of normal grade ores to smelters controlled by the A. S. & R. Company.

The Mining Company has recently constructed a smelter of its own, and though it has not yet diverted any of the ores agreed to be sold to the Smelting Company, except some of the high and low grade, it has threatened to do so, and there is no doubt that such is its pur-

pose, unless its obligations under the agreement prevent it from so doing. The agreement has been assigned by the Smelting Company to the A. S. & R. Company, the plaintiff.

[3] It is unnecessary to review the authorities respecting the conditions under which preliminary injunctions may issue. It is only essential that it appear that there is a probable right, and a probable danger that such right will be defeated without the immediate interposition of the court. The purpose of such injunctive relief is to maintain the status quo, and it will be granted wherever the questions of law or of fact to be ultimately determined are grave and difficult, and injury to the moving party will be immediate, certain, and great if denied, while loss or inconvenience to the opposing party will be comparatively small if granted. *Sanitary Reduction Works v. California Reduction Co.* (C. C.) 94 Fed. 693; *Denver & Rio Grande R. Co. v. United States*, 124 Fed. 156, 59 C. C. A. 579; *Magruder v. Belle Fourche Valley Water Users' Ass'n*, 219 Fed. 72, 135 C. C. A. 524.

[4] Along with fixed rules of law, there is need of a sound discretion to be exercised at all times, in view of the attendant facts and conditions.

It is urged that the bill fails to state a cause of suit for specific performance or an injunction, in that it is concerning personalty, and that it appears that complainant has a plain, speedy, and complete remedy at law, and, further, that the conditions are such that a court of equity will not intervene to enforce specific performance. I will not attempt to pass categorically upon the bill as to its sufficiency, except to inquire whether the questions presented are grave and weighty, and difficult of solution, and such as to call for a maintenance of the status quo during the pendency of the litigation.

[5] It can no longer be maintained that a suit will not lie for the specific performance of a contract respecting personalty. The underlying thought touching such a suit is whether the suitor has a plain, speedy, adequate, and complete remedy at law. If he has, he cannot have specific performance. *Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. Ed. 152; *Express Co. v. Railroad Co.*, 99 U. S. 191, 25 L. Ed. 319; *Texas Co. v. Central Fuel Oil Co.*, 194 Fed. 1, 114 C. C. A. 21; *Livesley v. Johnston*, 45 Or. 34, 76 Pac. 13, 946, 65 L. R. A. 783, 106 Am. St. Rep. 647.

[6] The bill herein does show, practically without question, that the complainant has not as plain, adequate, and speedy a remedy at law as in equity. I need only instance the fact, which appears both by the bill and by the affidavits adduced and on file herein, that the ores produced by the Mining Company have a peculiar value for smelting purposes, and are not readily obtainable elsewhere, and it would be practically impossible to measure their value for determining the loss plaintiff would sustain if it were not able to obtain them under the contract. The instance is weighty in itself. Others might be added, of cumulative value, but I will not stop, nor is it necessary, to recount them.

[7] As to the practicability of a court of equity enforcing the terms of the agreement, it would seem to be comparatively simple, at least

as it pertains to the normal product. The agreement is for the sale and purchase of these ores. They consist of the product of the mines of the Mining Company. The only stipulation that would seem to present an obstacle to a court's requiring performance is that the Mining Company shall "operate all its said mines." There is no provision respecting the manner of their operation requiring any supervision of the court as to details, but the simple agreement that the Mining Company shall actively operate the mines. There seems to be no plausible reason why the court may not require a performance on the part of the Mining Company in this respect. The production of ores is, of course, a result of the active operation of the mines, and these ores the Mining Company is required to sell and deliver to the Smelting Company. The relief asked is that the Mining Company, in pursuance of its undertaking, continue their delivery to the plaintiff. There are no delicate or complex conditions involved in their production or delivery, or in obtaining the stipulated price agreed upon to be paid for them; nothing apparent that will necessitate supervisory control in requiring performance on the part of the Mining Company. There is a provision respecting the assay upon which the price is to be fixed, which looks to the possible submission of the assay to an umpire for adjustment where the assayers for the two companies do not agree. So far as the record shows, up to this date, and for more than 12 years, there has been no necessity for submission to the umpire. But this aside, the umpires are specifically named, and if it should turn out that the parties do not agree, the submission automatically takes place, and the matter is adjusted. It requires no supervision of the court, therefore, for ascertaining and fixing the price which the Mining Company is to receive for its ores. There is a stipulation in the supplemental agreement of May 4, 1905, providing for filling vacancies in the list of persons designated to act as umpires in case any one of the list should be rejected by either of the parties, but this does not materially affect the situation.

[8, 9] It is urged that, even as to these ores of normal grade, there is accorded under a certain contingency an option to the Smelting Company to purchase them. This is based upon the second paragraph of the supplemental agreement of May 4, 1905. The true meaning and purpose of the paragraph is not at all clear. It seems incongruous and out of harmony with the other stipulations of both the original and the supplemental agreements. It should, however, under one of the canons of construction, be considered in connection with the other stipulations, respecting the same subject-matter, contained in both the original and supplemental agreements. The third paragraph of the supplemental agreement provides that the terms that are to govern (transposing the statement for clarity) shall be those made by the A. S. & R. Company to a majority of the Cœur d'Alene shippers, unless the A. S. & R. Company shall go out of existence or shall cease to purchase a majority of the Cœur d'Alene ores. This is a specific and positive stipulation, and comes later in the agreement than the provisions of paragraph 2. It is then later provided, in the third paragraph, that in case the A. S. & R. Company shall cease to exist or shall cease to purchase

a majority of the tonnage of ore produced in the Cœur d'Alenes, then the terms given by the other smelting companies for a majority of the ores produced in the Cœur d'Alenes, after excluding certain ores specified, shall govern. This latter stipulation would seem also to be specific and positive. Yet in order to give it effect, paragraph 2 must be read in connection with this latter condition. So that if the smelting companies purchasing a majority of the Cœur d'Alene ores fix terms that the Smelting Company does not desire to meet, then the Mining Company may accept those terms, and ship its ores accordingly. But if the Smelting Company desires subsequently to meet the terms, it may do so by giving notice, etc. This is the option alluded to, and such is the construction that seems the more reasonable. It is the one that the parties have apparently acted upon and have considered to be binding in the execution of the agreement. But if I am mistaken as to this, the question presented is both weighty and difficult, and one which may well be deferred until the final hearing. If I am right in this construction, the exercise of the option is contingent upon conditions that have never as yet come about and may never arise. The contingency of the conditions arising under which the so-called option may be invoked is so remote that it places no material obstacle in the way of enforcing specific performance in equity. *Guffey v. Smith*, 237 U. S. 101, 35 Sup. Ct. 526, 59 L. Ed. 856.

[10] As it respects the high and low grades, the agreement as interpreted, and as acted upon by the parties, involves an option on the part of the Smelting Company to take them. But there seems to be no good reason why the Mining Company may not be required to deliver the ores when the option has been declared. I need not comment on this phase of the agreement further, however; nor do I attempt to determine precisely its legal aspect, or its bearing upon complainant's right to the relief demanded. Complainant's counsel, by their argument, are only asking that for the present the injunction extend to require a continuation of the delivery of the normal grade.

[11-14] Another question of importance relates to the assignability of the agreement; and, if assignable, a further inquiry arises as to what rights the assignee will acquire under the assignment.

By the eleventh paragraph it is expressly stipulated that:

"This agreement shall be binding upon and inure to the benefit of the successors and assigns of the respective parties hereto."

The general rule is that the right of one party to a contract to its performance is assignable, unless the assignment is unauthorized or forbidden by statute or by the terms of the contract itself. To this rule exist exceptions, and among them are contracts involving relations of personal confidence and contracts for personal service. If reliance be had for performance upon the integrity, credit, or responsibility of a party, or confidence or trust be reposed in him personally, the contract is without assignability. And so it is if it be one for personal services, involving the exercise of knowledge, taste, or skill, for it is said to be considered contrary to public policy that any person should exercise

such control of the power of another to choose for whom he shall labor. 5 C. J. 874, 882, 883.

The exceptions are concretely stated in Pollock on Contracts (4th Ed.) 425, as quoted in Arkansas Valley Smelting Co. v. Belden Co., 127 U. S. 379, 388, 8 Sup. Ct. 1308, 1309 (32 L. Ed. 246):

"Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided."

But whether the contract falls within either branch of the exception is a question which must turn upon the intention of the parties, and must be eventually determined by consideration of the language employed, the kind of acts and services to be performed, and the nature and purpose of the contract itself. King v. West Coast Grocery Co., 72 Wash. 132, 129 Pac. 1081.

Now, turning to the contract, it is expressly stipulated that deliveries shall be made to any smelting plant owned by the Smelting Company, its successors, or assigns. Then follows the stipulation of the eleventh paragraph above quoted, respecting the binding effect and the inuring benefit to successors and assigns.

The parties have recognized the significance of this clause, by stipulating in the fourth supplemental contract that no assignment of the agreement shall be made without the consent of the Mining Company. This stipulation expired by limitation in June, 1915; but it serves to indicate, with much force, how the parties themselves regarded the primary stipulation.

In this connection, a matter is pertinent for consideration, though outside of any specific terms of the agreement. I refer to the Baruch purchase of the Smelting Company's stock. The purpose of the purchase, with scarcely a question, was to enable the A. S. & R. Company to control the affairs of the Smelting Company; and, when the present agreement was entered into, it was, by the strongest probability, within the contemplation of the parties that it would be convenient, and perhaps serviceable, that the agreement be assigned to the A. S. & R. Company, as it was designed that a large proportion, if not all, of the ores should, in the immediate future or at some stage of the time limitation of the agreement, be diverted to the A. S. & R. Company's smelters. So that when the Tacoma smelter, in January, 1912, ceased the smelting of lead ores, it was but natural that an assignment of the agreement should be made to what is termed the parent company, namely, the A. S. & R. Company. Thus, by the assignment, eventually transpired just what the parties contemplated might or should come about in the course of legitimate dealings respecting the agreement. True, it may be, as claimed by counsel for the Mining Company, that the Smelting Company would have no interest in the agreement after it ceased to smelt lead ores, except the right to direct shipments to other smelters; but the assignment has accomplished the very purpose of diverting shipments, and the diversion now is entirely to the A. S. & R. Company's smelters, and has put the A. S. & R. Company in a position to make the diversions in the stead of the Smelting Company. And

while the Smelting Company, subsequent to the assignment, could have no right of action against the Mining Company on account of future transactions, and is not in a position to demand specific performance or an injunction, yet, by the very terms of the stipulation that the agreement shall be binding upon and inure to the benefit of the successors and assigns of the respective parties, as well as by the extraneous contemplation of the parties as gathered from the attendant circumstances and conditions obtaining at the time the agreement was entered into, the A. S. & R. Company, by the assignment, succeeded to all the benefits to inure to the Smelting Company. Such being the case, the A. S. & R. Company is put exactly in a position to demand specific performance, and an injunction, if need be.

The assignment, it must be understood, cannot relieve the assignor of its obligations to the Mining Company under its agreement. 5 C. J. 879. But the Smelting Company having by the assignment delegated its performance to the A. S. & R. Company, and the A. S. & R. Company by accepting the assignment having become bound to perform as the Smelting Company was bound in the first instance, the Mining Company has lost no remedial rights, but instead has been accorded a like remedy against the A. S. & R. Company to that it had against the Smelting Company. In a broad sense, this is exactly what the parties from the very inception of the negotiations contemplated might happen.

I have examined with much care the cases of *Arkansas Smelting Co. v. Belden Co.*, supra, *Wooster v. Crane & Co.*, 73 N. J. Eq. 22, 66 Atl. 1093, *Central Brass Co. v. Stuber*, 220 Fed. 910, 136 C. C. A. 475, *Swarts v. Narragansett Lighting Co.*, 26 R. I. 436, 59 Atl. 111, and *Rice v. Gibbs*, 33 Neb. 460, 50 N. W. 436, and 40 Neb. 264, 58 N. W. 724, and find no pertinent analogy of the facts upon which those cases are based to those of the present case, except the last cited. The *Wooster Case* is a good example of contract provisions which, as it was there held, do not render the contract assignable. The contracts purport to have been made between Lizzie E. Wooster and Crane & Co., their successors and assigns, and it was stipulated that:

"The above agreements are made with the understanding that the said Crane & Co. and their representatives and assigns shall in substantial good faith keep and perform their agreement hereinafter contained."

Pitney, Advisory Master, states the pith of the controversy in a single sentence:

"I am," says the master, "unable to construe it as a contract on the part of Miss Wooster to deal with anybody to whom Crane & Co. may assign that contract and to accept such assignee as paymaster."

Not so with the agreement of the parties here, which is specific that it shall be binding upon and inure to the benefit of the successors and assigns.

In the Nebraska case, it was held on the first hearing that the contract involved was assignable, and the ruling was not departed from on the rehearing. After setting forth the stipulation which it was claimed rendered the contract assignable, the court says:

"The precise point in the construction of this contract is not whether it is in its nature assignable, so that, its conditions being performed, an assignee might enforce it, but whether or not the plaintiff in this case as assignee did perform or tender a performance of those conditions."

So the case was determined upon the question whether the assignee had performed, thus in effect conceding the assignability of the contract.

The record does not show in the Belden Case what provision was made in the contract respecting assignment.

[15] Another question is presented, arising from the fact that now, since the assignment of the agreement, the A. S. & R. Company is constituted an agent for fixing the price of ores which that company is itself purchasing. Under the agreement, however, it is not fixing the price arbitrarily, but the price to govern is that which the A. S. & R. Company shall make to a majority of the Cœur d'Alene shippers. At the time of entering into the contract, it is manifest that the Mining Company was satisfied to take what the majority of the Cœur d'Alene shippers could get for their ores; and, while the A. S. & R. Company has now become in effect a party to the contract, the Mining Company will still be able to obtain what it contracted for. In reality, this is another condition that the Mining Company contemplated might eventually happen, and it can hardly insist now that the agreement is void because it did happen.

Another suggestion is that the A. S. & R. Company has brought about an unlawful combination with other smelting companies, so that it has a monopoly of the market for the purchase of lead ores, and, for that reason, that it ought not to be allowed to prevail here. While there is a surmise that such may be the case, the testimony in the record falls far short of establishing the fact.

I conclude that a preliminary injunction should issue restraining the Mining Company from disposing of any of its lead ores of normal grade to any other person or corporation than the plaintiff, and from itself smelting such ores in its own behalf, upon the giving of a bond by the plaintiff in the sum of \$20,000, to indemnify the Mining Company for any loss it may sustain if the injunction be wrongful or without sufficient cause.

I will hear the parties further, if they desire to be heard, as to the amount of the bond.

AMERICAN NAT. BANK OF MACON v. COMMERCIAL NAT. BANK OF
MACON et al.

(District Court, S. D. Georgia, E. D. January 21, 1918.)

No. 25.

1. BANKS AND BANKING ⇨248(1)—LIQUIDATION AGENT—AUTHORITY.

A loan to a liquidation agent of a national banking association cannot make stockholders individually liable under Rev. St. § 5220 (Comp. St. 1916, § 9806), and section 5151.

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

2. BANKS AND BANKING ⇨283—LIQUIDATION CONTRACTS—RATIFICATION BY STOCKHOLDER.

The directors of defendant national bank recommended by resolution that it was expedient to go into voluntary liquidation, under Rev. St. §§ 5220, 5223 (Comp. St. 1916, §§ 9806, 9810), providing that any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock, and declaring that an association which is in good faith winding up its business for the purpose of consolidating with another shall not be required to deposit lawful money for its outstanding circulation, and that the question of a consolidation with complainant bank by a sale of the assets of the bank should be submitted to stockholders. Though the directors of the defendant bank had authorized its officers to transfer to complainant all of its assets as cash or as collateral for its notes, the assets had been turned over, but no notes had been taken indicating any indebtedness. Defendant's stockholders ratified the resolution of the board of directors, transferring and assigning the assets of their corporation to complainant. Complainant by resolution assumed defendant's debts, and authorized its directors to contract with the directors of defendant, or such liquidating agent as might be appointed. *Held*, that as the contract submitted to and ratified by the stockholders was plainly a sale, and created no debt, and all of the stockholders did not participate in the ratification, they cannot be held liable individually as stockholders by complainant, which assumed the obligations of the defendant bank, particularly as a loan to a liquidating agent could not make the stockholders individually liable.

3. BANKS AND BANKING ⇨262—DISSOLUTION—STOCKHOLDERS.

In such case, the acts and conduct of the directors of defendant cannot bind the stockholders, who had a right to rely on a written resolution of liquidation; the acts of the directors not being a practical construction by the stockholders.

4. BANKS AND BANKING ⇨283—CONSTRUCTION—ACTS OF PARTIES.

In such case, a subsequent stockholder's resolution authorizing the sale of a portion of the property of defendant national bank, had two years after they ratified the agreement with the directors, is not admissible as the construction of a contract between the two banks.

In Equity. Bill by the American National Bank of Macon against the Commercial National Bank of Macon and its shareholders. On motion to dismiss amended bill. Bill dismissed.

Hardeman, Jones, Park & Johnston, of Macon, Ga., for plaintiff.

Hall & Grice, C. L. Bartlett, R. L. Berner, C. M. Hughley, Minter Wimberly, Jesse Harris, Jordan & Lane, W. D. McNeil, Ryals & Anderson, and Feagin & Hancock, all of Macon, Ga., Green F. Johnson, of Monticello, Ga., and W. A. Dodson, of Americus, Ga., for defendants.

EVANS, District Judge. When this bill was submitted on the motions to dismiss it, I reached the conclusion that the bill should be dismissed, and undertook to state the reasons therefor in an opinion filed November 8, 1917, 246 Fed. 721. Leave was granted to take an order sustaining the motions to dismiss, but before this order was taken complainant moved to amend its bill, which was allowed, subject to pending motions to dismiss and to subsequent motions to dismiss the bill as amended. Motions to dismiss the bill as amended have been filed.

The amendment states in full the resolutions of the directors of the two banks, which were epitomized in the contract, and alleges that

under these resolutions the assets of the Commercial were not purchased, but taken as collateral security for an indebtedness of the Commercial to the American Bank; that no notes were taken as contemplated in the resolution, as it was found to be impracticable to take notes; but that the money was advanced under an agreement between the banks that the indebtedness should be carried as an overdraft, and that such overdraft should be secured by the assets which were transferred as collateral security. The system of dealing and accounting between the two banks under this arrangement is set forth; each bank was alleged to have made separate reports to the Comptroller of Currency, and in these reports the Commercial Bank listed as a liability the amount due by it to the American, and the American included such liability in its reports under the head of loans and discounts. Plaintiff attached a resolution of the stockholders of the Commercial Bank, ratifying the action of its board of directors, as contained in the resolution of August 1, 1914, and the contract of August 11, 1914, made pursuant to such resolution. It was further alleged that on July 1, 1916, the directors of the Commercial Bank accepted the offer of the president of the American to purchase the Commercial Bank's building, fixtures, and furniture for \$40,000, to be credited on the Commercial's indebtedness to the American. The prayers of the original bill were amended, so as to include a prayer for judgment against the Commercial Bank.

[1-3] It is well to bear in mind that the purpose of this bill is to enforce a stockholders' liability under Revised Statutes, § 5220 (U. S. Comp. St. 1916, § 9806), and section 5151. These sections apply to the voluntary liquidation of a national banking association by a vote of its shareholders owning two-thirds of its stock. It is not pretended in this bill that all of the shareholders participated in the liquidation of the Commercial Bank, so that the case must be considered from the standpoint of official action by the stockholders placing the bank in voluntary liquidation.

Liquidation in strict pursuance of the statute begins with action by the stockholders authorizing it. But this was not the course followed in this instance. The directors of the two banks acted in the matter under resolutions which they severally adopted. The whole of the Commercial's business was taken over by the American, all of the assets of the Commercial were transferred and delivered to the American, and a contract was entered into by the directors of the two banks, as a memorial of what they had done under these resolutions. Affairs were in this condition when the stockholders were called together. In their resolution the stockholders purported to ratify: (1) The resolution of their board of directors, dated August 1, 1914, transferring and assigning the assets of the association to the American National Bank; (2) the contract between the two banks, made pursuant to the resolution of their board of directors; (3) the action of a special meeting of stockholders, approving the resolution of the board of directors and the contract aforesaid.

It is this ratifying resolution which constitutes the voluntary liquidation by the stockholders. They interpreted the resolutions of their

directors in the condensed form contained in the contract, and ratified the contract with this understanding. I undertook in my former opinion to demonstrate that this contract was definite and unequivocal, and did not create the relation of debtor and creditor between the banks. The full text of the resolutions was not before me. The parties so clearly expressed their conception of their meaning that I do not think any ambiguity exists which justifies a reference to them. But, looking at the contract as it was presented to the shareholders for their ratification, these facts appear: (1) The Commercial's directors had recommended in their resolution that it was expedient to go into voluntary liquidation under sections 5220, 5223, of the Revised Statutes (Comp. St. 1916, §§ 9806, 9810), and that the stockholders should be called to consider a consolidation with the American National Bank of Macon "by sale of its assets to said bank." (2) The directors of the Commercial Bank had authorized its officers to transfer to the American National Bank "as cash or as collateral for the notes of this association all of its assets," and that the American should "take over the business" of the Commercial. The assets had been turned over, but no notes were taken indicating any indebtedness.

The American National Bank by resolution had assumed all of the Commercial's debts, and its directors were authorized to make a contract with the directors of the Commercial, "or with such liquidating agent as may be appointed for said association," thus clearly indicating that the American intended to buy the assets, because the resolutions contemplated the same character of contract was to be made with the directors of the Commercial Bank as would be made with its liquidating agent, in case the bank had appointed a liquidating agent. A loan could not be made to the liquidating agent of a national banking association, so as to make the stockholders individually liable for it.

On further consideration, I am confirmed in my opinion that the contract should be construed as one of purchase, and not of pledge of the Commercial's assets to the American.

It is contended that the contract is ambiguous, and in its essence is executory, and that the stockholders of the bank are bound by the practical construction put on it by the directors at the time of its ratification by the stockholders. I freely concede that, where an executory contract is ambiguous, the practical interpretation put upon it by the parties who are to be bound thereby may be considered in arriving at the true meaning of the contract. This rule is inapplicable here, because the contract is not ambiguous, and the acts and conduct of the directors cannot bind the stockholders, who had a right to rely on the written instrument.

[4] The stockholders' resolution authorizing the sale of its banking house and fixtures, adopted nearly two years after the contract of consolidation of the banks, and the sale of assets of one to the other was made, is of no evidentiary value as explaining the contract of August 11, 1914. Nor do the pleaded facts justify the interposition of the doctrine of estoppel.

Wherefore the petition as amended should be dismissed, as provided in the order accompanying this opinion.

In re EPSTEIN.

(District Court, S. D. Florida. November 17, 1917.)

1. BANKRUPTCY ⇨413(3)—DISCHARGE—SUFFICIENCY OF OBJECTION.

An objection to a bankrupt's discharge on the ground that he failed to keep books of account, to be sufficient under Bankruptcy Act July 1, 1898, c. 541, § 14b (2), 30 Stat. 550 (Comp. St. 1916, § 9598), must allege that the failure was with intent to conceal his financial condition.

2. BANKRUPTCY ⇨413(3)—DISCHARGE—SUFFICIENCY OF OBJECTIONS.

An objection to discharge on the ground that the bankrupt obtained property by means of a materially false statement in writing is insufficient, unless it sets out the statement and alleges wherein it was false, to whom it was made, and from whom the property was obtained.

3. BANKRUPTCY ⇨407(1)—DISCHARGE—GROUNDS FOR REFUSAL.

A bankrupt can be refused a discharge only on one of the grounds named in the statute.

In Bankruptcy. In the matter of Morris Epstein, doing business as "The Outlet," bankrupt. On motion to strike out specifications of objection to bankrupt's discharge. Motion granted.

H. N. Sandler, of Tampa, Fla., for bankrupt.

Knight, Thompson & Turner, of Tampa, Fla., for creditors.

CALL, District Judge. This cause comes on to be heard upon the motion to strike six of the seven specifications of objection to the discharge of the bankrupt. The motion is withdrawn as to the sixth specification, said sixth specification having been amended subsequent to the motion made.

[1] The first specification is "that said bankrupt failed to keep books of account from which his creditors could ascertain his true financial condition." The second is "that said bankrupt kept no books," etc.

Section 14b (2) of the Bankruptcy Act states what is necessary to defeat the discharge of the bankrupt. It must be "with intent to conceal his financial condition." Comp. St. 1916, § 9598. These specifications are absolutely silent as to what the intention of the bankrupt was in failing to keep books. Specifications of objection to discharge must be sufficiently definite to put the bankrupt upon notice of what he is to meet, and make the issue of fact to which the evidence is to be adduced.

It has been generally decided that a specification of objection under subdivision (2) is sufficient, if stated in the words of the statute. A specification couched in the language of the above specifications held insufficient in *In re James A. Bradin* (D. C.) 179 Fed. 768, 24 Am. Bankr. Rep. 793. The motion to dismiss these specifications, unless the same shall be amended within five days, will be granted.

[2] The third specification is that the bankrupt obtained property from the objecting and other creditors upon a material false statement in writing made by him for the purpose of obtaining credit. The words of the statute were used without any attempt to show to whom

the statement was made, from whom the goods were obtained, or what the false statement was, or wherein false. Under all the authorities I have seen such a specification is insufficient, and the motion to dismiss will be granted.

The fourth specification sets up that the bankrupt, desiring to obtain property from the Hutchinson Shoe Company, a creditor, made a statement in writing showing assets of \$5,400 and liabilities of \$1,700; that said statement was false, and made for the purpose of obtaining credit from said company and other creditors, etc. There is no allegation that he obtained such credit, nor wherein said statement was false.

The fifth specification is that the bankrupt gave "information" to R. G. Dun & Co., upon which they based their statement. No allegation that the information was in writing, or any part of it false, materially or otherwise, or made for the purpose of obtaining credit, or that goods were obtained.

These three specifications were evidently intended to be framed upon subdivision 3 of section 14b of the Bankruptcy Act:

"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."

A reading of specifications 3, 4, and 5 will show that each is wanting in the essential allegations to make such specifications sufficient. In *re Levey*, 133 Fed. 572, 13 Am. Bankr. Rep. 317; In *re Main*, 205 Fed. 421, 30 Am. Bankr. Rep. 552. The motion to dismiss these specifications will therefore be granted.

[3] The seventh specification is that the bankrupt has not accounted for money or property coming into his hands since he has been engaged in business. There are six grounds mentioned in the statute why a bankrupt shall be refused his discharge. Unless one of these six grounds is alleged and proven, the court cannot refuse the bankrupt a discharge. This seventh specification does not set forth one of the grounds mentioned in the statute. If the pleader intended it under the fourth subdivision of section 14b of the Bankruptcy Act, it is so clearly insufficient as not to admit of argument to the contrary.

The motion to dismiss the seventh specification will be granted. It will be ordered accordingly.

HOLSMAN et al. v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. February 18, 1918.)

No. 3015.

1. INDICTMENT AND INFORMATION ⇨91(1)—CONSPIRACY—WILLFUL.

An indictment charging a conspiracy to commit an offense against the United States by using the mails in connection with a scheme to defraud, whereby defendants advertised treatment for diseases of men, and intended to represent to any one inquiring that his symptoms showed that he was seriously afflicted, regardless of whether the treatment was needed, sufficiently disclosed defendants' fraudulent intent, though not specifically averring defendants acted willfully, for where the facts alleged necessarily import willfulness, failure to use the word "willful" itself is not fatal.

2. WITNESSES ⇨268(1)—EXAMINATION—CROSS-EXAMINATION.

In a prosecution for conspiracy to use the mails in connection with a scheme to defraud by advertising treatment for diseases and representing to persons inquiring that they were afflicted, regardless of the fact, where a medical witness testified that one of the defendants had charge of the office of the other, who was a physician, during his absence, the action of the court in refusing to permit cross-examination of such medical witness as to the office equipment was not, though the inquiry was somewhat germane to the direct examination, an abuse of the trial court's discretion, which as to cross-examination covers a wide range.

3. CRIMINAL LAW ⇨423(6)—DECLARATIONS OF COCONSPIRATOR—ADMISSIBILITY.

An affidavit made by one of the defendants charged with conspiracy, but not in furtherance of the conspiracy, is not admissible against a co-conspirator.

4. CRIMINAL LAW ⇨1169(5)—INSTRUCTIONS—CURE OF ERRORS.

Where the court improperly admitted in evidence over the objection of one of the defendants an affidavit made by his alleged coconspirator, which did not relate to the conspiracy, the error was cured by an instruction that only those things said or done by one conspirator in furtherance of the objects of the conspiracy are chargeable against the other conspirators.

5. CRIMINAL LAW ⇨1169(1)—APPEAL—HARMLESS ERROR.

Where, in a prosecution for conspiracy to use the mails in connection with a scheme to defraud, certain advertisements of one of the defendants were received under stipulation of counsel, the admission of other similar advertisements was not harmful.

6. CONSPIRACY ⇨45—EVIDENCE—ADMISSIBILITY.

In a prosecution for conspiracy to use the mails in connection with a scheme to defraud, decoy letters sent by post office inspectors to ascertain whether the law was being violated, as well as answers thereto, are competent evidence, the inspectors in no way becoming parties to the conspiracy.

7. CONSPIRACY ⇨45—EVIDENCE—ADMISSIBILITY.

Where post office inspectors, to ascertain whether the law was being violated, sent defendants decoy letters and received replies purporting to come from the office of one of the defendants, it is a legitimate inference that defendants authorized the replies to be sent, and they are admissible in a prosecution for conspiring to use the mails in connection with a scheme to defraud.

8. CRIMINAL LAW ⇨413(1)—EVIDENCE—ADMISSIBILITY.

In a prosecution for conspiracy to use the mails in connection with a scheme to defraud, correspondence of defendants of a self-serving nature is not competent.

⇨For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
248 F.—13 *Rehearing denied May 13, 1918.

9. CRIMINAL LAW ⇨1129(1)—ERROR—ASSIGNMENTS OF ERROR.

Alleged errors discussed in defendants' briefs, but not included in the assignments of error, need not be considered.

10. CRIMINAL LAW ⇨829(1)—TRIAL—INSTRUCTIONS.

The refusal of requests covered by the instructions given is not error.

11. CONSPIRACY ⇨45—OFFENSES.

In a prosecution for conspiracy to use the mails in connection with a scheme to defraud, replies to decoy letters sent by the post office inspectors are admissible to show that the conspiracy actually existed, but the conspiracy must have existed independently of the decoy letters, and a conviction cannot be had where it was induced as a result of such letters this not being a case where inspectors, suspecting one of using the mails to transmit nonmailable matter, send decoy letters, and the suspect in violation of law replies, using the mails to transmit nonmailable matter.

12. CRIMINAL LAW ⇨829(3)—TRIAL—INSTRUCTIONS—REQUESTS.

In a prosecution for conspiracy to use the mails in connection with a scheme to defraud, the denial of defendants' requested instruction that evidence procured through decoy letters sent by post office inspectors could only be considered for the purpose of determining whether defendants had actually entered into the conspiracy, and such letters are not of themselves sufficient to sustain a conviction, was not error, where the court charged that a government official cannot conspire with another person to violate the laws of the United States for the purpose of getting such person convicted of a crime, and that the conspiracy with which defendants were charged must be proven to exist independently of any inducement to enter therein by any government official, but if the conspiracy does exist, it is immaterial what means government officers adopted in order to procure evidence to establish it, for the instruction given covered the request.

13. CRIMINAL LAW ⇨810—TRIAL—INCONSISTENT INSTRUCTIONS.

In such case, where the court further charged that a government officer, suspecting that a person or persons may be engaged in a business in violation of the laws of the United States, has the right to seek information under an assumed name, and that if such suspected person responds to such inquiry and by responding violates a law of the United States by using the mails to convey such information, it is no defense that the violation was in response to an inquiry of a government official, there was no contradiction or inconsistency between the several portions of the charge of which defendants could complain, the latter portion of the charge being proper for, as the decoy letters were not calculated to incite defendants to enter the conspiracy, the court might instruct that the fact that the letters were decoy letters is no defense.

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

Charles K. Holsman and Gideon M. Freeman were convicted of conspiracy to commit an offense against the United States, by devising and intending to devise a scheme and artifice to defraud to be accomplished by use of the mails, and they bring error. Affirmed.

The plaintiffs in error, with others, were indicted, charged with conspiracy to commit an offense against the United States, namely, the offense of devising and intending to devise a scheme and artifice to defraud, to be accomplished by placing and causing to be placed in the United States post office at Los Angeles, Cal., letters, packages, circulars, and advertisements, to be delivered through the post office establishment, whereby Freeman should be represented to be a practicing physician, especially and specifically qualified to treat certain diseases of men, who could and would cure persons so

afflicted, thus causing such persons to open correspondence with Freeman, giving the symptoms of their trouble, whereupon the said Freeman would represent to such persons that he could cure their afflictions and restore them to health, and thereby induce such persons to take treatment of him, for which he would require them to pay him such stipulated sums as he desired to fix; and it is further alleged that said statements, representations, and advice, so intended to be so made and given, were not intended by the defendants to be made in good faith, but were intended to be made and given for the purpose of inducing said persons to believe they were seriously afflicted with the said certain diseases, regardless of the fact as to whether they were so afflicted or not, and to induce such persons to send their money to defendants in cases where no treatment at all, physical or mental, was needed. For effecting the object of their alleged conspiracy, certain overt acts are set forth.

Holsman and Freeman were tried separately from the other defendants, and were convicted, and the cause is here on writ of error prosecuted by them.

Duke Stone, M. E. Meader, and Ralph Woods Pontius, all of Los Angeles, Cal., for plaintiffs in error.

Albert Schoonover, U. S. Atty., and Clyde R. Moody and Wm. Fleet Palmer, Asst. U. S. Attys., all of Los Angeles, Cal., for the United States.

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

WOLVERTON, District Judge (after stating the facts as above).
[1] A demurrer to the indictment was overruled, and the action of the court in that respect is assigned as error. The specific reason advanced, challenging the sufficiency of the indictment, is that it in no way alleges fraudulent intent on the part of the defendants in doing what they are charged with doing.

The offense with which the defendants are charged is conspiracy to commit another offense denounced by Congress, namely, devising or intending to devise a scheme to defraud. The indictment does plainly charge that the defendants did knowingly and unlawfully conspire to commit the offense. This is formal, however, and it should further appear by reasonable intendment that what they are charged with conspiring to do was done with willful intent. While the word "willful," or its equivalent, is not in the indictment, other language is employed which is clearly indicative of an intent to defraud. The indictment shows that the acts alleged to have been done were done with the purpose of inducing persons to believe they were afflicted with a serious disease, when in fact they were not so afflicted, and this with the ultimate purpose of getting from such persons money to which the defendants were not entitled, by reason of not having rendered any service whatsoever. This shows very plainly the intent with which the acts were committed, and they were necessarily and essentially fraudulent.

Where the facts alleged necessarily import willfulness, the failure to use the word itself is not fatal. *Van Gesner v. United States*, 153 Fed. 46, 82 C. C. A. 180.

So, in the present case, fraudulent intent on the part of defendants, though not specifically averred, appears more than inferentially from

the indictment. The very scheme alleged to have been devised is impregnated with fraud, and an intent to defraud cannot be dissociated from the device. The demurrer was properly overruled.

[2] The next assignment of error relates to the cross-examination of Dr. Fuller. In his examination in chief he had related that, in the summer of 1912, he saw the defendant Holsman at the office of Dr. Freeman, and that Holsman had charge of the office during Freeman's absence; that when witness began working in May, 1912, the office was located at No. 305½ South Spring street, and was shortly afterwards removed to No. 327½, same street; that he saw Dr. Holsman at the latter place; that Holsman was around there about three weeks in the latter part of July, and had charge of the office during Dr. Freeman's absence. On cross-examination, the defendants attempted to show by the witness what the equipment of the office was, and the supply of drugs kept there, which, on objection, they were not allowed to prove. The matter was in a measure germane to the examination in chief. The court, however, has a wide range of discretion respecting cross-examination, and it is by no means apparent that the exercise of such discretion in thus curtailing the examination affected the defendants injuriously. The inquiry pertained to the association together of Holsman and Freeman, and the manner of equipment, etc., of the office had but little bearing, if any at all, upon the subject.

[3, 4] An affidavit subscribed and sworn to by Freeman, wherein it is recited that Holsman was one of the persons practicing, or assisting in the practice of medicine and surgery in his, Freeman's office, situated at 305½ South Spring street, was admitted in evidence over the objection of Holsman that what was said in the affidavit was not binding upon him. It does not appear that the affidavit was made in furtherance of the conspiracy, or to effectuate its purposes. Indeed, it was made at a date previous to the time when it is alleged by the indictment that the conspiracy was entered into, and it should have been rejected as to Holsman. We think, however, the error was cured by instruction to the jury as follows:

"The court further instructs you that, while the acts or declarations of a coconspirator cannot prove the existence of the conspiracy itself, any act or declaration done or made by one of the conspirators during the existence and in furtherance of the unlawful combination, when proven, is not only evidence against him, but is evidence against the other conspirator who, if the combination be proved, is as much responsible for such act or declaration as if done or made by himself. You must not, however, permit yourselves to use against either defendant anything said or done outside the presence of such defendant, unless you believe from the evidence, beyond a reasonable doubt that at the time the things were said or done a conspiracy existed between the party saying or doing the things and the defendant to be effected thereby. In such a case it is only those things said or done in furtherance of the objects of the conspiracy which are chargeable against the other member or members of such conspiracy."

[5] The next assignment of error relates to the admission in evidence of two bound volumes of the Los Angeles Examiner, containing advertisements of the defendant Freeman. Previous to the admission of such volumes, certain of Freeman's advertisements had been introduced under stipulation of counsel that they should be allowed to go

to the jury. The advertisements contained in the two volumes are similar to those admitted under the stipulation; they being simply a continuation of Freeman's advertising in the same journal. It is not at all apparent that their admission proved harmful to defendants.

[6] The next assignment pertains to the admission of certain decoy letters and the answers thereto in evidence. The objection urged by counsel in their brief is to the effect that the letters were admitted without showing that they were received at the office of the defendant Freeman, and that certain replies, purporting on their face to come from his office, were received by the post office inspectors who caused the decoy letters to be sent. It was stipulated between the government and the defendants Freeman and Holsman that these letters were received, through the post office department, at the office of Freeman, and that the replies were transmitted through the mail from said office, and nothing was left for the determination of the court except the competency thereof as evidence fit to go to the jury.

That the letters were competent is beyond question. The inspectors in no way became parties to the alleged conspiracy in sending the decoy letters. Their course was adopted simply for the purpose of ascertaining whether the law was being violated by the defendants, which resulted in obtaining pertinent evidence tending to show such violation of the law.

[7] It is specifically insisted that, while the replies purported to come from the defendant Freeman's office, that fact alone is not sufficient evidence from which it might legitimately be inferred that he authorized them to be sent. The contention is adequately answered by the opinion of the court in *Hughes v. United States*, 231 Fed. 50, 54, 145 C. C. A. 238, 242, of apt analogy to the present case. The court says:

"The defendants, N. A. Hughes, T. W. Hughes, August Marable, J. F. Allen, and Edward Parlan are shown by the government's evidence to have been physicians and principals in the business that was being conducted at the two locations mentioned as the seats of the conspiracy, and the jury were authorized to infer from the evidence that these defendants were responsible during the period covered by the years 1912 and 1913 for whatever was being done on the premises at each location, and that they shared, or were to share, in the profits of the transactions, knowing their actual character. It was also open to the jury to infer from the evidence that the purpose of the business that was being conducted during the period mentioned, at those places, was not the bona fide treatment of disease, but a scheme to secure money from patients, with no purpose to treat them in good faith as promised, but merely as a pretext for taking the money solicited. The correspondence between the inspectors and the defendants, introduced in evidence, was of a character which justified the jury in drawing the inference of bad faith and fraud, if they saw fit. The fact that only fictitious transactions, based on decoy letters written by inspectors, were in evidence, and that no money is shown to have been received by the defendants, did not prevent the jury from inferring the existence of the conspiracy charged in the first count or the fraudulent scheme charged in the remaining three."

[8] The next question presented, for which we find any assignment of error, is the refusal of the court to admit in evidence Defendants' Exhibits 1, 2, 3, 4, 5, 6, 7, and 8, which consisted of the correspondence from the office of the defendants from May 1, 1913, to January 4,

1914, including letters received, as well as copies of letters sent from the office, concerning requests for treatment. A careful examination of all this correspondence impels us to the conclusion that it is self-serving, and was not competent as evidence in the case.

[9] Counsel for appellants have discussed in their briefs, under heads designated as "(e)," "(f)," "(g)," "(h)," and "(i)," certain matters respecting which it is claimed that error was committed by the court, but we have searched in vain among the assignments of error filed on the appeal for any assignments respecting these matters. For this reason, such alleged errors cannot be insisted upon here, and this court is therefore not called upon to look into them. We have examined them, however, and find them to be without merit.

[10] At the close of the testimony, and when the parties had rested, the defendants requested that certain instructions be given in their behalf, which were refused. Error is assigned respecting the action of the court in that respect. It is needless to discuss requested instructions 1 and 2, because the gist thereof is clearly covered by instructions Nos. 5, 6, 9, and 10 given by the court.

[11, 12] By requested instructions 3, 4, and 5, the court was asked to instruct, in effect, that the decoy letters alone were not sufficient evidence upon which to base a verdict of guilty, unless the jury believed that, at the time such letters were mailed, defendants were actually engaged in the criminal practice charged in the indictment, or that the defendants had then conspired together for the unlawful purposes indicated, because if the jury believed that the alleged conspiracy was suggested and planned by the post office inspectors, and that the defendants had not previously been engaged in the conspiracy except as shown by the response to such letters, the government would not be permitted, under the policy of the law, to prosecute for a conspiracy thus induced, or respecting which it was a party; further, by requested instruction 4, that, unless the jury believed that the defendants, at the time alleged in the indictment, had formed a conspiracy as stated, without the suggestion and origination of the same by the post office inspectors, and independently thereof, they should acquit; and, by requested instruction 5, that the evidence, if any, or the facts and circumstances, if any, procured by the decoy method, could only be considered for the purpose of determining the question as to whether or not the defendants had actually entered into the conspiracy, and that any fact or facts, or circumstances, elicited by the decoy letters, were not of themselves sufficient to sustain a verdict of guilty, unless the jury believed that the defendants had, independently of such letters, entered into the conspiracy at the time and place alleged in the indictment.

The court instructed the jury, by its instructions 12 and 13, as follows:

"If at the time the said decoy letter or letters were mailed to the defendants, or one of the defendants, the said defendants were engaged in the criminal practice charged in the indictment, and the said defendants, in response to said alleged decoy letters, mailed one or both of the letters set forth in the indictment in answer to such decoy letters, or either of them, in order to execute or carry out such conspiracy, or in an attempt so to do,

then the use of such decoy letters and the answers thereto can lawfully be received as evidence to prove said conspiracy.

"A government official cannot conspire with another person to violate the laws of the United States for the purpose of getting such person convicted of a crime. The conspiracy with which the defendants are charged must be proven to exist independently of any inducement to enter therein by any government official. In other words, if the conspiracy existed, it does not matter what the government officers did in order to procure evidence to prove it.

"You are instructed that the fact that the letters alleged in the indictment were in reply to such decoy letters is no defense in this action. You are further instructed that a government officer, suspecting that a person or persons may be engaged in a business in violation of the laws of the United States, has a right to seek information under an assumed name, directly from such person or persons so suspected; that if such suspected person or persons respond to such inquiry for such information, and by so responding violates a law of the United States by using the mails to convey such information, which use of the mails is prohibited by law, then such person or persons so using the mails cannot, when indicted for that offense, set up that he would not have violated the law if the inquiry had not been made of him by the government official or through the procurement of the government official."

Practically every phase of defendants' requested instructions 3, 4, and 5, it will be seen by comparison, is covered by the court's instructions 12 and 13. The only point especially urged is that the court should have instructed that the facts and circumstances acquired by the decoy letters were not of themselves sufficient to sustain a verdict of guilty, unless the jury believed that defendants had, independently of the decoy letters, entered into the conspiracy.

In a certain class of cases, the action of the party respecting decoy letters will render him liable criminally, and will constitute the substantive offense, regardless of what he may have done previously. *Grimm v. United States*, 156 U. S. 604, 15 Sup. Ct. 470, 39 L. Ed. 550, is a good illustration. There the defendant had been suspected of posting nonmailable matter, and decoy letters were sent for testing out whether he was thus transgressing the law, with the result that the defendant mailed such nonmailable matter. He was indicted for doing the particular act, and the prosecution was sustained. *Goode v. United States*, 159 U. S. 663, 16 Sup. Ct. 136, 40 L. Ed. 297, is another case, where a letter carrier was suspected of embezzling from the mail, and his conviction for taking money and stamps from a decoy letter was upheld.

It is not claimed here that the act of replying to the decoy letters constitutes the substantive offense. But an element of the offense charged is the existence of the conspiracy. The decoy letters were not designed or calculated to induce the defendants to conspire together for committing the offense of devising or attempting to devise a scheme to defraud, but their purpose was to elicit from defendants something of what they were doing. If the answers contained matter tending to show that a conspiracy existed, they were pertinent evidence for establishing that fact, and it was proper for the jury to consider them, along with the other testimony in the case, for determining whether or not such a conspiracy did in fact exist. But it is true that the conspiracy must have existed independently of the decoy letters;

that is, of the effect of such letters, not as evidence, but as inducing the conspiracy; and this is evidently the true interpretation of defendants' requested instructions. The point is adequately, or at least understandingly, covered, however, by the court's charge to the effect that the conspiracy must be proven to have existed independently of any inducement to enter into it by any government official. This, of course, refers to the decoy letters.

The cases of *Woo Wai v. United States*, 223 Fed. 412, 137 C. C. A. 604, and *Sam Yick et al. v. United States*, 240 Fed. 60, 153 C. C. A. 96, are without application to the present controversy.

By requested instruction 7, it was sought to have the court instruct that the jury should acquit unless they believed from the evidence that the defendants in some way knew of, or intentionally authorized, the mailing of the letters set out in the indictment. We think that this is sufficiently covered by the court's instruction 9. The same may be said of the defendants' requested instructions 9 and 11, in so far as they correctly state the law.

[13] Criticism is made of the court's instructions 12 and 13, in that it is urged that certain expressions of the court contained therein are contradictory and inconsistent. The analysis of counsel is this:

"First, that the jury are told that the conspiracy must be proven independently of any inducement to enter into it by the government official, and in the next place that the fact that the letters were decoy letters is no defense in this case, when as a matter of fact they may or may not have been a defense, depending upon whether or not the jury believed the conspiracy existed independently of the letters, and for this reason, also, the charge was upon the weight of the evidence. In other words, the court had plainly told the jury that the conspiracy must be proven independently of any inducement to enter therein by the government officials, and then, with full knowledge that the decoy letters were the only evidence in the case relied on by the government, the court instructed the jury that the fact that they were decoy letters was no defense, thereby making the instruction misleading, contradictory, and confusing."

This harks back somewhat to the discussion touching requested instructions 3, 4, and 5. The decoy letters, taken in connection with the replies thereto, were proper to be considered as evidentiary of the fact of the conspiracy. But the conspiracy must have existed independently of any inducement exerted by or through the agency of the decoy letters. The inducement here spoken of must be taken to signify the incitement of the defendants to commit the offense, whereby the government became a party thereto. Now, while the replies did constitute certain overt acts, which were made the basis of the indictment as having been committed in furtherance of the conspiracy, and were evidentiary, to some extent at least, of the fact of conspiracy, yet, as we have said, the decoy letters were not designed or calculated to induce nor, to emphasize the word, to incite the defendants to enter into the conspiracy, and could have no such effect. In this view, it was perfectly consistent for the court to tell the jury that the fact that the letters were decoy letters could not afford the defendants any defense to the prosecution: This simply because they did not incite the defendants to enter into the conspiracy, nor could they have, by any reasonable construction thereof. They did elicit the replies

by the defendants which constituted the overt acts. But these were entirely voluntary, and were written in pursuance of their previous practice of transacting the business in which they were engaged through the mails. The advertisements inserted in the Los Angeles Journal show this. The court's expression that it did not matter what the government officers did in order to procure evidence to prove the conspiracy was pertinent and proper in the connection in which it was used.

Having fully answered the objections and alleged errors specially insisted upon, and finding no error, the judgment will be affirmed.

MAGON et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 4, 1918.)

No. 2901.

1. POST OFFICE ⚡31—OFFENSES—DEFINITION—"INDECENT."

Under Criminal Code (Act March 4, 1909, c. 321) § 211, 35 Stat. 1129, as amended by Act March 4, 1911, c. 241, § 2, 36 Stat. 1339 (Comp. St. 1916, § 10381), declaring that every publication of an indecent character shall be nonmailable, and denouncing the offense of depositing or causing to be deposited, for mailing or delivery, anything declared by the section to be nonmailable, and further declaring that the term "indecent" shall include matter of a character tending to incite murder or assassination, the definition of the word "indecent" as including matter of a character to incite murder or assassination is sufficiently definite to sustain a prosecution for depositing such matter in the mails, the question whether the matter so deposited was indecent, as having that tendency, being for the jury to determine just as the question whether matter is obscene is for the jury.

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

2. POST OFFICE ⚡50—TRIAL—PROVINCE OF COURT AND JURY.

In a prosecution for violating Criminal Code, § 211, as amended in 1911, by depositing in the mails matter of an indecent character, the question first is for the court whether the language can have the tendency attributed to it, and then for the jury to determine whether it has such tendency in fact.

3. POST OFFICE ⚡48(2)—OFFENSES—INDICTMENT.

An indictment alleging that defendants deposited in the post office newspapers of an indecent character, in violation of Criminal Code, § 211, as amended in 1911, to be transmitted by the post office establishment to many and divers persons, the names of such persons being unknown to the grand jurors, is sufficient, though not alleging that the newspapers were addressed to any particular persons.

4. POST OFFICE ⚡48(2)—OFFENSES—INDICTMENT.

An indictment charging a violation of Criminal Code, § 211, as amended in 1911, which averred that the newspaper deposited in the post office contained certain indecent language, and was a publication of a character to incite in the minds of persons reading the same murder and assassination, and then set forth the objectionable language in full, sufficiently alleged that the newspaper was nonmailable.

5. POST OFFICE ⚡48(2)—OFFENSES—INDICTMENT.

An indictment alleging that defendants knowingly, willfully, unlawfully, and feloniously deposited in the post office certain indecent newspa-

pers, in violation of Criminal Code, § 211, as amended in 1911, is sufficient, without a specific allegation that defendants knew that the papers contained indecent matter or comprehended its import.

6. POST OFFICE Ⓒ31—TRIAL—DEFENSES.

Where, in a prosecution for violation of Criminal Code, § 211, as amended in 1911, by depositing in the post office newspapers of an indecent character, as tending to incite murder or assassination, it was unnecessary for the government to show any specific intent on the part of defendants in writing, publishing, or mailing the newspapers, lack of such intent could not be shown as a defense.

7. POST OFFICE Ⓒ31—OFFENSES—SPECIFIC INTENT.

Where defendants, who deposited in the post office newspapers alleged to be indecent, as having a tendency to incite murder or assassination, both were familiar with the articles, it is not necessary, in prosecution for violation of Criminal Code, § 211, as amended in 1911, declaring such publications to be nonmailable, to show any specific intent on the part of defendants to incite murder or assassination.

8. CRIMINAL LAW Ⓒ1121(1), 1122(5)—REVIEW—MATTERS REVIEWABLE.

Where neither the testimony nor the instructions given by the court below were in the record, questions of the sufficiency of the evidence or the propriety of the refusal of requested instructions by defendants cannot be reviewed.

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

Enrique Flores Magon and Ricardo Flores Magon were convicted of violating Criminal Code, § 211, as amended in 1911, by depositing in the post office newspapers of an indecent character, as tending to incite murder and assassination, and they bring error. Affirmed.

J. H. Ryckman, of Los Angeles, Cal., for plaintiffs in error.

Albert Schoonover, U. S. Atty., and Clyde R. Moody, Asst. U. S. Atty., both of Los Angeles, Cal.

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

DOOLING, District Judge. [1, 2] The defendants were convicted of the offense of depositing in the post office at Los Angeles, Cal., to be transmitted to divers persons in the United States and in Mexico, a certain newspaper, which was a publication of an indecent character, as tending to incite murder and assassination. The indictment is based upon section 211 of the Criminal Code, as amended in 1911; the portions of the section material here being the following:

"Every obscene, lewd, or lascivious, and every filthy, book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, * * * is hereby declared to be nonmailable. * * * Whoever shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be nonmailable, * * * shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both. * * * And the term 'indecent' within the intentment of this section shall include matter of a character tending to incite * * * murder, or assassination." Comp. St. 1916, § 10381.

The last sentence is the amendment of 1911. Upon the meaning therein assigned to the word "indecent" this prosecution is based. De-

defendants contend with great earnestness that this definition is void for uncertainty, in that it leaves it to the jury to say what words upon paper tend to incite murder or assassination. But, while this particular portion of the statute is new, the statute itself is an old one, and has been many times considered by the courts. In construing the word "obscene," as used therein, it has been uniformly held that, if the matter complained of were of such a nature as would tend to corrupt the morals of those whose minds are open to such influences by arousing or implanting in such minds lewd or lascivious thoughts or desires, it is within the prohibition of the statute, and that whether or not it had such tendency was a question for the jury. *Rosen v. United States*, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; *Knowles v. United States*, 170 Fed. 409, 95 C. C. A. 579; *United States v. Bennett*, Fed. Cas. No. 14,571; *McFadden v. United States*, 165 Fed. 51, 91 C. C. A. 89; *Demolli v. United States*, 144 Fed. 363, 75 C. C. A. 365; *United States v. Musgrave* (D. C.) 160 Fed. 700; *United States v. Harmon* (D. C.) 45 Fed. 414; *United States v. Clarke* (D. C.) 38 Fed. 732.

It is no more difficult for a jury to determine whether certain language has a tendency to incite murder or assassination than to determine whether certain other language has a tendency to corrupt the morals of those whose minds are open to such influences, and while the meaning assigned to the word "indecent" in the statute by the amendment of 1911 is new, the method of its application is as old as the statute itself. It is for the court to determine in the first instance whether any given language can have the tendency attributed to it, and for the jury to determine whether it has such tendency in fact. A defendant charged with sending indecent matter through the mails is therefore, under the amended statute, in the same position that a defendant charged with sending obscene matter has always been in, and there is no more reason for holding the statute void as to the one than as to the other.

[3] It is further claimed that the indictment is invalid because the newspapers deposited in the post office are not described as having been addressed to any persons. But it is averred that they were so deposited "to be transmitted by the post office establishment to many and divers persons; the names of which divers persons are unknown to the grand jurors." This is sufficient. *Durland v. United States*, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709.

[4] The indictment is also challenged because it contains no distinct averment that the newspaper was nonmailable. But it avers that the newspaper "contained certain indecent, vile, and filthy substance and language, and was a publication of an indecent character, and which said indecent, vile, and filthy substance, and language * * * was of a character to incite, in the minds of persons reading the same, murder and assassination." The objectionable language is then set out in full. These averments show the nonmailable character of the publication, and when that appears the additional particular averment that it was so nonmailable is not required.

[5] It is also claimed that the indictment is insufficient because it

does not appear therefrom that defendants knew that the papers deposited by them contained indecent matter, or knew its import, or that it was of a character tending to incite murder or assassination. The indictment, however, states that the defendants "knowingly, willfully, unlawfully, and feloniously deposited" the matter in question. Indictments for similar offenses in identical language were upheld by the Supreme Court, against the very contentions that are here advanced, in *Price v. United States*, 165 U. S. 311, 17 Sup. Ct. 366, 41 L. Ed. 727, and *Rosen v. United States*, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606.

[6] The defendant Enrique Flores Magon, while testifying, was asked by his counsel the following question:

"When you deposited copies of your newspaper containing the alleged non-mailable matter set out in the indictment, did you thereby intend to incite murder or assassination?"

And his codefendant was asked:

"Did you intend, or was it your purpose, in writing for publication the alleged nonmailable matter set out in the indictment, to incite murder or assassination?"

To each of these questions the government objected, and the objections were sustained. One of the defendants wrote the articles, and the other published and mailed them. Both defendants were familiar with them, and if they did in fact have a tendency to incite murder or assassination, as it was not necessary for the government to show any specific intent on the part of the defendants in writing, publishing, or mailing them, so the lack of such intent could not be shown as a defense.

[7] The defendants requested the court to instruct the jury that, if they were not satisfied beyond a reasonable doubt that defendants knew that the objectionable matter was of a character tending to incite murder or assassination, it was their duty to acquit. But the government was not required to prove that defendants knew that the objectionable matter, with which they were confessedly familiar, was of a character tending to incite murder or assassination. In *Rosen v. United States*, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606, an instruction had been requested that the jury should acquit if they entertained a reasonable doubt whether defendants knew that the paper referred to in the indictment was obscene. This request was refused, and the Supreme Court, speaking of such refusal, says:

"This request for instructions was intended to announce the proposition that no one could be convicted of the offense of having unlawfully, willfully, and knowingly used the mails for the transmission and delivery of an obscene, lewd, and lascivious publication—although he may have had at the time actual knowledge or notice of its contents—unless he knew or believed that such paper could be properly or justly characterized as obscene, lewd, and lascivious. The statute is not to be so interpreted. The inquiry under the statute is whether the paper charged to have been obscene, lewd, or lascivious was in fact of that character, and if it was of that character and was deposited in the mail by one who knew or had notice at the time of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. Congress did not intend that the question as to the character of the paper should depend upon

the opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails of the United States. The evils that Congress sought to remedy would continue and increase in volume, if the belief of the accused as to what was obscene, lewd, and lascivious was recognized as the test for determining whether the statute has been violated."

[8] The testimony offered by the government, and the instructions given by the court not being in the record, we cannot pass on any asserted lack of evidence to warrant a conviction, nor upon any alleged error in failing to give instructions requested by the defendants. It may well be that every correct statement of the law in any of the requested instructions was covered by the instructions given.

The judgment of the District Court is affirmed.

WHEELING TRACTION CO. v. BOARD OF COM'RS OF BELMONT COUNTY, OHIO, et al.

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

No. 3073.

1. STREET RAILROADS ⇨38—REPAVEMENT—AGREEMENTS—MODIFICATION.

Where defendant's predecessor was granted a franchise to construct and maintain an electric railway on county roads and agreed, for himself, his successors and assigns, to pave and maintain the tracks in the same condition as the remainder of the roadway was paved, an agreement between defendant and the county commissioners, thereafter entered into, which allowed defendant to change the rails used, and provided that defendant should pave the tracks and for one foot outside thereof, with a material that then was used on the roadway, was without consideration, and cannot be deemed to have abrogated the original obligation of defendant, so as to excuse it from thereafter repaving the track from the time the county commissioners should change the paving material.

2. STREET RAILROADS ⇨38—REPAVEMENT—COUNTY'S AUTHORITY.

While the powers conferred by Act of April 16, 1900 (94 Ohio Laws, p. 364), and other statutes upon county commissioners of highways may not be so comprehensive as those conferred on municipal corporations, they are to be construed according to the same rules; hence the county commissioners cannot contract away their police power to regulate the highways, and an agreement that defendant traction company should pave its tracks with a particular material does not preclude the commissioners from thereafter ordering a change.

3. HIGHWAYS ⇨95(1)—COMMISSIONERS—SURRENDER OF POLICE POWER.

County commissioners cannot validly surrender or alienate their police power to regulate highways.

4. STREET RAILROADS ⇨38—REPAVEMENT.

The grantee of a franchise to operate an electric railway on the highway takes the same subject to the police power of the county commissioners, and where not unreasonable the commissioners may require the successor of the grantee, who was required to pave between the tracks and for one foot outside thereof, to change the pavement to conform with that placed on the remainder of the highway.

5. SPECIFIC PERFORMANCE ⇨26—STREET RAILROADS ⇨38—NATURE OF REMEDY—REPAVEMENT CONTRACTS.

Specific performance of a contract can be directed where the work to be done is defined, where plaintiff has a substantial interest in its ex-

ecution, which cannot adequately be compensated for by damages, and where defendant has, by contract obtained from plaintiff, possession of the land on which the work is to be done; hence, where under the terms of its franchise a traction company was required to pave its tracks and for one foot on either side thereof with the same material used on the remainder of the county road and to maintain the same in proper condition, such company may be ordered to specifically comply with its agreement by repaving the tracks and the portion outside thereof with the same material adopted by the county commissioners for the pavement for the remainder of the road, for the company, having control of the operation of its road, can best schedule the running of its cars and fix the hours of labor for pavers, and an action at law for damages might, in event of the insolvency of the company, prove an inadequate remedy.

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

Suit by the Board of Commissioners of Belmont County, Ohio, and the Trustees of Pultney Township, Belmont County, against the Wheeling Traction Company. From a decree for complainants, defendant appeals. Affirmed, with modification.

Gordon D. Kinder, of Martin's Ferry, Ohio, for appellant.

Danford & Danford, of Bellaire, Ohio, and George Thornburg, of St. Clairsville, Ohio, for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. The commissioners of Belmont county and the trustees of Pultney Township, Ohio, brought suit in the Belmont court of common pleas to enforce specific performance of a covenant contained in a railway franchise contract between them and the appellant company. The suit was removed to the court below on the ground of diversity of citizenship. Subject to such contract, the company was operating an electric street railway over the county road known as the Bellaire and West Wheeling road, from the north corporate boundary of the city of Bellaire northwardly to the south line of Pease township in Belmont county. Decree was entered against the railway company, requiring it within seven months to comply with the conditions of its franchise by conforming the grade of its track to that of the roadway occupied by it and by paving between its rails and also one foot outside of each rail with the same material (to wit, brick, laid upon a proper foundation of cement) as that of the remainder of the roadway which had theretofore been improved by the public authorities having control of the entire roadway. The railway company appeals. The facts of the case, with applicable decisions, were so fully stated and considered by the learned trial judge as to dispense with the necessity for an opinion here; though it is important to call attention to the rulings ultimately made by the Supreme Court of Ohio against the defendant railway companies in *City of Columbus v. C., C. & St. L. Ry. Co.*, 79 Ohio St. 473, 475, 87 N. E. 1132, and the *C., C. & St. L. Ry. Co.*, 2 Ohio Cir. Ct. R. (N. S.) 305, cited near close of Judge Sater's opinion in the instant case; and his decision upon the subject of specific performance is well within the principle of those rulings. We approve the opinion below and affirm

the decree, subject, however, to a modification of the decree so as to require that the seven-month period therein provided shall commence to run from the time the mandate shall have been received and filed below. The opinion follows:

"Sater, District Judge. The purpose of this action is to require the defendant to grade and pave its track between the rails and for one foot outside of each rail, with paving brick. On April 14, 1893, the county commissioners of Belmont county granted to A. R. Leyda the right to construct and maintain an electric street railway on certain roads in Belmont county. The grantee agreed for himself, his successors and assigns, at all times to keep and maintain the tracks between the rails and for one foot outside of each rail in as good condition, and with the same material, as the remainder of the roadway is kept by the proper legal authorities, and at a grade to conform with the general grade of such roadway. If a change in the grade of the roadway should be required, the grantee must conform the grade of the railway so as to preserve the uniformity of the entire road. If bridges or culverts were necessarily rebuilt, strengthened, or repaired, the grantee was to pay one-half of the expense incurred. The cars and motors to be operated were given the use of the tracks, and every wagon, cart, rig, carriage, or other vehicle is by the terms of the grant with reasonable dispatch to turn out, whenever any motor or car approaches so that the track may be free and unobstructed. The grantee agreed to maintain the top of the rail on a level with the public highway. A railway was constructed in pursuance of the above-mentioned grant. On April 1, 1901, an agreement was entered into between the commissioners and the defendant company, which, by successive assignments, had succeeded to the rights of Leyda, wherein it was stipulated that instead of girder rails mentioned in the original grant, weighing not less than 52 pounds to the yard, the defendant might have the privilege of laying and maintaining T-rails, provided the company should plank solidly all crossings, turnouts, and switches inside and one foot outside of the rails—all tracks, turnouts, and switches to be filled flush with the top of the rails with broken limestone and to be kept in that condition so as to enable teams to travel on such tracks and drive on and off with all the convenience reasonably attainable. In the town of West Wheeling, however, the rails were to be planked inside and one foot outside of the rails, if the trustees of Pultney township should so elect, if T-rails should be used. Such planking, however, was not to be required if the trustees elected that girder rails should be used. The agreement provided that it did not modify in any respect any other condition or provision, express or implied, in the original grant. An agreed statement of facts supplemental to the oral evidence given, recites, touching the situation on April 1, 1901, that the space between the rails of the traction company along the part of the line in question had been filled or partly filled with gravel and broken limestone some time prior to such date. At the time of the execution of such supplemental agreement the space between the rails was only partly filled; and no improvements on the roadway were about to be undertaken. On June 16, 1902, another agreement was made between the commissioners and defendant relating inter alia to a certain bridge. It also recited that the other terms and conditions of the Leyda contract should remain in full force. At the date of the 1901 agreement the county road not occupied by defendant's track was improved by being covered with broken limestone. Plaintiffs, it is admitted, have been, and are, invested with the care and management of the county road. In 1912 plaintiffs improved the road, in so far as not occupied by the defendant, by grading and paving it with brick, excepting a small portion at its north end, the contract for the improvement of which, however, had, at the time of the filing of the petition, been entered into. The defendant was called upon by the plaintiffs to pave in like manner its track and for one foot outside of each rail. It refused thus to pave between its rails, asserting that it is under no obligation so to do and that the agreement of April 1, 1901, requires it to fill the space between the rails with broken limestone only. The photographs and other evidence submitted establish by a fair preponderance that the space between the defendant's rails is not so filled with broken stone

or slag—at least, at all points—as to admit of the convenient or reasonable use of the same by vehicles passing over the highway and having occasion to drive upon the defendant's tracks.

[1] "The right of the traveling public to use the whole of the highway in so far as such use is consistent with the operation of cars on the company's track was preserved by the original grant. The grantee and his successors were required to use the same kind of material between and adjoining its rails as might be employed by the proper public officers for so much of the roadway as lies outside of the granted right of way. The power of determining what such material should be was vested in such officers. The two subsequent agreements hark back to that with Leyda, and declare that it remains unimpaired except as modified by them respectively. The plaintiffs assert that the agreement of 1901 had reference to the then existing condition only, contemplated merely the fulfillment of the requirements of the original grant, and did not relieve the defendant from the future use of the same material as might thereafter be employed in subsequent improvements of the road outside of the defendant's right of way. The defendant contends that by the agreement of 1901 the plaintiffs are bound by contract not to exact of it the use of any material between its rails other than broken stone, that its right to use such material is continuing, and that it may not be required to pave such space with brick. Is this position sound?

"In view of the agreed statement of facts, so much of the agreement of April 1, 1901, as provided that, as a condition of the use of T-rails, the defendant company should fill all tracks, turnouts, and switches inside and one foot outside of the rails with broken stone was an agreement that the company should do what it was already obligated to do, and was therefore without consideration. I also interpret the proviso of that agreement that the company, when it should do what it was already required to do, should keep the right of way in that condition to mean no more than that such right of way should be kept in the same condition as the remainder of the roadway, which was then covered with broken stone. That the commissioners did not intend to barter away the terms of the original grant is manifest from the reservation that the agreement of April 1st should not modify in any respect any other condition or provision, express or implied, which reservation was subsequently repeated in the later agreement of June 16, 1902. If this interpretation is correct, the terms of the original grant remain unimpaired as to the duty to maintain the space between the tracks [and] for one foot on each side of them, and the plaintiffs are therefore entitled to the relief asked for. If, however, my interpretation is unwarranted, I am still of the opinion that the plaintiffs should prevail, for the reasons hereafter stated.

[2, 3] "A résumé of the powers vested in county commissioners and township trustees as regards highways will not be attempted. Allusion, however, may be made to the act of April 16, 1900 (94 Ohio L. 364), to the various sections of the Revised Statutes of Ohio in force when the several agreements above mentioned were made, and also to those of the present time, touching the powers and duties of commissioners and township trustees. Rockel in his recent work on Roads and Bridges, chapter 6, in commenting on section 6906, G. C. (section 85, 106 Ohio Laws, 597, Act May 17, 1915), (pp. 153, 154) states that the sections of such chapter combine the various previously existing laws conferring powers on the county commissioners to construct and improve roads. Whether or not the powers conferred on commissioners and trustees have been and are quite as comprehensive as those granted by the General Assembly to municipal corporations they are akin to those enjoyed by municipalities. The same general rules of law as to the powers which have been and may be exercised by county commissioners and township trustees on the one hand and municipalities on the other apply to a railway whether it operates on a county road or the streets of a city or village.

"An illuminating case, whose doctrine is controlling, is that of *Wabash R. Co. v. Defiance*, reported in 10 Ohio Cir. Ct. R. 27, 52 Ohio St. 262, 40 N. E. 89, and 167 U. S. 88, 17 Sup. Ct. 748, 42 L. Ed. 87, in which all of the state courts and the Supreme Court of the United States by like reasoning reached the same result. The railroad company had been authorized to erect two

new bridges over two public streets, provided the bridges should be of good and substantial construction, be located in the center of the respective streets, have 18-foot roadways and a good substantial sidewalk 8 feet wide on each side and should at all times be kept in good order and repair by the company. The bridges were to be of a given height above the company's rails, and were to have sufficient approaches with a specified grade, which grade was to be made firm and solid by the use of either stone or gravel. If gravel should be used, it was to be taken from the city's gravel beds. The approaches to the sidewalk were to be kept in constant repair, and were to be brought up to the proper level of the then existing walks by broad, safe steps, all to be kept in repair by the company to the extent of its right of way. The entrance by the company on the construction of the bridges was made an acceptance by it of the terms of the ordinance. The provisions of the ordinance were quite as specific as those of the agreement of April 1, 1901, here under consideration. The company faithfully performed the conditions imposed upon it. Thereafter the city council so changed the grade of the streets as to bring them to the level of the company's tracks, and assessed the cost of the change on the real and personal property of the municipal corporation, including that of the railway company. The railway company resisted the proposed change, and asserted in its petition its right to a continuance of the bridges and approaches as specified in, and as constructed in accordance with, the original ordinance, and pleaded the dangers and expense incident to the proposed change. The state Supreme Court held that every grant in derogation of the right of the public in the free and unobstructed use of the streets, or restrictive of control of the proper agencies of the municipal body over them, or of the legitimate exercise of their powers in the public interest, must be construed strictly against the grantee, and liberally in favor of the public, and never extended beyond its express terms when not indispensable to give effect to the grant; that the original ordinance calling for new bridges of a specified description, to be kept in repair by the company, did not divest the municipal authorities of their control over the streets, nor impair their power to improve the same, nor entitle the railway company to perpetually maintain the bridges as constructed, and that the ordinance and the privileges granted by it are subject to a proper exercise, by the municipal body, of its power to improve the streets and make such changes in the grades as may be necessary to subserve the public interest. The obvious and stated reason for the ruling was that the powers conferred on municipal corporations with respect to the opening, improvement, and repairing of the streets and public ways are held in trust for public purposes, and are continuing in their nature, to be exercised from time to time as the public interests may require, and cannot be granted away, or relinquished, or their exercise suspended, or abridged, except when and to the extent legislative authority has expressly been given to do so. Mr. Justice Brown spoke for the United States Supreme Court, which held that, properly construed, the original ordinance was simply a license to the company to build the bridges and to continue them until the city council should conclude that it was for the public interest to so change the grade of the street as to make it a level crossing. There was no agreement on the part of the city that the bridges should remain any particular length of time, or that it should not make new requirements as the growth of the city might suggest. If the contention of the railway company that it was entitled to maintain in perpetuity the bridges and approaches as originally constructed were sound, the result would be that, if the city should, in the growth of its population, become thickly settled in the neighborhood of the bridges, they would stand forever in the way of any improvement of the streets—a proposition declared to be untenable. It was thought to be incredible that the city intended by its ordinance or the railroad company could expect that the former relinquished forever the right to improve or change the grade of its streets. It was held that the power of city councils and of county commissioners to regulate the grading and paving of streets and their exercise of control over them is a legislative function, an exercise of the police power of the state and incapable of being bartered away.

"Differences are recognized between the Defiance Case and the one at bar.

The Wabash Railroad Company owned its right of way. It did not pass through the city and operate over its tracks by virtue of a grant from the city or other state agency. The contract that was made between the parties related to a crossing which affected the use of a street and of the company's right of way. In that case, as in this, there was no abridgment of the company's franchise. The right to operate still continued. There was no contemplated disturbance of the company's roadway, although an appropriate crossing made of plank or other suitable material would doubtless have been necessary. In the instant case the defendant company does not own the soil or that portion of the street over which it operates. It merely has a right to operate over it. Such portion belongs to the public quite as much as the residue of the street, and the public has the right to use such right of way for all purposes quite as much and in the same manner as the residue of the street, so long as it does not interfere with the operation of the defendant company's cars. Such company would be temporarily disturbed in the operation of its cars, but to the extent only of such adjustment of its tracks at the point where the work of paving is in progress as would admit of the continuance of its business. Some inconvenience would result even if broken stone should be continued in use on its right of way. In the Defiance Case, the municipality's jurisdiction over the street and the extent to which it could barter away such jurisdiction were involved. The question was there presented, may a municipality bind itself in perpetuity to the maintenance of a given street or a portion of it in a given way, regardless of future needs and developments? The question here is, May the county commissioners thus bind themselves, and thereby the public, for the life of a franchise? The attempt so to do was held in the Defiance Case ineffectual, because unauthorized by the city charter or laws governing the city. It was said (52 Ohio St. 309, 40 N. E. 89) that the statute does not contemplate the destruction of the street, or the cessation of its use by the public or its withdrawal from the control and supervision of the proper municipal officers. Mr. Justice Brown held (167 U. S. 94, 17 Sup. Ct. 748, 42 L. Ed. 87) that: 'If it were possible a city could make such a contract at all, it could only be done by express authority of the Legislature, and in language that would admit of no other interpretation.' No statute is cited conferring on county commissioners express legislative authority to make a contract such as the defendant company claims to have been made.

"The arrangement of April 1, 1901, for the use of broken stone by the defendant company, was not a continuing contract which conferred the right in perpetuity on the defendant to use such material and such only for the improvement of its roadway. In *Reading v. United Traction Co.*, 202 Pa. 571, 52 Atl. 106, it appears that a street railway company had with its tracks occupied the streets of a city with the latter's consent on condition (1) that it pave its right of way and keep the same in good repair; and (2) that it pave its right of way in a specified manner, superior to that of the then existing streets, and keep such paving in good repair. It was held that the city, upon notice to the company of the adoption of an improved pavement for the rest of the street, with which the original pavement of the right of way was incongruous and practically incompatible, might require the company—the pavement of its right of way being in fact out of repair—to replace the same with a pavement reasonably corresponding with the street pavement adopted. In that case it will be noted that the company was originally required to use a particular pavement upon its right of way and keep that sort of a pavement in repair, but it was held that such provision in the ordinance did not deprive the city of the right subsequently to put down a different and more expensive pavement. It was there said that it was not intended that the maintenance of a cobblestone pavement by the railway company should forever be the measure of the latter's service in return for the grant of the use of the streets. The language of *Philadelphia v. Ridge Avenue Pass. Ry. Co.*, 143 Pa. 444, 22 Atl. 695, was approved to the point that such a proposition could not be entertained for a moment, and that it was never contemplated that the railway company would continue to exist and perform its corporate functions in a cobblestone age. It was called into being with a view to progress.

"Elliott, Roads and Streets (3d Ed.) § 987, has stated with force the applicable rule, citing the Reading Case. See, also, Reading v. United Traction Co., 215 Pa. 250, 64 Atl. 446, 7 Ann. Cas. 380 and State v. Railroad Co., 52 La. Ann. 1570, 28 South. 111.

"The right to regulate streets and highways and to control the improvement of the same, being an exercise of the police power, neither a city council, a board of commissioners, or trustees of a township can barter such right away. This power the plaintiffs cannot refuse to exercise when public necessity or convenience demands that it shall be done, nor could they be allowed to excuse their failure to exercise such power upon the grounds that they had by contract deprived themselves of the right so to do. Louisville City Ry. Co. v. City of Louisville, 8 Bush (Ky.) 415, 420. In the last-named case it appears that the railway company had placed between its tracks a boulder pavement to correspond with that of the street, but it was said: 'The law reserves to the council the right to regulate the manner of the construction and reconstruction of the street railways. The city government in the exercise of its legislative powers must determine as to the necessity for or the propriety of the improvement of the streets and also to the manner of such improvement. The contract with the railway does not impair its right to put down the Nicholson pavement upon the streets through which the right of way has been granted to that corporation.'

"In Anderson v. Fuller, 51 Fla. 380, 41 South. 684, 6 L. R. A. (N. S.) 1026, 120 Am. St. Rep. 170, it was ruled that, while municipalities may by ordinance grant to individuals and corporations the privilege of occupying the streets and public ways for lawful purposes, such as railroad tracks, poles, wires, gas, and water pipes, such rights are at all times held in subordination to the superior rights of the public, and all necessary and desirable police ordinances that are reasonable may be enacted and enforced to protect the public health, safety, and convenience, notwithstanding the same may interfere with legal franchise rights.

"In Village of Mechanicsville v. S. & M. St. Ry. Co., 35 Misc. Rep. 513, 71 N. Y. Supp. 1102, affirmed 174 N. Y. 507, 66 N. E. 1117, two franchises had been granted to the defendant, each of which provided that the space between the rails and a space of at least 20 inches wide outside of the rails on both sides of the track should be paved with 'small stone' and the same should at all times be kept in good condition. Subsequently the village required of the railway company a 6-inch excavation filled in with sand or gravel and covered with vitrified paving brick. The railway company refused to pave, and the village at its own expense did the work it had required of the company. It was held entitled to recover of the railway company the expense of such paving, for the reason that the village had a right to exact what it deemed a paving suitable at the time it was ordered, and was not limited to requiring a pavement composed of 'small stone,' and that the contracts or franchises granted by the village trustees, persons having limited powers, were not a defense, as the trustees could not give up the streets to private corporations nor surrender the right of the public to have the streets in a proper condition for use, such powers being held in trust for the public benefit and incapable of abrogation or delegation to private parties. The requirement of the use of 'small stone,' it was said, was suited to the situation when the grant was made, but that it would be a dangerous conclusion to hold that the provision relating to the use of 'small stone' at the time of the grant gave the railway company the right to pave the streets with such stone for all future generations, whatever the emergency which excited other requirements. See, also, Nellis, Street Railways, § 157 (2d Ed.) citing the above case.

"Elliott on Roads and Streets (3d Ed.) § 939, states the rule thus: 'The general rule is well settled that no contract can be made which assumes to surrender or alienate a strictly governmental power which is required to continue in existence for the welfare of the public. This is especially true of the police power, for it is incapable of alienation. It cannot be doubted that a company which secures a right to use the streets of a municipal corporation takes it subject to the police power resident in the state as an inalienable attribute of sovereignty.'

[4] "The above rule must necessarily apply to public highways other than streets within municipalities. A grant of the right to own property and transact business confers no immunity from any police control to which a citizen could be subjected, and a reasonable regulation of the enjoyment of the franchise is not a denial of the right nor an invasion of the franchise, or a deprivation of property, or interference with the business of the grantee. *Nellis, Street Railways*, § 117; *Cape May R. R. Co. v. Cape May*, 59 N. J. Law, 393, 395, 36 Atl. 679, 36 L. R. A. 656. The demand made by plaintiffs of the defendant as regards the paving of its right of way with brick to conform to the remainder of the road is not unreasonable or shown to be so.

[5] "There are no insuperable obstacles preventing the defendant's specific performance of its contract. Why should the plaintiffs, or any of them, at public expense, construct the pavement which the defendant ought to construct, and then be required by an action at law, with its necessary attendant delay, to recover or seek to recover what the taxpayers should not have been required to pay? If the defendant should in the meantime become financially embarrassed or insolvent, the burden of maintaining the street between and on each side of defendant's rails would fall in part or wholly on the public as a burden for which it is in no wise responsible. The improvement is to be made, it is true, not on the defendant's own land, but nevertheless on its right of way, and its construction must cause some necessary inconvenience. The defendant, having control of the operation of its road, can best schedule the running of its cars and fix the hours of labor for pavers. The court has jurisdiction to grant specific performance of a contract for construction where three things concur: (1) Where the work to be done is defined; (2) where plaintiff has a substantial interest in its execution, which cannot adequately be compensated for by damages; and (3) where the defendant has, by the contract obtained from plaintiff, possession of the land on which the work is to be done. 36 Cyc. 583. On the next succeeding page are given instances in which specific performance has been exacted of railroads. In the instant case, the contract is fair, complete, and certain, and the public welfare demands its enforcement. The case falls within the rule announced in *City of Columbus v. C., C. & St. L. Ry. Co.*, 2 Ohio Cir. Ct. R. (N. S.) 305, in which the authorities are intelligently reviewed. Note, also, *Village of Milford v. C., M. & L. Traction Co.*, 4 Ohio Cir. Ct. R. (N. S.) 191, and *City of Toledo v. L. S. & M. S. Ry. Co.*, 17 Ohio Cir. Ct. R. 265.

"An order may be taken in accordance with the above. Attention of counsel is directed to the fact that the copy of the original agreement between the commissioners and Leyda, attached to the petition, is incorrect and does not conform to the certified copy of such agreement."

LUMBERMEN'S TRUST CO. v. TITLE INS. & INV. CO. OF TACOMA et al.

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

No. 3013.

1. MONOPOLIES ⇨12(2)—WHAT ARE—SUBJECTS OF MONOPOLY.

As the records are open to the inspection of all, the abstract business is not susceptible of being monopolized in same sense that dealing in a commercial product may be monopolized; so a transaction whereby one of several competing abstract companies acquired the business of its competitors is not subject to attack.

2. MONOPOLIES ⇨12(2)—COMBINATIONS IN RESTRAINT OF TRADE—WHAT ARE.

Where one of three corporations doing abstract business in a city acquired the business of one of its competitors and leased the plant of another, such contract, though it tended to suppress previous ruinous competition, was not open to attack under Const. Wash. art. 12, § 22, declaring that monopolies and trusts shall never be allowed, and no in-

corporated company shall directly or indirectly combine or make any contract with any other incorporated company, through their stockholders or trustees, or in any manner whatsoever, for the purpose of fixing the price or regulating the production of any product or commodity; for, while one of the purposes of the contract and its necessary effect was to suppress competition, it is not subject to attack on that ground, the purchasing and leasing company acquiring the plants of its competitors without any agreement in restraint of trade.

3. MONOPOLIES \Leftrightarrow 12(2)—WHAT ARE—SUBJECTS OF MONOPOLY.

In such case, where the corporation organized by the purchasing company to acquire the assets of one of the competing abstract companies found itself unable to meet its obligations, owing to the weakness of the business, and at that time another competing company had already entered the field, a subsequent contract, whereby the terms of the purchase were modified and the purchasing company and its stockholders guaranteed the payment of principal and interest, is not subject to attack as creating a monopoly.

4. MONOPOLIES \Leftrightarrow 12(4) — CONTRACTS — COVENANTS NOT TO RE-ENGAGE IN BUSINESS.

Covenant of a corporation, in disposing of its business to another, not to engage in the same business within a certain area and within a reasonable time, is not invalid as tending to create a monopoly.

5. CONTRACTS \Leftrightarrow 116(1)—MONOPOLIES—VALIDITY.

Before contracting parties can be absolved from their solemn obligations, on the ground that their contracts are invalid as creating a monopoly, it must be shown that their agreements are manifestly injurious to the public, for public policy is as much concerned in holding persons to their contracts as in prohibiting contracts in restraint of trade.

6. CORPORATIONS \Leftrightarrow 484(3)—CONTRACTS OF GUARANTY—VALIDITY.

Const. Wash. art. 12, § 6, entitled "Limitations upon Issuance of Stock," and declaring that corporations shall not issue stock except to bona fide subscribers or their assigns, nor shall any corporation issue any bond or other obligation for the payment of money, except for money or property received or labor done, does not, its obvious purpose being to protect creditors of corporations and prevent the issuance of worthless securities, preclude a corporation, which, through the agency of another, it organized for the purpose of acquiring the business of a competitor, from guaranteeing the principal and interest of the indebtedness incurred by its subsidiary; it appearing that the stock of the nominal purchasing corporation was held by the shareholders of the principal company, and there being a valuable consideration for the guaranty.

7. CORPORATIONS \Leftrightarrow 484(3)—STOCKHOLDERS—GUARANTY—VALIDITY.

Where a corporation organized another corporation to acquire the business of a competitor, and the stock of the nominal purchasing corporation was owned by the shareholders of the principal company, a contract by the shareholders of the principal company, guaranteeing the obligations of the subsidiary company on account of the purchase, is valid, notwithstanding Const. Wash. art. 12, § 6, forbids a corporation to issue a bond or any other obligation for the payment of money, except for the money or property received or labor done, for the provision, if for the benefit of stockholders of a corporation, might by them be waived.

8. CHATTEL MORTGAGES \Leftrightarrow 104—CONSTRUCTION—NOTES.

While a note and chattel mortgage should be construed together, yet, as the provisions of the note govern in case of a conflict, the holder may, where there had been a long-continued default in payment of interest, exercise the option given in the note and declare the whole of

the principal and interest due, regardless of the provisions of the mortgage as to defaults.

9. ABATEMENT AND REVIVAL ⇨84—ANSWER TO MERITS—PREMATURE ACTION—WAIVER.

The objection that a suit was prematurely brought is waived, where, without presenting the objection in any way to the court below, defendants answered to the merits.

Appeal from the District Court of the United States for the Southern District of Washington; Edward E. Cushman, Judge.

Bill by the Lumbermen's Trust Company, as trustee, against the Title Insurance & Investment Company of Tacoma, a corporation, and others. From a decree dismissing the bill, complainant appeals. Reversed and remanded, with directions.

In the year 1909 there were three incorporated companies engaged in the business of furnishing abstracts of title at Tacoma, Wash.: The Commonwealth Title Trust Company, hereinafter called the Commonwealth Company, owned and controlled by the Foggs and Gove; the Title Insurance & Investment Company, of Washington, hereinafter called the Washington Company, owned and controlled by Willoughby and Smith; and the Wilson Title & Abstract Company, hereinafter called the Wilson Company, owned and controlled by Wilson. These companies had carried on business in competition with each other for several years, and they owned and controlled the only abstract plants in Tacoma and Pierce county. In 1909 the competition between them was keen, and they were cutting prices. On December 6, 1909, the Wilson Company executed and delivered to Willoughby, the actual manager of the Washington Company, and to Franklin Fogg, the manager of the Commonwealth Company, a lease for five years of the plant of the Wilson Company, with an option to purchase the same within two years at an agreed price. The lease provided that the abstract plant should remain in the exclusive possession of the Wilson Company, but should not be operated, and that the Wilson Company and its officers should not, during the life of the lease, be interested in any other abstract plant in Pierce county. On December 7, 1909, Willoughby assigned his interest in the lease to Franklin Fogg. On the same day the Title Insurance & Investment Company of Tacoma, hereinafter named the Tacoma Company, was organized, with a capital stock of \$5,000, and it purchased from the Washington Company the latter's abstract plant and business for the sum of \$100,000, of which \$10,000 was paid in cash, the remainder to be paid in deferred payments, with interest at 7 per cent., semiannually, to secure which notes of the Tacoma Company and a chattel mortgage of the property purchased, together with a set of current files complementary thereto, the property of the Commonwealth Company, of an estimated value of \$25,000, were executed by the Tacoma Company to the Washington Company; the Commonwealth Company thereby contributing the current files to the security of the mortgage. The mortgage provided that the plant should be operated as a going concern, and kept up to date, and that every endeavor should be made to build up its business and increase its good will, and the mortgagee was empowered to name a competent person to be employed by the mortgagor to see that the plant was kept up to date and properly posted and indexed. The original stock of the Tacoma Company was subscribed to by Willoughby and two others, and they, on December 30, 1909, turned over all the stock to the stockholders of the Commonwealth Company, who divided it among themselves in proportion to their holdings in the latter company. Willoughby had received from Fred and Franklin Fogg an agreement to save him harmless by reason of his subscription. The result of these transactions was to place the abstract business in Pierce county in the hands of the Commonwealth Company and the Tacoma Company, in both of which the stockholders were substantially the same. The mortgage and the notes were as-

signed by the Washington Company to the Traders' Trust Company of Oregon, as trustee, a company of which Willoughby and Smith and wife were the sole stockholders. The Tacoma Company paid on the notes and the interest due to June 7, 1911, the total sum of \$29,100.

In 1910 a new company, the Tacoma Title Company, entered into the abstract business in Pierce county. In July, 1911, the Foggs complained of the general depression and falling off of the abstract business, and the competition of the Tacoma Title Company, and the inability of the Tacoma Company to meet the payments, and proposed an amalgamation of the companies, the mortgagee to take preferred stock in place of the mortgage and notes. After prolonged negotiations a new arrangement was made on December 2, 1911, of which the following is the substance: The mortgage and the notes were surrendered. The Tacoma Company executed a new series of notes, aggregating \$80,000, bearing interest at 5 per cent. payable semiannually, to secure the payment of which it was agreed that the abstract plant of the Washington Company should be boxed and delivered to a trustee in Portland, to remain in pledge until the indebtedness was satisfied, or a court should decree a foreclosure. For further security the Commonwealth Company agreed to guarantee the payment of the interest to and including December 7, 1915, and the payment of principal and interest to and including the year 1921, and agreed to make and to deliver to the trustee the necessary take-offs to keep the plant up to date. To secure this undertaking the Commonwealth Company made a mortgage of its real property in Tacoma in the sum of \$15,000, and all the stockholders of the Commonwealth Company ratified the undertaking, and guaranteed that their corporation had such powers, and that its agreements were for a valid consideration, and were binding on the corporation. Following the execution of these instruments, Willoughby and Smith, in consideration of the agreements already made between the various corporations, covenanted with the Tacoma Company that, as long as the agreements theretofore made were kept and performed, they would not, directly or indirectly, transact any abstract business or title insurance business in Pierce county.

In compliance with its guaranty agreement the Commonwealth Company paid the semiannual installments of interest up to and including June 7, 1914, amounting in all to \$10,000. Owing to the condition of the abstract business, which continued to decline after December 2, 1911, the Commonwealth Company found that it could not continue to fulfill its guaranty agreement without loss, and an unsuccessful effort was made to adjust matters between the parties. Thereafter the present suit was brought by the Lumbermen's Trust Company, trustee, as assignee of the Traders' Trust Company, the original trustee, to enforce the agreement of December 2, 1911, and to foreclose the mortgage. To that suit the Commonwealth Company in its answer alleged that the agreements were void as creating a monopoly in violation of the Constitution and laws of Washington, and against public policy. The Tacoma Company made a similar answer. The court below found upon the pleadings and the facts that the guaranty given by the Commonwealth Company was invalid, as prohibited by article 12, § 6, of the Constitution of Washington, which forbids corporations to "issue any bond or other obligation for the payment of money, except for money or property received or labor done," and that it followed therefrom that the individual guaranty of the Foggs and Gove was also invalid; that the suit upon the mortgage was prematurely brought, and that the notes and the mortgage were void, for the reason that they were given for the purpose of creating a monopoly; that the taint of the transaction wherein they were executed attached to the sale and mortgage of 1909, and that all subsequent agreements were in furtherance of the original unlawful purpose. The bill was dismissed.

Frank H. Kelley, of Tacoma, Wash., John H. Hall, of Portland, Or., and Robert M. Davis and Frank C. Neal, both of Tacoma, Wash., for appellant.

Charles O. Bates, Charles T. Peterson, and Edward Fogg, all of Tacoma, Wash., for appellees.

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

GILBERT, Circuit Judge, (after stating the facts as above). [1] We turn first to the question whether the original sale of the Washington Company to the Tacoma Company and the contemporaneous lease of the Wilson Company created a monopoly in the vendee and the lessee within the prohibition of the Constitution of Washington. The Commonwealth Company was the first corporation to engage in the abstract of title business in Pierce county. For a time it had a monopoly of that business, so far as such a business could be monopolized; but, of course, the monopoly cannot be said to have been unlawful. On December 6, 1909, there were three corporations engaged in the business. One of them, the Commonwealth Company, by means of a new corporation which it organized for that purpose, bought out the Washington Company, and at the same time took a lease of the plant of the Wilson Company. When the Washington Company sold out, it sold out absolutely. It acquired no interest in the purchasing company, and it retained no interest in the property sold. The transaction did not diminish production, nor did it serve to increase prices. It was unattended by any agreement of the selling company or its members not to enter into competition. The fact that the Washington Company reserved the right to have a competent person employed at the expense of the vendee to see that the plant which the vendor sold was continually kept up to date until the purchase price was paid was not a retention by the vendor of an interest in the property sold. It was but a provision for the protection of the property, which was mortgaged as security for the deferred payments of the purchase price. Nor is evidence of a retention of interest by the Washington Company or its stockholders in the property transferred to the Tacoma Company to be found in the fact that Willoughby became temporarily a stockholder of the Tacoma Company or the fact that he was temporarily one of the lessees of the Wilson Company. The whole transaction indicates but a purpose, in which Willoughby assisted, to transfer the property of the Washington Company to the Tacoma Company, and to lease to the latter company the property of the Wilson Company. In Cooke on Combinations (2d Ed.) § 116, it is said:

"A monopoly exists where all, or so nearly all of an article of trade or commerce within a community or district, is brought within the hands of one man, or set of men, as to practically bring the handling or production of the commodity or thing within such single control, to the exclusion of competition or free traffic therein."

Assuming that the business of furnishing abstracts of title may become the subject of a monopoly, it is obvious that it can never be a monopoly within the meaning of the language of the text-writer just quoted. The combination so referred to is a combination whereby the whole of a marketable product is placed under single control. It

is obviously impossible to place the production of abstracts of title under a single control. The records of title are open to the inspection of all, and all are free to enter into the business of furnishing abstracts. The business is not susceptible of monopoly in the sense in which the business of dealing in a commercial product may be monopolized.

[2] Article 12, § 22, of the Constitution of Washington provides:

"Monopolies and trusts shall never be allowed in this state, and no incorporated company * * * in this state shall directly or indirectly combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders, or the trustees, or assignees of such stockholders * * * or in any manner whatever, for the purpose of fixing the price or limiting the production or regulating the transportation of any product or commodity. The Legislature shall pass laws for the enforcement of this section."

The Legislature has as yet passed no law for the enforcement of the section, and we have for our guidance only the constitutional provision. There is nothing in its terms which renders illegal the transactions in question here. The case does not come within the specific provision, which forbids a corporation to combine or make any contract with any other corporation for the purpose of fixing prices or limiting production. Nor do the transactions create an illegal monopoly or trust. The case before us is simply one where three competing corporations have remedied a situation in which each was facing loss and possible insolvency. One of them bought out one of its competitors, and took a lease of the plant of the other. The mere fact that one of the purposes of the purchasing company was to suppress competition does not of itself render the transaction the creation of a monopoly. There was no intention to wrong the general public. The prices remained thereafter as they had been before the ruinous price cutting intervened. We find no principle of public policy or provision of the Washington law that requires that two or more persons or corporations engaged in the same business, whose competition threatens ruin to all, shall continue in that competition until one or more is forced out of business, or that prohibits the ending of the destructive competition by the voluntary act of the competing parties, by one purchasing and the others selling competing plants, thus securing economy of administration, so long as the transactions are unaccompanied by circumstances to indicate that the contracts were entered into only as a device to enhance prices or to secure control of the market. In *Cincinnati Packet Co. v. Bay*, 200 U. S. 179, 184, 26 Sup. Ct. 208, 209 (50 L. Ed. 428), Mr. Justice Holmes said:

"A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts."

In *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612, the court said:

"A person engaged in any manufacture or trade, having the right to acquire and possess property and to do with it what he chooses, may lawfully buy the business of any of his competitors. His first purchase would at once diminish competition. If he continued to purchase, each succeeding transaction would remove another competitor. If his capital was large enough to enable him to buy the business of all competitors, the last purchase would completely

exclude competition, at least for a time. But in the absence of legislative restrictions (if such could be imposed) upon the acquisition of such property and its use when so acquired courts could impose no limitation. They would be obliged to enforce such contracts, notwithstanding the effect was to diminish, or even to exclude, competition."

In *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464, the court said:

"We are not aware of any rule of law which makes the motive of the covenant the test of the validity of such a contract. On the contrary, we suppose a party may legally purchase the trade and business of another for the very purpose of preventing competition, and the validity of the contract, if supported by a consideration, will depend upon its reasonableness as between the parties."

In *C., C. & I. R. Co. v. Closser*, 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754, 22 Am. St. Rep. 593, the court said:

"We are not required to decide, nor do we decide, that combinations fair to the public, untainted by any sinister design, and formed solely to prevent the destruction of business by unregulated competition, may not be valid."

The statute of Missouri prohibited any corporation from creating or entering into any pool, trust, agreement, combination, confederation, or understanding with any other corporation, partnership, individual, or any other person or association of persons to regulate or fix prices, or maintain prices when so regulated and fixed. In *State v. International Harvester Co.*, 237 Mo. 369, 141 S. W. 672, the court said:

"A corporation formed for the purpose of actually acquiring the absolute and complete title to properties and plants formerly in competition, and of operating the same under a new management and control so as to secure greater efficiency and more economical administration, is not within the statutory prohibition merely because of the incidental ending of competition arising from such organization. Any other rule would prohibit competing individuals from forming partnerships, and corporations from purchasing the property of others or from consolidating with another."

So in *State v. Continental Tobacco Co.*, 177 Mo. 1, 75 S. W. 737, the court held that the purchase by one corporation of the plants of another, if done in good faith, in the legitimate conduct and management of its business, is the exercise of a legal right. In *Camors-McConnell Co. v. McConnell (C. C.)* 140 Fed. 412, the court said:

"The sale and transfer by a person of his property and good will to another cannot be repudiated on the ground that the purchaser acquired the property for the purpose of obtaining a monopoly of the business, and in pursuance of an illegal combination in restraint of trade."

In *United States v. Reading Co. (C. C.)* 183 Fed. 427, it was held that the mere extent of acquisition of business or property achieved by fair and lawful means cannot be the criterion of monopoly within the meaning of the Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209); but, in addition to acquisition and acquirement, there must be an intention, by unlawful means, to exclude others from the same traffic or business, or from acquiring by the same means property and material things. In *United States v. Great Lakes Towing Co. (D. C.)* 208 Fed. 733, it was held that the sale of a business and the sur-

render of the good will pertaining thereto, and an agreement thereunder, within reasonable limitations as to time and territory, not to enter into competition with the purchaser, when made as part of the sale of the business, and not as a device to control or monopolize interstate commerce, is not within the federal Anti-Trust Act. *Davis v. A. Booth & Co.*, 113 Fed. 31, 65 C. C. A. 269, was a case in which a corporation engaged in the business of buying and selling fish sold out its assets and good will to another corporation, and the seller no longer retained any interest in the property, so that the sale was not a mere combination of owners and properties under one management. It was held that the sale was not in violation of the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209). Said the court:

"There is a clear distinction, which seems to be lost sight of in the argument here, between the aggregation of properties by purchase when the seller no longer retains an interest in the property, and a combination of owners and properties under one management, where each owner's interest is continued in the combination."

In *Munter v. Eastman Kodak Co.*, 28 Cal. App. 660, 153 Pac. 737, construing statutes of California which prohibited combinations to create or carry out restrictions in trade or commerce, or to limit or reduce the production, or increase the price of merchandise, or of any commodity, or to prevent competition in manufacturing, making, transportation, or sale of manufactured products or any commodity, the court said:

"There is no violation of the statute in the mere act of a person purchasing or otherwise securing control of a number of different concerns engaged in the business of manufacturing and selling the same article or commodity."

In *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 487, 28 Atl. 973, 974 (23 L. R. A. 639, 49 Am. St. Rep. 784), the court said:

"Monopolies are liable to be oppressive, and hence are deemed to be hostile to the public good. The combinations for mutual advantage which do not amount to a monopoly, but leave the field of competition open to others, are neither within the reason nor the operation of the rule."

[3] There is nothing in the transactions of December 2, 1911, which imports illegality into the contracts, or creates an illegal monopoly if none had existed before. The Tacoma Company found itself unable to meet its obligations. An adjustment was had whereby its notes and mortgages were surrendered and canceled, and new notes and a mortgage on more favorable terms were executed. For further security the Commonwealth Company, which was in fact the Tacoma Company, guaranteed the payment of principal and interest to a certain date. This was done by the authority of a resolution of the directors of the Commonwealth Company and with the assent of all its stockholders. In addition thereto the stockholders gave their personal guaranty. At this time a competing company was in the field, doing from 10 to 20 per cent. of the business, and that company in 1914, at the expiration of the Wilson lease, became the lessee of the Wilson plant, and thereafter operated it, and did about 40 per cent. of the abstract of title business in Pierce county.

[4] Nor does the fact that a corporation, in selling out its business to another, covenants not to engage in the same business within a certain area and within a reasonable time, tend in any way to create a monopoly. In *Camors-McConnell Co. v. McConnell*, supra, the court said:

"In the sale of a going business * * * with the good will attached, where, as ancillary and incident thereto, the seller enters into a covenant with the buyer that he would not compete with him in any way as to diminish the value of the property or business sold, although such covenant may be in partial restraint of trade, it should be upheld and enforced."

To the same effect are *Davis v. A. Booth & Co.*, supra, *United States v. Great Lakes Towing Co.* (D. C.) 208 Fed. 733, and *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271; 29 C. C. A. 141, 46 L. R. A. 122.

[5] The attack upon the legality of these contracts comes, not from the public, or from any one who claims to have been injured thereby, but from parties who deliberately entered into them. Before such contracting parties can be absolved from their solemn obligations, it must be shown that their agreements are clearly and manifestly injurious to the interest of the public. "It has been clearly recognized in recent times that public policy is at least as much concerned in holding persons to their contracts as in prohibiting contracts in restraint of trade." *Joyce on Monopolies*, § 94. In *Printing and N. R. Co. v. Sampson*, L. R. 19 Eq., 462, 465, it was said:

"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice."

[6] It is contended that the obligation of the Commonwealth Company of December 2, 1911, and consequently the guaranty of its stockholders, are void, as forbidden by section 6, article 12, of the Constitution of the state. That section is as follows:

"Limitations upon Issuance of Stock.—Corporations shall not issue stock except to bona fide subscribers therefor, or their assignees, nor shall any corporation issue any bond or other obligation for the payment of money, except for money or property received or labor done."

The argument is that the guaranty of the Commonwealth Company and its stockholders created an obligation for the payment of money, and that, not having been given in consideration of money or property received or labor done, it is within the prohibition of the Constitution, and is void. The caption of the section, "Limitations upon Issuance of Stock," and the language of the section lead to the conclusion that the phrase "other obligation for the payment of money," therein prohibited, was intended to be of the same nature as "bonds," under the rule of *ejusdem generis*. Similar provisions are found in the Constitutions of many of the states. In *Memphis, etc., Rd. v. Dow*, 120 U. S. 287, 7 Sup. Ct. 482, 30 L. Ed. 595, the court had under consideration the Constitution of Arkansas which prohibited the issu-

ance of stock or bonds except for money or property actually received or labor done, and the court said that the prohibition—

“was intended to protect stockholders against spoliation, and to guard the public against securities that were absolutely worthless. One of the mischiefs sought to be remedied is the flooding of the market with stock and bonds that do not represent anything whatever of substantial value.”

The guaranty here in question was executed for property actually received. The Commonwealth Company was in fact the purchasing company. It organized the Tacoma Company for the purpose of receiving title to the purchased property, but the stock in the latter company was held by the stockholders of the Commonwealth Company in the same proportions as their stock was held in that company. In that manner the Commonwealth Company acquired the purchased property, and we see no reason in law or equity why its undertaking to pay for the same should not be enforced. To guarantee the payment of its own indebtedness was not to “issue” bonds or other obligations for the payment of money. No bonds or other obligations were thereby issued or placed in circulation. The guaranty was not an instrument that passed by delivery and indorsement. As a consideration for the guaranty there was not only an existing indebtedness, but there was a present moving consideration in the refunding of the indebtedness on more favorable terms, and the release of a burden that had been imposed upon the guarantor.

[7] But if the constitutional prohibition of Washington was not intended for the purpose indicated in *Memphis, etc., Rd. v. Dow*, it could only have been intended for the protection of stockholders and creditors of corporations. There is no question here of the right of creditors. So far as it appears, the plaintiff is the only creditor. There can be no doubt that the stockholders could waive their right to the constitutional protection, there being involved no question of detriment to the community, and this they did by ratifying the undertaking of the corporation and giving their individual guaranties. In *Cooley's Constitutional Limitations* (5th Ed.) p. 216, it is said:

“Where a constitutional provision is designed for the protection solely of the property rights of the citizen, it is competent for him to waive the protection, and to consent to such action as would be invalid if taken against his will.”

In *Pierce v. Somerset Railway*, 171 U. S. 641, 648, 19 Sup. Ct. 64, 43 L. Ed. 316, the court said:

“A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States as well as under a statute.”

[8] The question is presented whether or not the suit was prematurely brought. The mortgage of the Tacoma Company provides:

“Time shall be and is of the essence of this agreement, and in the event of the failure of the first party to pay any of the said notes at the time specified in said notes, or to pay any taxes which the first party agrees to pay, and after the continuance of such default for the period of one (1) year, then the whole of said notes shall, at the option of the second party, forthwith and without notice, mature, and the second party shall be entitled forthwith to foreclose said pledge: * * * Provided, that nothing

In this paragraph or in this agreement shall be construed to prevent the second party at its option from suing upon any unpaid installment of principal and interest without waiting for the expiration of one (1) year from the date of default, provided ninety (90) days notice of such default shall have first been given in writing to the first party or its assigns."

The notes contain the provision:

"Interest to be paid semiannually at Tacoma, and, if not so paid, the whole sum of principal and interest to become immediately due and collectible, at the option of the holder of this note."

We think that the cause of action had matured when, on February 8, 1916, the suit was begun. There was no default in the payment of principal until December 7, 1915, but interest had been in default since December, 1914, and due notice had been immediately given of the default. It is plain from the terms of the notes that default in payment of any installment of interest rendered the whole of the notes, principal and interest, due and payable at the option of the holder. In 27 Cyc. 1135, it is said:

"Where a mortgage is given to secure the payment of a note or bond, the two instruments being made at the same time, they are to be read and construed together as parts of the same transaction, and hence the terms of the one may explain or modify the other, and a stipulation or condition inserted in the one is an effective part of the contract of the parties, although not found in the other, provided there is no necessary inconsistency. But in respect to the terms of the debt or interest, or the time of its payment, if the note and mortgage contain conflicting provisions, the note will govern as being the principal obligation."

Cases so holding are *Kansas Loan & Trust Co. v. Thayer*, 9 Kan. App. 888, 58 Pac. 238; *New England Mortgage Security Co. v. Casebier*, 3 Kan. App. 741, 45 Pac. 452; *Fletcher v. Daugherty*, 13 Neb. 224, 13 N. W. 207; *Rothschild v. Rio Grande W. Ry. Co.*, 84 Hun, 103, 32 N. Y. Supp. 37; *Bastin v. Schafer*, 15 Okl. 607, 85 Pac. 349. In *Lovell v. Musselman*, 81 Wash. 477, 142 Pac. 1143, the court said:

"The law is that, if a note and mortgage contain conflicting provisions, the note will govern as being the principal obligation."

[9] Again, the objection that the suit was prematurely brought was one that could be waived by the defendants, and we are of the opinion that it was waived when, without presenting the objection in any way to the court below, they answered to the merits, denying certain allegations of the complaint, alleging the illegality of the contracts, and resting their case upon those defenses. In 1 C. J. 1152, § 399, it is said:

"It is ordinarily held that, if defendant without objection appears and pleads to the merits of the action, he cannot thereafter object that it was prematurely commenced."

See *Kansas City So. Ry. Co. v. Greer*, 90 Ark. 531, 119 S. W. 1121; *Anthony v. Smithson*, 70 Kan. 132, 78 Pac. 454; *Ross v. Chambliss*, 5 La. Ann. 158; *Googins v. Gilmore*, 47 Me. 9, 74 Am. Dec. 472; *Harris v. North American Ins. Co.*, 190 Mass. 361, 77 N. E. 493, 4 L. R. A. (N. S.) 1137; *McClung v. McPherson*, 47 Or. 73, 81 Pac. 567, 82 Pac. 13; *Welch v. Miller*, 210 Pa. 204, 59 Atl. 1065.

The decree is reversed, and the cause is remanded to the court below, with instructions to enter a decree in accordance with the foregoing opinion.

In re R. E. TAYLOR CORP.

In re PRENTICE.

(Circuit Court of Appeals, Second Circuit. December 19, 1917.)

No. 79.

CHattel Mortgages ⇨194—VALIDITY—SUBTERFUGE.

Lien Law (Consol. Laws N. Y. c. 33) § 230, declares that every chattel mortgage, not accompanied by immediate delivery and followed by an actual and continued change of possession, is void as against creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage is filed. Some months before adjudication the bankrupt corporation desired to purchase motor cars from claimant, which refused to sell on credit, and, as the bankrupt was about to sell some of its preferred stock under an agreement that no additional liens should be placed on its property, it was arranged that a third person should take title to the cars, give a chattel mortgage thereon, and to secure payment his notes would be indorsed by the bankrupt. The mortgage was duly filed, and the individual purchaser executed a bill of sale of the cars to the bankrupt. *Held* that, as the mortgage was filed and became notice of record, and as no fraud was practiced on the purchaser of the bankrupt's preferred stock by reason of the transaction, the covenant not to place additional liens on the bankrupt's property not applying to subsequently acquired property, and the transaction increasing the bankrupt's assets by its equity in the motor cars, the chattel mortgage is not subject to attack on the ground that it was in fraud of the Lien Law.

Rogers, Circuit Judge, dissenting.

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

In the matter of the bankruptcy of the R. E. Taylor Corporation. The petition of Ezra P. Prentice, as receiver of the bankrupt, to enjoin the Maxwell Motor Sales Corporation from making any claim upon the proceeds of a sale of certain motor cars being denied, the receiver petitions to revise. Order affirmed.

Blau, Zalkin & Cohen, of New York City, for appellant.

Joline, Larkin & Kathbone, of New York City, for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. In September, 1916, the R. E. Taylor Corporation was in negotiation with the Maxwell Motor Sales Corporation for the purchase of 20 automobiles. The Maxwell Company was not willing to sell on credit, but required that a chattel mortgage be given it for the balance of the purchase money unpaid. The Taylor Company was not willing to do this, because it was about to sell some of its preferred stock under an agreement that no additional liens should be placed upon its property. Therefore it was arranged that one Cowan should take title to the cars and give a chattel mortgage upon them to

the Maxwell Company to secure payment of his notes, indorsed by the Taylor Company. This was done, and thereupon Cowan executed a bill of sale of the cars to the Taylor Company. The chattel mortgage was duly filed in accordance with the Lien Law of the state of New York (Consol. Laws, c. 33), but does not appear in the record.

March 28, 1917, an involuntary petition in bankruptcy was filed against the Taylor Company, and a receiver was appointed April 20th. The Maxwell Company, in accordance, as it is stated, with the terms of the mortgage, took possession of 10 of the cars for nonpayment of notes, and 10 came into the possession of the receiver. May 3, 1917, Judge Mayer, upon the motion of the receiver, ordered the Maxwell Company to turn over the cars in its possession to him, and that he sell them free and clear and out of the proceeds pay the lien of the Maxwell Company.

May 8th, the circumstances under which the chattel mortgage was executed having come to the knowledge of the receiver, he filed a petition praying that the Maxwell Company be enjoined from making any claim upon the proceeds of sale, because the chattel mortgage was void as against him, representing the creditors of the Taylor Company; it having been made in fraud of the Lien Law. June 8th Judge Augustus N. Hand entered an order denying the petition, and thereupon the receiver filed this petition to revise.

Section 230, art. 10, of the Lien Law, reads:

"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."

We see nothing to indicate that a fraud was practiced by any of the parties either upon the Lien Law or upon any one. The Maxwell Company was certainly entitled to insist upon a mortgage from the purchaser, and it sold to Cowan in order to get a mortgage. That was what the parties intended to do, and Cowan must be regarded as being the purchaser. As the mortgage was duly filed, knowledge of it was imputed to Cowan's creditors, and of course to the Maxwell Company, which had actual notice of it. If the purchasers of Taylor & Co.'s preferred stock have any right to complain, it is clear no fraud was practiced upon them, because the Taylor Company's covenant not to put any additional liens on its property would not apply to subsequently acquired property. In it the preferred stockholders would get the benefit of everything the Taylor Company had, viz. the equity over the mortgage.

The order is affirmed.

ROGERS, Circuit Judge (dissenting). I am unable to concur, while conceding that on the facts the question is a close one. The question involved, as it seems to me, is whether one who in effect has attempted to defeat the purpose of the chattel mortgage act may nevertheless claim the benefit of the mortgage. The facts lie within a narrow com-

pass. The R. E. Taylor Corporation, the bankrupt herein, wished to buy 20 Maxwell Motor Company touring cars. The manager of the Maxwell Motor Sales Corporation testified that the cars were purchased from him by the Taylor Corporation and for the Taylor Corporation, but that they were purchased in the name of Julius B. Cowan, vice president of the Taylor Corporation. The Maxwell Corporation received a check for \$1,058.50, which, as he remembered it, was made by the Taylor Corporation to Cowan and indorsed by him to the Maxwell Corporation. Cowan signed the notes which were given for the balance of the purchase price, and the notes were indorsed by the Taylor Corporation. At the same time Cowan instructed the salesman that the bills for the cars purchased were to be sent to the Taylor Corporation and they were so sent. The invoices show title in the Taylor Corporation. The cars were delivered by the Maxwell Corporation at the warehouse of the Taylor Corporation. The payment of the notes was secured by a mortgage on the cars given by Cowan. The following excerpt from the testimony of the manager of the Maxwell Corporation is illuminating:

"Q. Who purchased those cars from you? A. The R. E. Taylor Corporation. Q. In whose name were they purchased? A. Mr. Cowan's. Q. You knew it was purchased by Mr. Cowan for the R. E. Taylor Corporation? A. Yes."

It was said in *Re Cannon* (D. C.) 121 Fed. 582, 584, that:

"The mischief which the recording laws are intended to prevent is the obtaining of credit by reason of the ostensible ownership of property which in reality is covered by a secret lien, and the great object of all such laws is to give notice—notice to all purchasers and notice to creditors who give credit on the faith of property."

That is undoubtedly the purpose of the chattel mortgage law. And such a transaction as the record in this case discloses cannot be upheld by the courts, in my opinion, without disregarding the intent of the statute, and without ignoring the object which the Legislature intended to accomplish by its enactment. The sale to Cowan was a mere pretense and sham, and the effect of what was done was to give the Taylor Corporation a credit on the faith of property subject to a lien which its creditors could not discover. It is not necessary to inquire whether any creditors were actually deceived or prejudiced by what was done. They might have been, and that is sufficient.

The Circuit Court of Appeals for the Fifth Circuit in *Re Duggan*, 183 Fed. 405, 106 C. C. A. 51, held that a chattel mortgage, withheld from record for several months by the mortgagee under a tacit agreement to do so because of the effect which the record would have on the mortgagor's credit, is fraudulent and void, both as to prior and subsequent creditors. In this case, as in that, the effect of what was done was to give a fictitious credit to the Taylor Corporation. The testimony is that that company was about to sell certain of its preferred stock, and that one of the conditions of that preferred stock was that no other or additional liens should be placed upon the property of the corporation. The attorney for the Maxwell Company testified that he argued for several days with the attorney for the bankrupt that a chattel mortgage on the cars about to be purchased was not placing a lien on the

property, but merely the acquisition of an equity of the purchaser. He adds that he was not able to convince him, and that he then finally consented that the property should be taken in the name of Cowan. That Cowan was a mere dummy in the deal is evident. And it is also clear that the Maxwell Company knew that the real purchaser was the Taylor Corporation. That what was done did not wrong the preferred stockholders is not conclusive. The material fact is that the effect of what was done was to give the Taylor Corporation fictitious credit.

The conclusion I have reached is that a vendor of personal property, who consents to take a mortgage on the property in the name of one he knows is a dummy, and who never has or was intended to have possession of the property, and who has no interest therein, cannot enforce it as against the creditors of the real beneficial owner. It is not necessary to the validity of a chattel mortgage that the mortgagor have an absolute title to the property mortgaged, but he must have some interest therein. A mortgage in which the mortgagor has no interest is void. *Learned v. Brown*, 94 Fed. 876, 36 C. C. A. 524; *Jewell v. Simpson*, 38 Kan. 362, 16 Pac. 450. At the best all that can possibly be said for Cowan's interest is that he took as trustee for the Taylor Corporation, which furnished such money as was paid over and agreed to pay the balance. The mortgagee acquired only the interest of the mortgagor. *Bourland v. McKnight*, 79 Ark. 427, 96 S. W. 179, 4 L. R. A. (N. S.) 698; *Rainey v. Nance*, 54 Ill. 29; *Dillon v. Mizell Live Stock Co.*, 66 Fla. 425, 63 South. 824. A man cannot grant or charge that which he hath not. *Titusville Iron Co. v. New York*, 207 N. Y. 203, 209, 100 N. E. 806. If Cowan is to be regarded as a trustee for the Taylor Corporation, and the Maxwell Corporation took with full knowledge of that fact a mortgage which did not disclose the cestui's interest, it would be postponed to the rights of the creditors of the cestui who had no notice, and therefore of the trustee in bankruptcy; the intent of the Lien Law being that no chattel mortgage shall be good as against the creditors of the owner who are without either constructive or actual notice thereof. The rights of the creditors of the cestui are superior to those of the mortgagee under such circumstances.

SIEGELSCHIFFER v. PENN MUT. LIFE INS. CO. et al.

(Circuit Court of Appeals, Second Circuit. December 19, 1917.)

1. APPEAL AND ERROR ⇨401—"WRIT OF ERROR"—NATURE OF WRIT.

A writ of error is the writ of the appellate court, addressed to the judge of the trial court, directing him to send the record and proceedings in the case to the appellate court, and such writ is not brought, in the legal meaning of the term, until it is filed in the court which rendered the judgment.

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

2. TIME ⇨9(1)—COMPUTATION—RULE.

Ordinarily the time within which an act is to be done is to be computed by excluding the first day and including the last.

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

3. TIME \Leftrightarrow 10(9)—WRIT OF ERROR—PERFECTION—TIME OF.

Act Cong. March 3, 1891, c. 517, § 11, 26 Stat. 829 (Comp. St. 1916, § 1647), declares that no appeal or writ of error by which any order, judgment, or decree may be reviewed in the Circuit Court of Appeals shall be taken or sued out, except within six months after entry of the judgment, order, or decree to be reviewed. The last day of the six-months period allowed for suing out a writ of error fell on Sunday. Plaintiff in error, Sunday being "dies non juridicus," sued out a writ of error on the following Monday, contending that it was within time. *Held* that, despite the ordinary rule that, when the last day of a period falls on Sunday, the act can be lawfully done on the following Monday, the writ of error must be quashed, not being brought within time, for the Circuit Court of Appeals has no authority to extend or restrict the period, and furthermore such determination is in accordance with the practice in the state of New York, where sat the federal court rendering the judgment sought to be reviewed.

4. COURTS \Leftrightarrow 356—PRACTICE—FEDERAL COURTS.

As Act Cong. March 3, 1891, § 11, providing that appeals to and writs of error from the Circuit Court of Appeals must be taken or sued out within six months after entry of judgment, order, or appeal sought to be reviewed, should receive the same construction in each circuit, U. S. Comp. St. 1916, § 1537, declaring that the practice in civil cases in the District Court shall conform as near as may be to the practice existing at the time in like causes in the courts of record in the state within which such District Courts are held, has no application, and the state practice with respect to computation of time should not be deferred to, so as to change the rules as to computation of time for appealing or suing a writ of error in the various circuits.

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

Action between Hyman L. Siegelschiffer and the Penn Mutual Life Insurance Company and another. There was a judgment for the latter, and the former brings error. On motion for dismissal. Motion granted, and writ of error quashed.

A motion was made to dismiss the writ of error on the ground, among others, that it was not taken within six months after the entry of the judgments sought to be reviewed. The judgments in the court below were entered on January 8, 1917. The writ of error was taken out on July 9, 1917. The six-months period expired on July 8, 1917, which fell on Sunday. The question is whether the writ taken out on the following Monday was in time.

Bergoffen & Michaels, of New York City, for plaintiff in error.

Winthrop & Stimson, of New York City, for defendants in error.

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

ROGERS, Circuit Judge. The question presented involves the construction to be placed upon that part of Act Cong. March 3, 1891, c. 517, § 11, which fixes the time within which appeals and writs of error may be taken or sued out, and which reads as follows:

"No appeal or writ of error by which any order, judgment, or decree may be reviewed in the Circuit Court of Appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the

order, judgment, or decree sought to be reviewed." U. S. Compiled Statutes Ann. 1916, vol. 3, p. 3266, § 1647.

[1] The writ of error is the writ of the appellate court addressed to the judge of the trial court directing him to send the record and proceedings in the case to the appellate court. In *Brooks v. Norris* (1850) 11 How. 204, 13 L. Ed. 665, it was decided, Chief Justice Taney speaking for the court, that:

"The writ of error is not brought, in the legal meaning of the term, until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior to the appellate court, and the period of limitation prescribed by the act of Congress must be calculated accordingly. The day on which the writ may have been issued by the clerk or the day on which it is tested are not material in deciding the question."

This case is cited with approval in *Mussina v. Cavazos*, 6 Wall. 355, 18 L. Ed. 810, and in *Scarborough v. Pargoud*, 108 U. S. 567, 2 Sup. Ct. 877, 27 L. Ed. 824.

[2, 3] It is conceded that courts have no power to enlarge the statutory time to sue out a writ of error. It is also true that they have no power to shorten the statutory time. When the last day of the six-months statutory period falls on Sunday, does the period expire on Saturday or on the following Monday? It is agreed, of course, that the writ cannot be sued out on Sunday, which is dies non juridicus. The plaintiff in error insists that the writ was sued out in time, and he relies on the principle applied in *Street v. U. S.*, 133 U. S. 299, 10 Sup. Ct. 309, 33 L. Ed. 631. In that case the statute authorized the President to fill vacancies in the army then existing or which might occur prior to the 1st day of January then next. The 1st day of January fell on Sunday, and the Supreme Court held that in the exercise of the power thus conferred an order made on the 2d day of January was valid. The opinion, written for the court by Mr. Justice Brewer, stated that:

"A power that may be exercised up to and including a given day of the month may generally, when that day happens to be Sunday, be exercised on the succeeding day."

It is urged upon us that Congress, in enacting the law of March 3, 1891, and fixing a six-months limitation for appeals, presumably knew of the rule of statutory construction applied in the above case, and intended that the statute should be interpreted accordingly.

The early common-law rule adopted in England and in some early decisions in the United States was that, in the absence of anything indicating a different intention, a month in law meant a lunar month, or 28 days. This rule was abolished by statute in England in 1850. In this country, in some of the states, statutes have been enacted defining the meaning of the term, and now the word "month" means a calendar month, either because of a statute or by judicial decision. *Guaranty Trust & Safe Deposit Company v. Green Cove Springs & Melrose R. Co.*, 139 U. S. 137, 11 Sup. Ct. 512, 35 L. Ed. 116.

It is also, we take it, settled by the weight of authority that the time within which an act is to be done is to be computed by excluding the first day and including the last. *Sheets v. Selden*, 2 Wall. 177, 17

L. Ed. 822; *Eliot National Bank v. Gill* (D. C.) 210 Fed. 933, 940. And when the last day falls on Sunday it is the general rule, made so by statute in many jurisdictions, that the act to be done may be lawfully done on the day following. *Monroe Cattle Co. v. Becker*, 147 U. S. 47, 55, 13 Sup. Ct. 217, 37 L. Ed. 72.

In 38 Cyc. 330, it is said that, although the decisions are not entirely uniform, the above rule has also been held to apply to pleading, serving process, putting in special bail, the service, publication, and operation of notice, returning an execution, suing out a writ of scire facias to revive a judgment, preparing and serving a statement on motion for a new trial, the filing of a bill of exceptions, transcript, brief, appeal bond, or undertaking, and the taking of other steps to perfect an appeal, redeeming lands from a tax or other judicial sale, as well as to the time within which a justice of the peace must render judgment after submission of the case. The rule has, however, been held not to apply in computing the time limited by statute for the commencement of an action, the time for refileing a chattel mortgage, or filing and enforcing a mechanic's lien, or filing a motion to set aside a default; and where the day fixed for the payment of commercial paper falls on Sunday, the weight of authority is in favor of the view that the preceding day is the day of maturity, at least where the paper is entitled to grace. In 28 Am. & Eng. Encyc. of Law, p. 224, it is said that at common law:

"When Sunday is the last day for the performance of an act, it is usually excluded, and performance on Monday allowed. The contrary, however, has been held."

And in 20 Encyc. Pl. & Pr. p. 1204, it is said:

"The authorities also differ as to the proper practice where the period prescribed for doing an act expires on Sunday, though the weight of authority seems to be that the act may be done on the following day."

The question now presented to the court has been passed upon by the Circuit Court of Appeals in the Eighth and Ninth Circuits. And in both circuits it has been held that, when the last day of the six months within which an appeal may be taken or writ of error sued out falls on Sunday, the appeal cannot be taken or writ sued out on the Monday following. The question was presented in the Eighth Circuit in *Johnson v. Meyers* (1893) 54 Fed. 417, 4 C. C. A. 399. It then arose in the Ninth Circuit in *Meyer v. Hot Springs Imp. Co.* (1909) 169 Fed. 628, 95 C. C. A. 156.

The theory is that, when the period within which an act is to be done is less than seven days, there is reason to think that juridical days are intended, and that Sunday following within such time should be excluded, but that, where the time limited is such that one or more Sundays must fall within it, the court should not extend the time fixed by excluding the last, the first, or any intermediate Sunday. There are Sundays in every month, and they are as much a part of the month as Saturdays, and there is no more reason for excluding the last Sunday than the intervening Sundays, and if the intervening Sundays were to be excluded we should extend thereby the time limited another month.

[4] Counsel for the plaintiff in error argued in this court that, no matter what may be the rule in any other circuit, we should conform to the rule adopted in the state of New York, as the action was commenced in the Southern district of New York. He relies on section 1537 of the United States Compiled Statutes (1916) Annotated, vol. 3, p. 2912, which declares that:

"The practice * * * in civil causes, * * * in the [Circuit] District Courts, shall conform, as near as may be, to the practice * * * existing at the time in like causes in the courts of record of the state within which such [Circuit or] District Courts are held, any rule of court to the contrary notwithstanding."

It is clear to us that an act of Congress has the same meaning throughout the entire United States. It certainly cannot mean one thing in one circuit and a different thing in another circuit. And section 1537 of the Compiled Statutes does not apply to the question this case raises. But, if it were to be assumed for the purposes of the argument that the law of New York is controlling, we should reach the same result. Counsel informs us that in the state of New York the last day of any time to appeal, if a Sunday, is excluded. He has not referred us to any cases which support his claim. We have, however, examined the New York cases, and they seem to be contrary to his opinion.

The rule in New York in regard to computing time prescribed by statute was stated by the Court of Appeals prior to the enactment of the Statutory Construction Law in *Porter v. Pierce* (1890) 120 N. Y. 217; 24 N. E. 281, 7 L. R. A. 847, and the court held that under a statute allowing a creditor to redeem within 15 months after a sheriff's sale, and providing that he might redeem from any other redeeming creditor, although the 15 months had elapsed, provided he redeems within 24 hours after the last previous redemption, that if the last day for redemption fell on Sunday redemption could not be made on Monday. In its opinion the court said:

"But for reasons founded in public policy, the maxim '*dies non juridicus*' is given a liberal construction and effect, so as to embrace in it that which may be deemed within its purpose and meaning. * * * It is now quite well established that the observance of the Sabbath day as such is a right which may be enjoyed without molestation by transactions of a secular character. Hence Sunday cannot, for the purpose of performing a contract be regarded as a day in law, and when it is due on Sunday, performance on Monday following is in time. * * * When the statute requires that something be done within a given time, it must be so done, and, although the last day be Sunday, it must be embraced in the computation of the time."

Then the Statutory Construction Law (chapter 677, Laws of 1892) was adopted, which provided in section 26 that:

"In a statute * * * the term month means a calendar month and not a lunar month. A number of months after or before a certain day shall be computed by counting such number of calendar months from such day, exclusive of the calendar month in which such day occurs, and shall include the day of the month in the last month so counted having the same numerical order in days of the month as the day from which the computation is made, unless there be not so many days in the last month so counted, in which case the period computed shall expire with the last day of the month so counted."

And section 27 provides that:

"Sunday or a public holiday other than a half-holiday must be excluded from the reckoning if it is the last day or an intervening day of any such period of two days."

This was construed in *Aultman & Taylor Co. v. Syme*, 163 N. Y. 54, 57 N. E. 168, 79 Am. St. Rep. 565, and the Court of Appeals held that section 27 was not applicable to a period of years. So in *Ryer v. Prudential Ins. Co.*, 185 N. Y. 6, 77 N. E. 727, the same section was held inapplicable to a term of months. That being so, if the time within which a suit is to be commenced expires on Sunday, that day is not to be excluded as counsel contended.

In deciding as we do that, when the last day of the six months within which a writ of error may be taken out falls on Sunday, it is too late if it is taken out on the following Monday, we are conforming both to the law of the state of New York within which the District Court is held, and also to the decisions in the other circuits.

The motion to dismiss is granted, and the writ of error is quashed, with costs.

AUSTRO-AMERICAN S. S. CO. v. THOMAS.

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

No. 53.

1. CARRIERS ⇨247(1)—BREACH OF CONTRACT WITH PASSENGER—NATURE OF WRONG.

Though the relation between a passenger and carrier is contractual in origin and nature, the act that breaks the contract may be also a tort.

2. CARRIERS ⇨280(1)—INJURY TO PASSENGERS—NECESSITY OF.

A passenger cannot look to his carrier as an insurer, and some negligence, however slight, must appear.

3. CARRIERS ⇨283(4)—INJURY TO PASSENGERS—ACTS OF EMPLOYÉS.

A carrier's duty to a passenger includes protection from the personal misconduct of its servants, and such protection may fail when employés offer insulting and injurious language to a passenger.

4. CARRIERS ⇨283(2)—PASSENGERS—THREAT OF EJECTION—RIGHT OF ACTION.

Where a steamship company had accepted a passenger's check, it was a breach of contract and a tort, giving a right of action, for its agent in the presence of third persons to falsely notify her that the check was worthless and demand payment under threat of ejection, though the language used was not insulting and she was not ejected.

5. DAMAGES ⇨53—THREAT OF EJECTION OF PASSENGER—MENTAL SUFFERING.

As mental distress and suffering would result from such act in the case of a normal person, the passenger's mental suffering proximately resulted from the legal wrong, and was an element of damage.

6. CARRIERS ⇨317(1)—ACTIONS FOR DAMAGE—EVIDENCE.

The episode having occurred in an Italian port, it was error to admit an Italian statute making it a crime to attribute to another an act exposing him to public scorn, and to make such accusation known to third persons; this merely tending to inflame the minds of the jury.

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

7. APPEAL AND ERROR ⇨1026, 1027—HARMLESS ERROR—ERRORS NOT AFFECTING RESULT.

To render error harmless, it must appear beyond doubt that it did not and could not prejudice the rights of the complaining party; but, if it could make no difference in the judgment, it may be disregarded.

8. APPEAL AND ERROR ⇨1052(5)—HARMLESS ERROR—CURE BY REMITTITUR.

In an action against a steamship company for threatening a passenger with ejection and wrongfully asserting that a check received from her was worthless, the erroneous admission of an Italian statute suggesting to the jury that a crime was committed was cured by requiring the verdict for \$3,100 to be reduced to \$750.

9. CARRIERS ⇨317(1)—ACTION FOR DAMAGES—EVIDENCE—"NERVOUSNESS"—"HEADACHE."

Evidence that, after the episode, plaintiff cried, was nervous, and had a headache, was admissible; the words "nervousness" and "headache" being no more than the translation into common speech of emotional excitation.

[Ed. Note.—For other definitions, see Words and Phrases, Headache; Second Series, Nervous.]

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

Action by Marie Louise Thomas against the Austro-American Steamship Company. Judgment for plaintiff, and defendant brings error. Affirmed.

In 1914, the Steamship Company maintained a line between Trieste and New York. The plaintiff below, Mrs. Thomas, obtained in Italy, passage tickets for herself and daughter entitling them to transportation from Trieste to New York. In payment therefor she gave her own check upon a bank in the state of Ohio, which the agent of the steamship company accepted. Plaintiff and her daughter then embarked at Trieste by virtue of the tickets so obtained. Some days later, and when lying in the harbor of Palermo, the purser notified Mrs. Thomas that her check was worthless, and that she must forthwith pay the passage money for herself and daughter, or be ejected from the vessel. This demand was made in the presence of several people, including especially at least one fellow passenger. As a matter of fact Mrs. Thomas's check was good, and was paid in due course; the purser's demand was the result of false information. The fellow passenger, who undoubtedly witnessed this transaction, tendered his own check to the purser if the Thomases were permitted to remain on board. This offer was accepted, and the voyage completed without further incident. No force was used nor threatened, though the plain implication was that, if Mrs. Thomas did not leave the ship quietly, she would be forcibly removed.

The complaint set forth these facts, and further averred that, when defendant threatened plaintiff "with expulsion from [its vessel]," it did so in an "insulting and insolent manner," and "without any just cause or provocation." At the trial defendant substantially admitted that the purser's demand and threat were the result of the foolish and inexplicable mistake of his informant; but it appeared that no insult or insolence occurred, other than such as necessarily inhered in a demand of such a nature. Over objection and exception, plaintiff was permitted to read in evidence a section of the Italian Criminal Code declaring, in substance, that any one who attributed to another an act exposing such other to public scorn, and made such accusation known to third persons, was guilty of a crime entailing severe punishment. Over similar objection and exception Mrs. Thomas was permitted to testify that after her interview with the purser she cried all night, and had "very bad headaches," and was extremely nervous during the balance of the voyage and for some weeks afterward.

The jury rendered a verdict in favor of the plaintiff for \$3,100, whereupon the court ordered a new trial, unless plaintiff reduced the verdict to \$750. Such reduction was consented to, judgment was entered on the reduced verdict, and defendant took this writ, alleging for error in substance: (a) The evidence furnished no basis for assessment of any damages; (b) the above referred to section of the Italian Criminal Code was incompetent; and (c) so was plaintiff's testimony as to her own nervousness and headaches.

James A. Beha, of New York City, for plaintiff in error.

Graves, Miles & Yawger, of New York City (Charles S. Yawger, of New York City, of counsel), for defendant in error.

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

HOUGH, Circuit Judge (after stating the facts as above). [1-3] Undoubtedly the relation between the passenger and carrier is contractual, both in origin and nature; yet the act that breaks the contract may be also a tort, just as a carrier's unexcused failure to deliver goods entrusted to him is at once a breach and a conversion. *Vanderbilt v. Ocean S. S. Co.*, 215 Fed. at 891, 132 C. C. A. 226. Yet a passenger cannot, like a cargo owner, look to his carrier as an insurer; some negligence, however slight, must be shown. *New York, etc., Co. v. Baker*, 98 Fed. 697, 39 C. C. A. 237, 50 L. R. A. 201, and cases cited. The carrier's duty, however, not only extends to matters immediately concerned with the act of transportation, but includes protection from the personal misconduct of the carrier's servants (*Steamboat Co. v. Brockett*, 121 U. S. 645, 7 Sup. Ct. 1039, 30 L. Ed. 1049), and such protection may fail when employes offer insulting and injurious language to a passenger; i. e. one having legal right to the care aforesaid (*Gillespie v. Brooklyn, etc., Co.*, 178 N. Y. 348, 70 N. E. 857, 66 L. R. A. 618, 102 Am. St. Rep. 503).

[4, 5] That within these principles Mrs. Thomas had a cause of action is, we think, certain. It is admitted that if, under the circumstances shown, she had been actually ejected from the vessel, she could have recovered, even though she had physically and forcibly resisted (*Erie R. R. v. Winter*, 143 U. S. 73, 12 Sup. Ct. 356, 36 L. Ed. 71); and the action would have also lain, had she left the ship when ordered, without any resistance or suggestion thereof (*Georgia, etc., Co. v. Eskew*, 86 Ga. 641, 12 S. E. 1061, 22 Am. St. Rep. 490). The mere leaving the vehicle of transport is nothing; it is the cause or reason for departure that displays, defines, and indeed constitutes, the cause of action. That the actual going was avoided is of itself unimportant. In this instance it was the order to go ashore, unless an unlawful demand was complied with, that constituted a breach of contract; and the demand by its nature was a tort of the same kind as that so exhaustively considered in the *Gillespie Case*. Except as to amount of damages, it makes no difference, that (as we assume) there was no verbal insult or language of contumely on the purser's part. To be wrongfully accused of passing a worthless check is in and of itself an insult, and to offer that insult in the presence of others is a notorious aggravation thereof. No softness of speech or verbal politeness

can take away or materially lessen the inherently insulting and injurious nature of the accusation.

The contention of plaintiff in error really comes to the assertion that, because Mrs. Thomas suffered no physical injury, her claim is *injuria sine damno*. We have not here to deal with the long- vexed question as to whether mere mental suffering, resulting from the non-malicious act of one owing no special duty to the sufferer, can either furnish basis for suit or justify an award of damages. There was here an infraction of contractual obligation, which was also a tort; that mental distress and suffering would result therefrom in the case of a normal person we hold too plain for argument; therefore mental suffering proximately resulted from a legal wrong, and consequently is an element of damage. *Sanderson v. Northern Pacific R. R.*, 88 Minn. 162, 92 N. W. 542, 60 L. R. A. 403, 97 Am. St. Rep. 509, and citations there made. Cf. *The Willamette Valley (D. C.)* 71 Fed. 712, and the rule in slander, *Lombard v. Lennox*, 155 Mass. 70, 28 N. E. 1125, 31 Am. St. Rep. 528, and in libel, *McClure Co. v. Philipp*, 170 Fed. 910, 96 C. C. A. 86.

[6] The section of the Italian Criminal Code was erroneously received in evidence. It did not furnish, nor tend to prove, the cause of action; if no such statute had existed, the suit would have been perfectly well brought. It did tend to inflame the minds of the jury, by suggesting that plaintiff had been wronged through the commission of a crime—a word often of dread, and therefore of influence. The suggestion was illegitimate, for there could be no crime without criminal intent (that being the law of Italy for all we know from this record), and that the whole transaction was no more than a silly, though painful, mistake is especially clear.

[7] To render error harmless, it must appear beyond doubt that it did not and could not prejudice the rights of the party complaining thereof (*Vicksburg, etc., R. R. v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. 118, 30 L. Ed. 299, and cases cited); if it could have made no difference in the judgment it may be disregarded (*Reed v. Stapp*, 52 Fed. 641, 3 C. C. A. 244).

[8] If this verdict had been originally for \$750, after careful instructions from the court that compensatory damages only could be awarded, we should hold, as of course, that so moderate a verdict was necessarily uninfluenced by testimony that could affect the quantum of recovery only. No right of defendant could have been prejudiced by a fact so obviously disregarded. But it is insisted that, as the facts are, this is to approve a verdict (which alone supports the judgment) made, not by the jury, but by the court, with the assent of plaintiff alone, for which doctrine we are referred to *North Chicago, etc., Co. v. Hoffart*, 82 Ill. App. 539. This is too technical; our writ of error inquires whether the judgment is right; often, but not always, that means was it reached by lawful methods? But if the judgment, from all the facts shown, could and should beyond all doubt have been absolutely the same, had no error been committed, such judgment cannot be reversed without making fetishes of the rules of the game.

It is further urged that this involves a holding that the court may

fix a verdict; after verdict the trial judge may do so in result, by declaring a new trial unless the victorious party accept what the court deems a fair award. We have no power to directly review that proceeding; yet the plaintiff in error here, having been relieved of a verdict confidently asserted to have been the gift of passion, denies that by a remittitur the result of that passion can be eliminated. The point lacks binding authority, and our holding is that we may and must regard this judgment as if based on a verdict for \$750. So regarded, we deem it clear beyond doubt that the evidence erroneously admitted could not possibly have affected the matter. Therefore it was harmless error to admit the same.

[9] It was not error to permit plaintiff to testify that after the episode of insult she cried, was nervous, and had headache. The boundaries between mental and physical suffering are but ill defined. Emotional exhaustion is the natural concomitant of excitement of any kind, and we regard the words "nervousness" and "headache" as no more than the translation into common speech of emotional excitation. The line between a statement of feeling and a claim of disease or injury can better be illustrated than defined. The plaintiff could not properly have deposed that she had neuritis after the threat of ejection, without proper pleading and medical evidence.

The subject is one which in its minute variations must always be left to fair discretion in the trial court. That discretion was not abused in this instance.

Judgment affirmed.

LEARNED HAND, District Judge. I concur in the result, but not upon the ground that the reduction of the verdict by the court could cure the error in the admission of section 393 of the Italian Code. The defendant was entitled to an assessment by the jury after a legal trial. The plaintiff might consent to abate the verdict; but he might not take from the defendant the right to some verdict. I agree that the evidence was irrelevant, and that it was error to admit it; but it seems to me that the judge's charge, although not expressly directed to that point, was sufficient to undo its evil. The court first said that there was no charge that the defendant had acted maliciously, but at most only negligently, and then said that the jury could award nothing but compensatory damages, which it defined as those to reimburse the plaintiff for the actual injury she had sustained. The defendant made no request for a further charge in respect of the evidence in question. The evidence was not of such kind as inevitably to involve a mistrial, no matter what action the judge took. It seems to me a fair exercise of his discretion in correcting the error not to emphasize the evidence by an express withdrawal, certainly unless the defendant required it.

Now, it is true that *Washington Gaslight Co. v. Lansden*, 172 U. S. 534, 19 Sup. Ct. 296, 43 L. Ed. 543, does appear to be a decision to the contrary, and pretty close to the case at bar. Yet that case was a good deal complicated by the fact that the testimony there admitted was not relevant against the defendant Leetch at all, although he was

necessarily involved in the verdict, and besides I think the evidence of the defendant's wealth was a good deal more dangerous than the evidence here. The act could not be the crime of the defendant, but only of the purser, and it does not seem to me inevitable that a crime of the purser should have been attributed to the defendant. I think no one would have been for reversal if the evidence had been expressly withdrawn, and I confess that the difference between that course and the charge as given appears to me too technical to justify a reversal under the more modern treatment of such matters.

POWER & IRRIGATION CO. OF CLEAR LAKE, CAL., v. SPRINGE.

(Circuit Court of Appeals, Ninth Circuit. February 4, 1918.)

No. 2956.

JUDGMENT \Leftrightarrow 720—CONCLUSIVENESS—MATTERS CONCLUDED.

In view of Code Civ. Proc. Cal. § 1911, declaring that only is deemed to have been adjudged in a former judgment which appears on its face to have been so adjudged, or which was actually or necessarily included therein, a judgment of a California state court in favor of the vendor of land, who brought ejectment to recover possession on account of the purchaser's failure to pay the last installment of the price, which found against the purchaser's assertion that he was entitled to remain in possession of the land, despite nonpayment, because of defects in the vendor's title, and his failure to tender a deed, and which also denied the intervention petition of one who had contracted with the purchaser, is, the purchaser's improvements having been shown, conclusive against an action by the successor of the purchaser to recover on account of installments paid and improvements made.

In Error to the District Court of the United States for the Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Action by the Power & Irrigation Company of Clear Lake, Cal., a corporation, against Heinz Springe. From a judgment for defendant, plaintiff brings error. Affirmed.

The defendant in error, Springe, on the 20th of September, 1906, entered into a contract with one Shuman, by which he agreed to sell and the latter to purchase certain real estate situate in Lake county, Cal., for the sum of \$47,000, and certain personal property for \$8,000. Thereafter, and on the same day, Shuman assigned all his right and interest in the contract to one J. Dalzell Brown. The purchase price for the personalty was paid in full, and no further reference to it need be made. The purchase price for the realty was by the contract made payable in installments, the final installment of which, amounting to \$28,500, became, by the contract, payable with interest September 15, 1907. December 15, 1906, Brown entered into possession of the land pursuant to the contract, and thereafter erected improvements thereon at an expense of about \$30,000. The contract contained these provisions respecting the vendor's title: "The seller agrees to furnish an abstract of title covering the lands hereby agreed to be sold complete to date on or before December 15, 1906. The purchaser is allowed thirty days after receipt of said abstract within which to examine title. Objections to the title, if any, shall be reported to the seller, in writing, within said period of thirty days, and if not so reported shall be deemed

to have been waived. The seller agrees to remove defects rendering the title unmerchantable and specified by the purchaser in his written report of objections; but if said defects (saving and excepting the securing of said patent) are not removed within a reasonable time, not to exceed ninety days after the receipt by the seller of said written report, the purchaser may at his option insist upon the specific performance of the seller's agreement to sell, extend the time for the removal of said defects, or declare this agreement at an end, in which latter event the seller agrees to return to him the sum of money herein receipted for and any further sums paid on account of said purchase price. * * * The delivery to the purchaser of a good and sufficient deed of grant, bargain and sale covering title to said above described parcels of land and payment of said last installment of twenty-eight thousand five hundred (\$28,500) dollars of the purchase price are concurrent conditions."

Certain objections to Springe's title having been made by Shuman's attorneys, and not having been removed to the satisfaction of the latter during the 90 days following December 6, 1906, Shuman notified Springe's attorney in writing that he elected to insist upon the specific performance of his agreement, and that upon his failure to do so he would be held liable for all damages resulting therefrom. Thereafter Springe directed his attorney to proceed "in the matter of clearing up the objections" to the title of the land. That was followed by other correspondence between the attorneys for the respective parties relating to the matter; and on September 3, 1907, Brown, through his attorney, reiterated the necessity of remedying certain of the objections made, and added that, "until this is done, we do not believe that there is sufficient record evidence of Mr. Springe's title." Thereafter Brown addressed to Springe, in care of his attorney, this letter: "With reference to the contract for purchase and sale entered into between yourself and L. J. Shuman, wherein you agreed to convey your Lake county property, with certain exceptions, to Mr. Shuman, or his assigns, I beg to confirm the statement already made that I am Mr. Shuman's assignee. I understand that Mr. Springe is now in Paris; that he has signed and acknowledged a deed conveying the property described in the contract with Mr. Shuman to the California Industrial Company, and that this instrument is now in San Francisco; and that Mr. Springe has in San Francisco no attorney in fact. In confirmation of the understanding reached between Mr. Levy and Mr. Gray [the attorneys of the respective parties], I hereby waive the production of a deed from Mr. Springe to myself on the day specified in the contract between yourself and Mr. Shuman; the understanding between us being that you will with all diligence cause to be delivered to me, upon payment of the balance of the purchase price due, a proper deed conveying the property under consideration to myself."

October 29, 1907, Springe tendered to Brown a deed to the property and demanded of him payment of the final installment of \$28,500 of the purchase price, with interest thereon, which payment Brown refused to make. December 14, 1907, Brown executed to the Central Counties Land Company, a corporation, a contract dated September 20, 1907, to sell to it 1,700 acres of the land described in the contract of September 20, 1906, for \$68,000, and on the same day executed to the same company another contract to sell to it the remaining 250 acres of the land described in the contract of September 20, 1906, for \$65,000. December 17, 1907, Springe again tendered to Brown a deed of the land described in the contract of September 20, 1906, and again demanded of him payment of the final installment of the purchase price therefor, which payment Brown refused to make, and on January 16, 1908, Springe demanded of him possession of the said property, of which he was then in possession, which possession Brown refused to surrender, whereupon, on the same day, Springe commenced in the superior court of Lake county, Cal., where the property is situate, an action in ejectment against Brown and others to recover possession of the property, in which action judgment was entered in favor of Springe, and which judgment was held by the court below to be a bar to the present action, which was brought by the plaintiff in error, as successor in interest of Brown, to

recover from Springe the value of the improvements put by Brown upon the property, as well as the various installments of money paid under the contract of purchase of September 20, 1906, on the purchase price.

Charles S. Wheeler and John F. Bowie, both of San Francisco, Cal., for plaintiff in error.

Luther Elkins and Richard P. Henshall, both of San Francisco, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). To determine whether the judgment in the ejectment action is a bar to the present one, it is necessary to see what was involved, litigated, and decided in the former. The law upon the subject is well settled. In the case of *Cromwell v. County of Sac*, 94 U. S. 351, 352, 24 L. Ed. 195, which was an action on certain bonds of the county and on certain interest coupons attached to them, to which action the defendant pleaded as an estoppel a judgment rendered in favor of the county in a prior action brought by another holder of certain earlier maturing coupons on the same bonds, accompanied with proof that the plaintiff Cromwell was at the time the owner of the coupons in that action, and that it was prosecuted for his sole use and benefit, the court, in considering the operation of the judgment so pleaded, said:

"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."

In *Landon v. Clark et al.*, 221 Fed. 841, 137 C. C. A. 399, the Circuit Court of Appeals for the Second Circuit held that to render a judgment conclusive in a subsequent action between the same parties, or their privies, but on a different cause of action, it must appear upon the record of the prior suit that the particular matter sought to be concluded was necessarily tried and determined, citing a number of cases in support of its ruling which need not be here specifically referred to. Indeed, such is embodied in the law of California by section 1911 of its Code of Civil Procedure, which reads:

"That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

On the trial of the present action in the court below the pleadings, findings, and judgment in the former one, which was between Springe and the assignor of the present plaintiff in error, were introduced. The parties were, therefore, in effect the same. The complaint in that action was in the ordinary form of a complaint in ejectment, alleging, among other things, the ownership in fee of the plaintiff Springe on the 30th day of October, 1907, and thereafter, of the property in question. By his answer the defendant thereto, Brown, among other things denied the alleged ownership of the plaintiff, denied that on October 30, 1907, or at any time since December 16, 1906, the plaintiff had been or then was lawfully or otherwise entitled to the possession of any part of the land in question, and while admitting that he withheld from the plaintiff the possession of the property denied that such withholding was unlawful or that plaintiff suffered any damage thereby, and denied the value of the use and occupation of the property as alleged in the complaint. And as an affirmative defense to that action of ejectment, Brown alleged and set up in his answer the contract between the plaintiff and Shuman of date September 20, 1906, the assignment by Shuman of all his right thereunder to Brown, the granting by the latter on September 20, 1907, of an option to the Central Counties Land Company to purchase 1,700 acres of the land described in the contract between Springe and Shuman for the sum of \$68,000, and the granting by Brown on the 14th day of December, 1907, of a like option to the Central Counties Land Company to purchase the remaining 250 acres of the land described in the contract of September 20, 1906, for the sum of \$65,000; that on February 1, 1908, Brown had let the Central Counties Land Company into the possession of all of the land, which company had since been in full possession thereof, and was still holding and claiming the right to hold the same by virtue of the said contracts; that Brown, since taking possession of the property had erected extensive improvements thereon of the reasonable value of \$40,000, and had paid Springe all installments of the purchase price as provided in the contract of September 20, 1906, except the last installment thereof, amounting to \$28,500, with interest thereon at the rate of 6½ per cent. per annum from June 15, 1907, which said last installment and interest was then due and payable to the plaintiff, Springe; that on December 18, 1907, the plaintiff, Springe, tendered to the defendant Brown a document purporting to

be a deed conveying the said property to the defendant, at the same time demanding the said deferred payment with interest; that said 18th day of December, 1908, was a legal holiday, and that no further tender of a deed conveying title to the said property had been made by the plaintiff to the defendant; that the said Central Counties Land Company filed in the superior court of the city and county of San Francisco, on the 26th day of December, 1907, a bill in equity against Springe and Brown, setting up, among other things, the contract of September 20, 1906, between Springe and Shuman, the assignment of the latter's interest therein to Brown, Brown's entry upon and subsequent improvement of the property, his subsequent contracts with the Central Counties Land Company for the conveyance of the property to it upon certain terms and conditions, and seeking judgment that the plaintiff to that action be substituted to all of the interests of Brown in the property upon its complying with the conditions of its contracts with Brown, which it offered to perform, and for a decree that upon the payment by it to Springe of the last installment due under the contract of September 20, 1906, amounting to \$28,500, with interest, Springe be compelled to convey to the plaintiff Central Counties Land Company all of said property, which said suit in equity Brown alleged in his affirmative defense to the ejectment action then remained pending and undetermined, and further alleged that the said Central Counties Land Company was therefore a necessary party to the ejectment action and asked that it be made a party thereto, and further pleaded the said suit in equity in abatement of the said action in ejectment.

The latter having been duly tried, the trial court made, in substance, these findings of fact:

(1) That Springe was on September 20, 1906, the owner in fee of the property referred to, and continued so to be.

(2) That while such owner he, on September 20, 1906, executed to Shuman the contract that has been referred to.

(3) That thereafter, and on the same day, Shuman assigned his interest therein to Brown.

(4) That thereafter, and on December 14, 1907, Brown delivered to the intervener, Central Counties Land Company, the two contracts that have been referred to—one dated September 20, 1907, and the other December 14, 1907.

(5) That from December 15, 1906, to February 1, 1908, Brown was continuously in possession of the property under the Shuman contract of September 20, 1906.

(6) That on the 1st day of February, 1908, Brown surrendered possession of the property to the intervener, Central Counties Land Company, which then took possession of it and continued in such possession, claiming to hold the same under and by virtue of the Shuman contract of September 20, 1906, and the various assignments that have been mentioned.

(7) That neither Brown nor the Central Counties Land Company have paid or offered to pay to Springe, or to any one for him, the last installment of the purchase price of the property, due September

15, 1907, under the contract of September 20, 1906, nor any part of such last installment, but that, on the contrary, both Brown and the intervener, Central Counties Land Company, refused to pay any part of the said last installment.

(8) That on the 29th of October, 1907, Springe tendered a good and sufficient deed of all of the property described in his contract made with Shuman September 20, 1906, to Brown, demanding of him payment of the amount then due thereunder, which payment Brown refused and continued to refuse to make in whole or in part.

(9) That on December 17, 1907, Springe made a like tender of a good and sufficient deed of the property to Brown, making a like demand of the amount remaining due under the contract of September 20, 1906, resulting in a like refusal on Brown's part.

(10) That on the 16th day of January, 1908, and prior to the commencement of the ejectment action, Springe duly demanded possession of the property from Brown, but that "Brown, being then in possession of said real property by his agent," refused to deliver up the possession of the property to Springe, which refusal he continued.

(11) That thereafter, and on the said 16th day of January, 1908, Springe commenced the action of ejectment and caused to be filed and recorded in the office of the recorder of Lake county, where the property is situated, a notice of the pendency thereof.

And from the facts so found the court concluded as matter of law:

(1) That Springe was on the 16th day of January, 1908, and continued to be, the owner in fee of the property described in the Shuman contract of September 20, 1906.

(2) That the intervener, Central Counties Land Company, was not entitled to the relief prayed for in its complaint in intervention nor to any relief, and accordingly entered judgment May 26, 1908, that the plaintiff to the action, Springe, have and recover of and from the defendant thereto, Brown, and also of and from the intervener, Central Counties Land Company, the whole of the real property described in the Shuman contract of September 20, 1906, together with his costs.

From the foregoing it clearly appears, we think, that there was never any attempt, either on the part of Springe or Brown, to rescind the Shuman contract of September 20, 1906, of which Brown was the assignee, but, on the contrary, the action of ejectment was brought by Springe because of what he claimed to be a breach of that contract by Brown, and in which action Brown by his answer refused to surrender the possession of the property, or to pay the last installment of the purchase price of the land, and setting up his right to continue to hold it under the contract, basing his refusal to pay the last installment of the purchase price on the alleged insufficiency of the deed tendered by the plaintiff in the ejectment action to convey the title to the property. The court in that action found that Springe was the owner in fee of the property, that the deed twice tendered by him to Brown was sufficient to convey to him the title, that Brown refused to pay the last installment of the purchase price and continued.

to withhold the possession of the property from the plaintiff, and accordingly awarded the plaintiff judgment therefor, with costs, which manifestly, we think, decided against Brown the very questions which lie at the foundation of the present action by his assignee, the plaintiff in error here.

The judgment is affirmed.

PELLERIN v. INTERNATIONAL COTTON MILLS.

INTERNATIONAL COTTON MILLS v. PELLERIN.

(Circuit Court of Appeals, First Circuit, January 24, 1918.)

Nos. 1304, 1305.

1. JUDGMENT \Leftrightarrow 199(1)—VERDICT—SETTING ASIDE.

Where a verdict for plaintiff was on defendant's motion set aside, it is improper for the trial court to enter judgment, in the absence of any verdict by the jury, notwithstanding the court might have entered judgment upon a verdict directed by it at the trial.

2. MASTER AND SERVANT \Leftrightarrow 375(1)—INJURIES TO SERVANT—EMPLOYERS' LIABILITY ACT—SCOPE—"MILL."

Under the New Hampshire Employers' Liability Act (Laws N. H. 1911, c. 163), which declares that it is applicable to workmen engaged in manual or mechanical labor in any shop, mill, factory, or other place in connection with or in proximity to any hoisting apparatus, or any machinery propelled or operated by steam, or other mechanical power in which shop, mill, factory, or other place five or more persons are engaged in manual or mechanical labor, the word "mill," under the decisions of the New Hampshire courts, includes not only the buildings wherein the work is done, but everything appurtenant thereto, and hence a carpenter, who under the terms of his employment might be engaged in manual labor, or in connection with or in proximity to machinery in the mill, and who had frequently been so engaged, is within the act, although his injury resulted from a fall from a platform adjoining and appurtenant to, but outside, one of the mill buildings.

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

3. MASTER AND SERVANT \Leftrightarrow 405(1)—INJURIES TO SERVANT—EVIDENCE—VERDICT.

In an action under the New Hampshire Employers' Liability Act, by a servant who fell from a platform while he was moving a cupboard, evidence held to warrant a finding that the fellow servant assisting him was negligent, and that plaintiff, who fell, was not guilty of contributory negligence.

In Error to the District Court of the United States for the District of New Hampshire; Edgar Aldrich, Judge.

Action by Moses Pellerin against the International Cotton Mills, begun in the state court and removed to the federal court. There was a verdict for plaintiff, and, on defendant's motion, verdict was set aside, and judgment for defendant ordered; but defendant's contention that the action was not maintainable under the New Hampshire Employers' Liability Act was not sustained. Plaintiff brings error, and defendant also brings error. Judgment reversed, and case remanded, with directions.

Louis E. Wyman, of Manchester, N. H. (Taggart, Burroughs, Wyman & McLane, of Manchester, N. H. on the brief), for plaintiff.

Edward C. Stone, of Boston, Mass. (Sawyer, Harding, Stone & Morrison, of Boston, Mass., on the brief), for defendant.

Before DODGE, BINGHAM, and JOHNSON, Circuit Judges.

DODGE, Circuit Judge. These two writs of error are brought by the plaintiff and defendant, respectively, in a suit to recover damages claimed by the plaintiff under the New Hampshire Employers' Liability Act (Laws 1911, c. 163).

The suit, brought originally in a New Hampshire state court, was removed into the federal District Court, on the defendant's petition alleging diverse citizenship of the parties, and was there tried at the April term, 1917. At the trial, notwithstanding a motion by the defendant at the close of the evidence for a directed verdict in its favor, the case was submitted to the jury, and a verdict rendered on May 4, 1917, in the plaintiff's favor and awarding him damages. Thereafter, on May 5, 1917, the defendant moved that the verdict be set aside and judgment for the defendant ordered. On June 21, 1917, the court granted this motion. According to a rescript that day filed, the verdict was set aside upon the ground that there was no substantial evidence entitling the plaintiff to go to the jury, and for the reason that he could not be relieved from the defense of contributory negligence. A further contention, which the defendant had made, not only in its motion to set aside the verdict, but also in its motion at the trial to direct a verdict in its favor, that the case was not within the above statute, was overruled.

The plaintiff excepted to the order setting aside the verdict, and has assigned as error the allowance of the defendant's motion and the setting aside of the verdict upon the grounds above stated. The defendant excepted to the ruling that the action was within the statute, and has assigned as error the denial of its motion to set the verdict aside on the ground that the evidence did not, as matter of law, bring the case within said statute.

[1] Having set the verdict aside as above, the court, on August 14, 1917, entered judgment for the defendant. This, in view of the decisions below referred to, we are obliged to regard as clearly erroneous. A new trial was necessary before any judgment could be entered. While the court might have entered judgment upon a verdict directed by it at the trial, it could not enter judgment in the absence of any verdict by the jury. The same right to trial by jury arose upon the setting aside of the verdict for the plaintiff as had belonged to him before the trial. *Slocum v. New York, etc., Co.*, 228 U. S. 364, 379, 380, 33 Sup. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914D, 1029; *Young v. Central R. R., etc.*, 232 U. S. 602, 34 Sup. Ct. 451, 58 L. Ed. 750. See, also, in this court, *Pacific Mills v. Farish*, 213 Fed. 448, 130 C. C. A. 95.

The parties, however, have stipulated in this court that final judgment for the defendant is to be entered if the District Court committed no error in setting aside the verdict, or if its ruling that the plaintiff's case was within the statute referred to was erroneous. They

have further stipulated that, if the order setting aside the verdict was erroneous, but the ruling that the plaintiff's case was within said statute was not erroneous, final judgment for the plaintiff in the sum of \$5,000 is to be entered, upon which judgment execution is to issue only for said amount and taxable costs. We proceed, therefore, to consider the errors respectively assigned.

[2] 1. The plaintiff, a carpenter by trade, had been employed in the defendant's mill for about five years before receiving the injury for which he claims damages, on March 26, 1915. The work carried on in the mill involved the use of hoisting apparatus or machinery propelled or operated by steam or other mechanical power, and in the mill five or more persons were engaged in manual or mechanical labor. So far there is no dispute.

According to his uncontradicted evidence, the plaintiff, during the period of his employment, had worked in the mill and on machinery therein. He had worked on several different machines. It cannot be said, however, that he had done no work, except in connection with machines. He had done the ordinary repair work which a carpenter would do, either in a carpenter shop located in one of the mill buildings, or wherever he was sent to do repair work about the mill, whether among machines or elsewhere.

He did not, however, receive the injury for which he sues while working on or in connection with machines of any kind. Nor was it received in any building containing machinery. He was injured by falling from a platform adjoining and appurtenant to, but outside of, one of the mill buildings. Under directions to get a certain fellow employé to help him, and to carry, with such help, a wooden cupboard then on said platform into a room in the building and there put it up, he and the fellow employé were trying to lift the cupboard and turn it on the platform, so as to get it through a door and into the room where it was to be put up. His claim is that the fellow employé negligently let the cupboard strike the wall of the building, and that he was thereby caused to lose his footing on the platform and fall to the ground, about 3 feet 7 inches below the level of the platform.

The New Hampshire statute is made applicable by section 1 thereof only to—

"workmen engaged in manual or mechanical labor in the employments described in this section, which, from the nature, conditions or means of prosecution of said work, are dangerous to the life and limb of workmen engaged therein, because in them the risks of employment and the danger of injury caused by fellow servants are great and difficult to avoid."

The only portion of the subsequent description applicable here, according to the contention of either party, is as follows:

"(b) Work in any shop, mill, factory or other place on, in connection with or in proximity to any hoisting apparatus, or any machinery propelled or operated by steam or other mechanical power in which shop, mill, factory or other place five or more persons are engaged in manual or mechanical labor."

So far as the place wherein the plaintiff was working when injured is alone concerned, the work being done comes under the statu-

tory description. "Mill," as used in the above quotation, includes not only the buildings wherein the "work" is done, but everything appurtenant to them, as a dam, flume, yard, or ways provided for use by employes. *Boody v. K. & C. Mfg. Co.*, 77 N. H. 208, 210, 90 Atl. 859, L. R. A. 1916A, 10, Ann. Cas. 1914D, 1280.

But, in order to be within the statute, the employment wherein the plaintiff was manually laboring when injured must not only be work in a mill, but also "work in connection with or in proximity to any hoisting apparatus or machinery," such as the statute describes. Moving the cupboard, if it is to be considered by itself, without regard to any work included within the plaintiff's general employment, is certainly not shown to have been work of that description. It had no connection with any machinery whatever, nor can we believe that it was "in proximity to" any, in the statutory sense, even if such machinery was to be found inside the building to which the platform belonged.

If the plaintiff had been employed to do work such as never required him to enter this building, or any building belonging to the mill and containing such machinery, he would not have been entitled to the statutory remedy, according to *Lizotte v. Nashua Mfg. Co.*, 78 N. H. 357, 100 Atl. 757. This, however, was not the case, as has been stated; and according to the construction of the statute adopted in *Boody v. K. & C. Mfg. Co.*, above cited, it is the work included in the scope of the plaintiff's employment which here controls, and not the character of the particular work being done by him under said employment at the particular time of his injury. Under his employment, the plaintiff might at any time be engaged in manual labor in connection with or in proximity to the machinery in the mill, and he had frequently been so engaged. In view of the above decision by the highest court of the state, and the construction of the statute therein adopted, we are unable to hold that the District Court erred in ruling that the plaintiff was entitled to bring the statutory action.

[3] 2. The only remaining error complained of is assigned by the plaintiff. It consists in the allowance of the defendant's motion to set aside the verdict, because based upon evidence insufficient to support it, particularly because the plaintiff's own negligence, contributing to his accident, conclusively appeared therefrom. If the verdict ought not to have been set aside, final judgment for the plaintiff is to be directed, in accordance with the above stipulation of the parties.

The provisions of the statute entitled the plaintiff to recover, if his injury was due to accident arising out of and in the course of his employment, and caused, in whole or in part, by the negligence of any of his employer's officers, servants, or employes, unless it was made to appear by a preponderance of evidence that his own negligence contributed. The verdict should therefore have been allowed to stand, if there was any evidence upon which it could be found that the fellow servant's negligence caused the plaintiff's injury, and that his own negligence did not contribute thereto. The jury was taken to view the scene of the alleged accident on the first day of the trial. Both the

plaintiff and the fellow servant who was helping him move the cupboard testified at the trial in person.

That the fellow servant failed to exercise due care in directing his movements at the end of the cupboard nearest the wall, in view of the room left on the platform at its other end for the necessary movements of the plaintiff in performing his part of the turning operation, and that the plaintiff was thereby caused to lose his footing and fall from the platform, seems to us a conclusion that reasonable men might have drawn. In setting aside the verdict the learned judge made no intimation to the contrary, nor has the defendant strongly urged a contrary view before us.

We are unable to hold that no other reasonable conclusion was possible than that the plaintiff was also negligent and that his own negligence contributed to his injury. Whether or not the method of moving the cupboard which the plaintiff adopted in directing the operation was reasonably safe or not was for the jury to determine, in view of all the circumstances as shown to them. We do not think it can be said that it was necessarily unsafe, whether the fellow servant used due care or not, and the plaintiff was not bound to anticipate the fellow servant's failure to use due care.

The plaintiff is therefore entitled to judgment as agreed.

The judgment of the District Court is reversed, and the case remanded to that court, with directions to enter final judgment for the plaintiff in the sum of \$5,000, execution to issue thereon only for said amount, with taxable costs. Pellerin recovers his costs in this court.

In re WOOD.

(Circuit Court of Appeals, Sixth Circuit. February 12, 1918.)

No. 3066.

1. BANKRUPTCY ⇨446—REVISION—STATEMENT OF FACT IN. OPINION—CONCLUSIONS.

Statement, uncontroverted in the record, of the District Judge, in his opinion on motion to set aside his reversal of the referee's order in bankruptcy, that a petition for review had been duly filed, is controlling on Circuit Court of Appeals, petitioned for revision.

2. BANKRUPTCY ⇨342½—REFEREE—PETITION FOR REVIEW—FILING.

Petition for review of action of referee in bankruptcy, even if filed only with the clerk, having been treated by the referee as filed with him, was as effective as if first filed with him, and later by him with the clerk.

3. BANKRUPTCY ⇨342½—REFEREE—PETITION FOR REVIEW—TIME OF FILING.

Time for filing petition for review of order of referee in bankruptcy commences, not from the date the order bears, but from the date of its entry.

4. BANKRUPTCY ⇨446—REVISION—SCOPE—CONCLUSION OF FACT.

The Circuit Court of Appeals, in proceedings to revise, under Bankruptcy Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (Comp. St. 1916, § 9608), is limited to review of matters in law, and so is bound by the District Judge's conclusion of fact that the individual bankrupt's individual liabilities exceeded his individual assets, so that there was nothing

in his individual estate for partnership creditors; there being evidence to support it, or the record not being such as to permit assumption of lack of such evidence.

5. **BANKRUPTCY** ⇨442—REVISION—FORMAL FINDINGS—COMPLAINT OF ABSENCE.

The trustee in bankruptcy, under a petition to revise, in matters of law only, the order of the District Court reversing the order of the referee consolidating an individual estate with the partnership estate, and appointing the trustee of the partnership estate trustee of the individual estate, cannot complain of the absence of formal findings of fact by the District Judge, contemplated by C. C. A. Rule 34, subd. 2, 202 Fed. xxi, 118 C. C. A. xxi; he having asked no such findings, and the petition not asserting absence of testimony or admission supporting the conclusion of fact, in the judge's opinion, that the individual liabilities exceeded the individual assets, so that there was nothing in the individual estate for partnership creditors, nor asserting error in that respect; the copy of bill in equity to set aside conveyances, accompanying the petition, not being enough to controvert the conclusion of fact.

6. **BANKRUPTCY** ⇨351—PARTNERSHIP AND MEMBERS—PAYMENT OF CREDITORS.

In administering the estate of a bankrupt partnership and its members, partnership creditors must first be paid out of the partnership assets and separate creditors out of the separate assets, before either class of creditors can resort to the other estate.

7. **BANKRUPTCY** ⇨127—PARTNERSHIP AND PARTNERS—SEPARATE TRUSTEES—DISCRETION.

While Bankruptcy Act, § 5 (Comp. St. 1916, § 9589), contemplates the appointment in the normal case of the partnership trustee as trustee for the individual estate, and subdivisions "d," "e," and "f," as to keeping of accounts, payment of expenses, and appropriation of net proceeds, recognize that in the ordinary case such appointment is essential to an orderly and economic administration of the partnership estate and to the protection of the rights of partnership creditors, yet, such unitary appointment being nowhere expressly required, and the act contemplating an administration by a trustee selected by creditors, the court has discretionary power to appoint separate trustees for such estates, to be exercised only in case of special and peculiar necessity, for the protection of rights which cannot be adequately protected by a common trustee or by creditors directly, but providently used, instead of abused, where the proceeding against the partner was instituted after the administration of the partnership estate had progressed to a dividend, and the assets of the individual estate are insufficient to meet the debts of the estate, so that the partnership creditors can have no concern with the administration of the individual estate.

8. **BANKRUPTCY** ⇨342½—REFEREE—ALLOWANCE TO ATTORNEYS—RECOMMITTAL.

Reversal of the order of the referee in bankruptcy, making lump sum allowances to attorneys, with recommitment of the matter to the referee for further consideration, was justified; it being impossible for the court to determine what services were performed, or to form an opinion other than that the allowances appeared to be very large, being more than 30 per cent. of the net estate for distribution.

Petition for Revision of Orders of the District Court of the United States for the Eastern District of Kentucky; A. M. J. Cochran, Judge.

Petition of C. L. Wood, as trustee in bankruptcy of G. W. McDaniel & Co. and George Mitchell, individually, to revise orders of the District Court in the case of such bankrupts. Orders affirmed.

Cole & Cole, of Maysville, Ky., for petitioner.

W. H. Rees, of Maysville, Ky. (T. D. Slattery, of Maysville, Ky., of counsel), for respondents.

Before KNAPPEN, MACK, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. January 26, 1916, involuntary proceedings in bankruptcy were instituted against the firm of McDaniel & Co. The partnership was adjudicated bankrupt and a trustee appointed over the partnership estate. Adjudication as to the individual members of the firm was not asked and was not had. About four months later involuntary proceedings were begun against Mitchell, a member of the partnership, and he was adjudicated a bankrupt. At a creditors' meeting, in the matter of Mitchell's individual estate, held in the following January, the referee denied the motion of Mitchell's creditors to proceed to elect a trustee for his estate, and ordered the consolidation of the individual estate with that of the partnership, appointed the trustee of the partnership estate trustee of the individual estate, and directed the turning over of the latter to such trustee. This order was reversed by the District Judge. Meanwhile, the administration of the partnership estate had proceeded, and before the making of the order just referred to a small dividend had been declared. The referee's action, in connection with the dividend order, in awarding several hundred dollars compensation to the receiver and to the attorneys for petitioning creditors, for the trustee, and for the receiver, was reversed by the District Judge. This proceeding is brought by the trustee, under section 24b of the Bankruptcy Act, to review both these orders of reversal.

[1-3] 1. The trustee challenges the jurisdiction of the District Judge to entertain either petition for review. As to the first petition, the contention is that under General Order in Bankruptcy No. 27 the petition for review must be in writing and filed with the referee, that such petition was not filed, and that its subsequent filing conferred no jurisdiction. This contention must be overruled, for in his opinion on motion to set aside the reversal of the referee's order the District Judge states that, while in his first order he had given directions for the filing of petition in case one had not already been filed, it was ascertained that one had been duly filed, but had been misplaced. This statement is not controverted by the record. Moreover, it there affirmatively appears that the petition for review was filed on the same date that the certificate thereunder bears, and on the day previous to the filing of that certificate; and even if the petition was filed only with the clerk (as it may have been), it was treated by the referee as filed with him, and was as effective as if first filed with that officer and later by him filed with the clerk.

As to the other petition for review the criticism is that it was not filed within ten days after the order sought to be reviewed. But there is no suggestion of local rule requiring the petition to be presented within ten days, and the District Judge expressly asserts the absence of such rule. In fact, however, the petition was filed on the tenth day after the entry of the order complained of; and the date of the entry, not the date the order bears, governs.

[4, 5] 2. As to the selection of trustee: The petition to adjudicate the individual partner bankrupt was a wholly separate and independent proceeding. Not only was it not entitled in the matter of the partnership estate, but it contained no mention even of the fact of such estate, or of the existence of a partnership. The order of appointment was entitled in the individual estate. When the question of appointing a trustee came up, the administration of the partnership estate had already proceeded for about eight months. The action of the District Judge in reversing the appointment made by the referee was based upon the proposition, stated in his opinion, that:

"There can be no question, that the individual liabilities largely exceed the individual assets, so that there is nothing in the individual estate for partnership creditors."

This conclusion of fact is binding upon us, for in proceedings to revise under section 24b of the Bankruptcy Act we are limited to a review in matter of law, and cannot determine questions of fact involved in the finding or order sought to be reviewed, where there is any evidence to support them. *Duryea Power Co. v. Sternbergh*, 218 U. S. 299, 302, 31 Sup. Ct. 25, 54 L. Ed. 1047; *In re Stewart* (C. C. A. 6) 179 Fed. 222, 228, 102 C. C. A. 348; *In re Holden* (C. C. A. 6) 203 Fed. 229, 233, 121 C. C. A. 435. The record is not such as to permit the assumption of lack of evidence to support this statement. True, the opinion is not in form a finding of facts, such as contemplated by subdivision 2 of our rule 34 (202 Fed. xxi, 118 C. C. A. xxi); but petitioner asked no finding of facts, his petition to revise does not assert the absence of testimony or admission supporting the statement of the District Judge, nor is error in that respect asserted therein. The copy of bill in equity to set aside conveyances, accompanying the trustee's application to set aside the District Judge's order of reversal, is not enough to controvert the judge's conclusion of fact. The trustee, under a petition to revise in matter of law only, is not thus in position to complain of the absence of formal finding of facts.

[6] It is well settled that, in administering the estate of a bankrupt partnership and its members, partnership creditors must first be paid out of the partnership assets, and separate creditors out of the separate assets, before either class of creditors can resort to the other estate. *Francis v. McNeal*, 228 U. S. 695, 700, 33 Sup. Ct. 701, 57 L. Ed. 1029, L. R. A. 1915E, 706; *In re Telfer* (C. C. A. 6) 184 Fed. 224, 231, 106 C. C. A. 366; *International Corporation v. Cary* (C. C. A. 6) 240 Fed. 101, 105, 153 C. C. A. 137.

[7] The important question upon this branch of the case thus is whether the bankruptcy court was, under the facts of this case, inflexibly bound, as matter of law, to appoint the trustee of the partnership estate trustee of the individual estate. The trustee contends that such appointment is compelled by the very terms of section 5 of the Bankruptcy Act, and, indeed, that under that section, and by the adjudication in the individual estate, the trustee of the partnership estate automatically became trustee of the individual estate. We are unable to agree with this contention. True, a partnership cannot ordinarily be insolvent unless all

the partners are (*Francis v. McNeal*, supra, 228 U. S. at pages 699-701, 33 Sup. Ct. 701, 57 L. Ed. 1029, L. R. A. 1915E, 706; *Vaccaro v. Security Bank* [C. C. A. 6] 103 Fed. 436, 442, 443, 43 C. C. A. 279); and it is not only settled that where a partnership is declared bankrupt on a ground involving its insolvency, although less than all of the individual members are declared bankrupt, the bankruptcy court has power to draw to itself and administer the property of the other members (*Francis v. McNeal*, supra, 228 U. S. at page 700, 33 Sup. Ct. 701, 57 L. Ed. 1029, L. R. A. 1915E, 706; *Armstrong v. Fisher* [C. C. A. 8] 224 Fed. 97, 99, 139 C. C. A. 653; *Ft. Pitt, etc., Co. v. Diser* [C. C. A. 6] 239 Fed. 443, 446, 447, 152 C. C. A. 321); but it is also settled, at least in this court, that a bankruptcy court administering the estate of a partnership has jurisdiction, as incidental thereto, to take possession of the property of a partner, although he has not been and could not be adjudged a bankrupt individually, and to administer the same as far as necessary to a settlement of the partnership (*Dickas v. Barnes* [C. C. A. 6] 140 Fed. 849, 72 C. C. A. 261, 5 L. R. A. [N. S.] 654; *Ft. Pitt, etc., Co. v. Diser*, supra, 239 Fed. at page 446, 152 C. C. A. 321). In our opinion, section 5 of the Bankruptcy Act contemplates the appointment, in the normal case, of the partnership trustee as trustee of the individual estate. In the ordinary case such appointment is essential to an orderly and economical administration of the partnership estate and to the protection of the rights of the partnership creditors; and section 5 recognizes this in providing (subdivision "d") for the keeping by the trustee of separate accounts of partnership and individual property, by providing (subdivision "e") for the payment of expenses from the partnership and individual property "in such proportions as the court shall determine," and by the provision (subdivision "f") for the appropriation of net proceeds of partnership property to partnership debts and of the individual estate of each partner to the payment of his individual debts; but the Bankruptcy Act, neither by the section in question nor otherwise, expressly requires such unitary appointment. Moreover, the theory of the act contemplates an administration by a trustee selected by creditors; and, as remarked by Judge Warrington, speaking for this court in the *Telfer Case*, supra:

"Neither the bankrupt partnership nor its trustee can have any possible interest in the separate estate of any of the bankrupt partners, except only for the benefit of the partnership creditors."

We think, therefore, that the bankruptcy court is given discretionary power to appoint separate trustees for the estates of a bankrupt partnership and of the individual partners, but that such power should be exercised only in case of special and peculiar necessity for the protection of rights which cannot be adequately protected by a common trustee or by creditors directly. In *re Currie* (D. C.) 197 Fed. 1012. In this case, in view of its history and accepting, as we must, Judge Cochran's statement that the assets of the individual estate are insufficient to meet the debts of that estate, and it thus appearing that partnership creditors can have no possible concern with the administration of the individual estate, we think the bankruptcy court had discre-

tionary authority to require the appointment of a separate trustee for the estate of the individual partner, and, having such discretionary authority, his exercise of it should not be disturbed unless shown to have been abused. The record not only shows no such abuse, but, on the contrary, indicates that the authority was providently exercised. The order of the District Judge impliedly, we think, reversed the order consolidating the individual and partnership estates.

[8] 3. As to the order of compensation: The order itself is not printed in the record, but from what is contained therein, and in briefs, it would appear that the awards criticized were \$150 to the receiver, \$400 to the attorneys representing both the petitioning creditors and the receiver, and \$300 to the attorney for the trustee. It does not appear how the \$400 item was apportioned, but the District Judge states that:

“According to the exceptions and petition of the petitioners here \$100 was allowed them for their services to the petitioning creditors and \$300 for their services to the receiver.”

By reason of the facts that all the allowances were “lump sums,” that it did not appear whether the allowance to the receiver was within the statute, that it was impossible to determine what legal services were rendered to the receiver and what to the trustee, to justify their allowance, the court found itself in no position “to form an opinion other than to say that the allowances to the attorneys appeared to be very large,” being “more than 30 per cent. of the net estate in the hands of the trustee for distribution”—the judge stating, however, that if but \$100 was allowed for attorney’s fees to the petitioning creditors “the probability is that the allowance on [that] account is not out of the way.”

The order of allowance was “accordingly reversed and re-referred to the referee for further consideration.” The District Judge has thus not finally passed upon the award, and his order, in view of the considerations stated by him, was entirely justified.

The orders of the District Court are affirmed.

AMERICAN ISSUE PUB. CO. et al. v. SLOAN.

(Circuit Court of Appeals, Sixth Circuit. February 11, 1917.)

No. 3061.

1. TRIAL ⇔278—INSTRUCTIONS—EXCEPTIONS—GENERALITY.
“Exception to charge as given” is futile, because general.
2. TRIAL ⇔273—INSTRUCTIONS—EXCEPTIONS—TIME.
Exception to charge, taken after the jury retires, is too late.
3. COURTS ⇔349—FEDERAL COURTS—FOLLOWING STATE STATUTE—CROSS-EXAMINATION.
Gen. Code Ohio, § 11497, construed as giving a party an unlimited right to cross-examine an adversary called by him, is not a matter of procedure, or a law of evidence, or a rule as to the competency of testimony or witnesses, but is a matter of trial administration, which the federal courts need not follow; under the Conformity Act (Rev. St. § 914 [Comp. St. 1916, § 1537]).

4. APPEAL AND ERROR ⇌928(4)—PRESUMPTION—EXISTENCE OF EVIDENCE.

The testimony not being in the record, it must be presumed on appeal, in an action against a publishing company for libel in the publishing of articles written by J., its editor, that there was testimony of such character as to warrant submission of the question of its liability to punitive damages; and refusal of the requested instruction that, relative to malice as a foundation for punitive damages, the jury could not impute any malice of J. to his employers, as the malice of an agent cannot be imputed to his principal; such instruction, to be worth anything, meaning that on the evidence in the case the editor's malice could not be imputed to the company, as the malice of an agent may, under proper circumstances, including his quality and authority, be imputed to his principal, and subsequent approval or ratification by a corporation of the unlawful acts of even a subordinate agent also making it liable to punitive damages.

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

Action by Thomas L. Sloan against the American Issue Publishing Company and others. Judgment for plaintiff, and certain defendants bring error. Affirmed.

Thomas H. Clark, of Columbus, Ohio, for plaintiffs in error.

Thomas M. Sherman, of Columbus, Ohio, and Thomas L. Sloan, of Washington, D. C., for defendant in error.

Before WARRINGTON, KNAPPEN, and MACK, Circuit Judges.

KNAPPEN, Circuit Judge. [1, 2] Action for libel against the Publishing Company, its general manager, and the editor of one of its publications. In a charge to which no exception was taken, except the general and futile "exception to the charge as given," taken after the jury retired (Pittsburg, etc., R. Co. v. Scherer [C. C. A. 6] 205 Fed. 356, 359, 123 C. C. A. 484; Hindman v. First National Bank [C. C. A. 6] 112 Fed. 931, 934, 50 C. C. A. 623, 57 L. R. A. 108; Wells, Fargo & Co. v. Zimmer [C. C. A. 8] 186 Fed. 130, 132, 108 C. C. A. 242), defendants' liability to both compensatory and punitive damages was submitted to the jury, resulting in verdict against the Publishing Company and its editor, Johnson, for \$8,582, which, on motion for new trial, was reduced to \$5,000. But two questions are properly before us.

[3] 1. The first relates to the trial court's refusal to permit defendants to call and cross-examine plaintiff under section 11497 of the General Code of Ohio, which provides that:

"At the instance of the adverse party, a party may be examined as if under cross-examination, either orally, or by deposition, like any other witness. The party calling for such examination shall not thereby be concluded but may rebut by counter-testimony."

The trial court held the statute not binding upon the federal courts. In Murray v. Third National Bank, 234 Fed. 481, 491, 148 C. C. A. 247, this specific question was passed without decision. We there, however, construed the latter sentence in the section as giving the right only to rebut the testimony of the witness by showing the facts to be otherwise than stated by him, holding that such right existed without the statute, even as to one's own witnesses. Again, a party has

the right, independently of this statute, to call his adversary as a witness in his own behalf. For present purposes, therefore, the only important question is whether the provision giving a party an unlimited right to cross-examine an adversary called by him is binding on the federal courts.

The result of the Conformity Act (Rev. Stat. § 914; Comp. Stat. 1916, § 1537), the Rules of Decision Act (Rev. Stat. § 721; Comp. Stat. 1916, § 1538), and the Competency of Witnesses Act (Rev. Stat. § 858; Comp. Stat. 1916, § 1464), is to make state statutes relating to the competency of witnesses and the competency of testimony, as well as the state law of evidence generally, binding on the federal courts sitting within such state, except where in conflict with the federal Constitution, statutes, or treaties. *McNiel v. Holbrook*, 12 Pet. 84, 89, 9 L. Ed. 1009; *Ryan v. Bindley*, 1 Wall. 66, 68, 17 L. Ed. 559; *Connecticut Life Ins. Co. v. Union Trust Co.*, 112 U. S. 250, 252, 5 Sup. Ct. 119, 28 L. Ed. 708; *Ex parte Fisk*, 113 U. S. 713, 720, 5 Sup. Ct. 724, 28 L. Ed. 1117; *Bucher v. Cheshire R. R. Co.*, 125 U. S. 555, 583, 8 Sup. Ct. 974, 31 L. Ed. 795; *Nashua Bank v. Anglo-American Co.*, 189 U. S. 221, 228, 23 Sup. Ct. 517, 47 L. Ed. 782; *Central Vt. R. R. Co. v. White*, 238 U. S. 507, 511, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252.

On the other hand, it is equally well settled that the personal conduct and administration of the trial on the part of the judge in the discharge of his separate functions is not within the Conformity Act. We refer, in note hereto, to illustrations of this principle contained in the decision of this court in *Knight v. Illinois Central R. R. Co.*, 180 Fed. at page 372, 103 C. C. A. 514.¹

The ultimate question thus is whether, on the one hand, the statute is to be considered as a matter of procedure, or a law of evidence or a rule as to the competency of testimony, or whether, on the other hand, it is to be regarded as a subject within the personal conduct and administration of the trial on the part of the presiding judge. In our opinion, the statute is not, properly speaking, a matter of procedure, a law of evidence or a rule of the competency either of witnesses

¹ State statutes and state Constitutions forbidding judges in charging juries to express an opinion upon the facts are not binding on the federal courts (*Railroad Co. v. Putnam*, 118 U. S. 545, 553, 7 Sup. Ct. 1, 30 L. Ed. 257; *Railway Co. v. Vickers*, 122 U. S. 360, 7 Sup. Ct. 1216, 30 L. Ed. 1161); nor are state statutes providing that written instructions shall be taken by the jury in their retirement and that papers read in evidence may be taken by them (*Nudd v. Burrows*, 91 U. S. 426, 23 L. Ed. 286); nor provisions that the judge require the jury to find specially upon particular questions of fact (*Railroad Co. v. Horst*, 93 U. S. 291, 299, 23 L. Ed. 898; *McElwee v. Metropolitan Lumber Co.* [6th Circuit] 69 Fed. 302, 319, 16 C. C. A. 232); nor statutes requiring that all instructions of the court to the jury shall be in writing (*Lincoln v. Power*, 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224); nor does the statute require the federal court to follow a state practice forbidding the separation of a jury after charge given and before verdict rendered (*Liverpool & L. & G. Ins. Co. v. Friedman* [6th Circuit] 133 Fed. 713, 716, 66 C. C. A. 543); nor is a state statute dispensing with the requirement that exceptions to the charge be made while the jury is at the bar, and before it retires, binding upon the federal courts (*Consumers' Cotton Oil Co. v. Ashburn* [5th Circuit] 81 Fed. 331, 333, 26 C. C. A. 436).

or of proof, but relates rather to a mode of examination of witnesses, and is thus a subject within the personal conduct and administration of the trial. The scope and extent of the cross-examination of a witness is peculiarly a matter of trial administration. See 5 Chamberlayne, Mod. Law of Evidence, § 3723.

We think the right of cross-examination attempted to be given by the statute falls, by fair analogy, directly under the ban of the well-settled rule in the federal courts that, subject to certain exceptions not here important, the right to cross-examine a witness is limited to the subject-matter of his direct examination. Philadelphia, etc., R. Co. v. Stimpson, 14 Pet. 448, 461, 10 L. Ed. 535; Houghton v. Jones, 1 Wall. 702, 706, 17 L. Ed. 503, where it is said "the rule has been long settled that the cross-examination of a witness must be limited to the matters stated in his direct examination"; Wills v. Russell, 100 U. S. 621, 626, 25 L. Ed. 607, where in holding that a judgment would not be reversed because cross-examination was not limited to the examination in chief, it was said that "the mode of conducting trials, and the order of introducing evidence, and the time when it is to be introduced, are matters properly belonging very largely to the practice of the court where the matters of fact are tried by a jury"; McKnight v. United States (C. C. A. 6) 122 Fed. 926, 928, 61 C. C. A. 112; Foster v. United States (C. C. A. 6) 178 Fed. 165, 177, 178, 101 C. C. A. 485; Hales v. Mich. Central R. R. Co. (C. C. A. 6) 200 Fed. 533, 538, 118 C. C. A. 627; in which latter case it is said "the general rule of practice in the federal courts limiting cross-examination to the matters embraced in the examination in chief, subject to certain exceptions, is settled." If the statute in question is binding upon the federal courts, no reason is apparent why a statute of a state giving to a party the complete right to cross-examine his adversary's witness, without reference to the subject-matter of the direct examination, would not be equally binding upon the federal courts.

In view of the long-established course of decisions, to some of which we have referred, we cannot doubt that such statute would be held not so binding. We have not overlooked the fact that in Davidson S. S. Co. v. United States (C. C. A. 8) 142 Fed. 315, 73 C. C. A. 425, a similar statute of Minnesota was applied to a suit in the federal courts. In that case, however, the question we are considering, viz. whether the statute was binding upon the federal courts, does not seem to have been raised or considered.

2. The remaining question relates to the refusal, following the charge, of a request that:

"If the jury come to consider the question of malice as a foundation for punitive or exemplary damages, the jury cannot impute any malice if they should find Mr. Johnson had any, to his employers. The malice of an agent cannot be imputed to his principal."

The remarks of the judge in denying motion for new trial seem to indicate that he understood defendants' contention to be that the corporation was not subject to punitive damages in an action for libel, which, of course, is not the law. Washington Gaslight Co. v. Lansden, 172 U. S. 534, 544, 19 Sup. Ct. 296, 43 L. Ed. 543. In this court

the stated ground of the assignment of error is that no officer of the defendant Publishing Company "knew anything about the publications complained of or had in any way authorized them, and there is no evidence whatever to the contrary." The contention seems to be that the alleged libelous articles—three in number—were published upon the sole responsibility and at the sole direction of Johnson, the editor, who wrote them, that Johnson was not an officer of the Publishing Company, and that the applicable rule is that a corporation is not liable in punitive damages for the unlawful acts of a subordinate employé—not wielding the full executive power of the corporation—merely because of the malicious motives of the employé.

The general rule of law invoked is well established. *L. S. & M. S. Ry. Co. v. Prentice*, 147 U. S. 101, 109, 13 Sup. Ct. 261, 37 L. Ed. 97 et seq.; *Memphis Co. v. Cumberland Co.* (C. C. A. 6) 231 Fed. 835, 838, 146 C. C. A. 31 et seq., and cases cited in that opinion. As an abstract statement of law, the requested instruction was too broad. The malice of an agent may, under proper circumstances, including the quality and authority of such agent, be imputed to his principal. *L. S. & M. S. Ry. Co. v. Prentice*, supra; *Memphis Co. v. Cumberland Co.*, supra. For example, a newspaper corporation has been held liable in punitive damages for the malicious conduct of its general manager—although he need not be a member of the corporation—(*Post Publishing Co. v. Hallam* [C. C. A. 6] 59 Fed. 530, 536, 8 C. C. A. 201); and subsequent approval or ratification by a corporation of the unlawful acts of even a subordinate agent makes it also liable in punitive damages.² If, however, the requested instruction means (as it must, to be worth anything) that upon the testimony in the case the editor's malice cannot be imputed to the Publishing Company, we are met with the fact that the testimony is not before us, for the bill of exceptions contains no statement whatever of the evidence respecting this subject, the few lines of testimony which it contains relating solely to the subject of the assignment discussed in the first subdivision of this opinion; and in the absence of such record the presumption would be that there was testimony of such character as to make it proper to submit the question of the Publishing Company's liability to punitive damages, and to refuse the requested instruction. However, were we to look to the charge for information (without deciding that we may properly do so), we find it there recited that while there was undisputed testimony that no officer of the Publishing Company was consulted about the articles complained of, and that the general manager did not know of them before their publication and was not consulted as to the propriety of publishing them, did not see the matter before it was published or the papers sent out, nor the

² *Press Publishing Co. v. Monroe* (C. C. A. 2) 73 Fed. 196, 201, 202, 19 C. C. A. 429, 435, 51 L. R. A. 353, where it is said: "Approval of the conduct of the particular editor who had directed the publication tended to prove ratification of his acts"; *L. S. & M. S. Ry. Co. v. Prentice*, supra, 147 U. S. at p. 110, 13 Sup. Ct. 261, 37 L. Ed. 97; *Bass v. C. & N. W. Ry. Co.*, 42 Wis. 654, 666, 24 Am. Rep. 437; *Ricketts v. C. & O. Ry. Co.*, 33 W. Va. 433, 439, 10 S. E. 801, 7 L. R. A. 354, 25 Am. St. Rep. 901; *Haines v. Schultz*, 50 N. J. Law, 481, 484, 14 Atl. 488; *Craven v. Bloomingdale*, 171 N. Y. 439, 448, 64 N. E. 169.

copies that were to be circulated; on the other hand, there was recited testimony that there was no special rule, and no instructions or directions, requiring articles to be submitted to the general manager for approval before their publication, that matters for publication were, in fact, seldom presented to the general manager, who, while "in a way" supervising, gave the editor "wide latitude."

[4] In view of the entire situation, including the absence of the testimony generally, we cannot assume that there was not evidence in the case which would justify an inference that the editor, Johnson, was, in effect, a managing editor, and that he, in writing and publishing the alleged libelous articles, acted in reckless disregard of plaintiff's rights (which is express malice),³ nor can we assume that there was no evidence from which the jury might properly find subsequent approval and ratification, on the part of the Publishing Company, of the editor's conduct, especially having in mind that six months elapsed between the publication of the first and second articles, and more than a month between the second and third, and that all three defendants joined in a common defense, including an assertion of the truth of the alleged libelous articles. There seems pertinency in the remark of Judge Sater, in denying the motion for new trial:

"The defendant company was by no means totally ignorant of Johnson's past career as the writer of articles, and it took a long chance when it gave him a loose rein in editorial matters. If it did not know it before, it knew it after the first article appeared."

A distinction between imputed and original liability of a principal by virtue of a subsequent approval or ratification of his agent's acts would, for the purposes of this review, seem overrefined. Upon this meager and unsatisfactory record, we cannot say that the refusal of the requested instruction was reversible error.

This conclusion makes it unnecessary to consider the question, which obtrudes itself, whether the managing editor of a publication, though not the general manager or an officer of the publishing corporation, so far wields the executive authority, and is so far the other self of the corporation, with respect to such publications, as that his reckless disregard of the rights of those made the subject of such publications, as distinguished from private malice or personal grudge, is imputable as matter of law to the corporation, regardless of its approval or ratification.

In nothing we have written have we intended to express any opinion of our own upon the merits of the case, or as to the fault or freedom from fault of either the editor or the Publishing Company.

The judgment of the District Court is affirmed.

³ L. S. & M. S. Ry. Co. v. Prentice, supra, 147 U. S. at p. 113, 13 Sup. Ct. 261, 37 L. Ed. 97; Milwaukee, etc., Ry. Co. v. Arms, 91 U. S. 489, 495; 23 L. Ed. 374; Press Pub. Co. v. Monroe, supra, 73 Fed. at p. 200, 19 C. C. A. 429, 51 L. R. A. 353; Maclean v. Scripps, 52 Mich. 214, 222, 17 N. W. 815, 18 N. W. 209.

MUTUAL OIL CO. v. HILLS.

(Circuit Court of Appeals, Ninth Circuit. February 11, 1918.)

No. 3010.

1. SPECIFIC PERFORMANCE ⇨70—COMPELLING TRANSFER OF STOCK—INADEQUATE REMEDY AT LAW.

Though, ordinarily, complete and satisfactory remedy for failure to deliver certificates of stock sold may be had in damages at law, there are exceptions, where equity will give relief, as where the value of the stock in question is not readily ascertainable, or where it cannot be had in the market, except at great inconvenience and expense.

2. SPECIFIC PERFORMANCE ⇨121(3)—TRANSFER OF CORPORATE STOCK—SUFFICIENCY OF EVIDENCE.

In suit for specific performance of a contract to transfer corporate stock, evidence that the value of the stock in question was not readily ascertainable, and that it could not be had in the market, except at inconvenience and expense, *held* to bring the case within the rule giving the court jurisdiction in equity to compel a transfer.

3. SPECIFIC PERFORMANCE ⇨32(3)—AGREEMENT AS TO EMPLOYMENT OF MANAGER—BILATERAL CHARACTER.

Where one oil company, acting through its president, induced the manager of another company to enter its employment under a contract whereby the manager took 30 shares of stock, giving a note to be discharged by dividends, and agreed to work for \$120 a month salary and 5 per centum of profits in his district, which contract was performed by the manager until he was discharged, the contract of employment, including the collateral matter of the purchase of stock, was not unilateral, binding only on the oil company, and so not specifically enforceable as to the stock by the manager.

4. CORPORATIONS ⇨426(10)—CONTRACT BY PRESIDENT—ACCEPTANCE OF BENEFITS.

A corporation was bound by a contract for the employment of a manager, made on its behalf by its president, who, when he made it, had general control over the corporation, which company later, with knowledge by the incorporators, directors, and secretary, accepted the benefits of the manager's services, acquiesced in the arrangement, and for several years failed to make any objection thereto, though the contract covering the manager's employment was not formally brought before the board of directors for three years.

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

Suit by H. G. Hills against the Mutual Oil Company. From a decree for plaintiff, defendant appeals: Affirmed.

This is a suit in specific performance, brought by Hills, plaintiff, against the Mutual Oil Company, defendant, to require the performance of an agreement for the sale of stock in the defendant company, and for accounting. It is alleged by plaintiff that before December 18, 1909, the corporation authorized Greenlees, its president, to make all arrangements necessary to enable defendant to engage in the business of marketing oils and petroleum in Montana, and intrusted to Greenlees the entire supervision, management, and control of the business; that in December, 1909, defendant, through Greenlees, negotiated with plaintiff for the purpose of inducing him to end his relations with the Continental Oil Company at Great Falls, Mont., and to take charge of the business of the Mutual Oil Company in the Great Falls section; that Greenlees represented to Hills that the district managers of the new

company must be stockholders in defendant; that as the result of the negotiations an agreement, a partial memorandum of which was in writing, was made. The writing was dated at Great Falls, December 18, 1909, and is as follows:

"Gt. Falls, Mont., 12—18, 1909.

"Whereas, I have this day executed a note to the Mutual Oil Co., of Lawrence, Kansas, for \$3,000.00, same being given for 30 shares, of \$100.00 each, of the common stock of the Mutual Oil Co.: It is hereby agreed that the dividends accruing on this stock, together with my share of the net earnings of the Great Falls district, same being 5 per cent., as set out in one certain contract, shall be applied on said note until same is fully paid. The above shares of stock to be then delivered to me together with the canceled note by the Mutual Oil Co. Should this note not be fully paid in this manner when due, it is agreed that a new note for the balance then due shall be executed to be held in the same manner until fully paid. The old note to be canceled and returned.

H. G. Hills.

"Mutual Oil Co.,

"By J. R. Greenlees, Pt."

It is further alleged that under the terms of the agreement Hills was to be employed as manager of the business of the Oil Company in the Great Falls district for such period as Hills should be in good health and able to give his attention to the management of the business; that the Oil Company would pay to Hills \$120 per month and 5 per cent. of the net earnings of the business done by the defendant in the Great Falls district; that plaintiff would buy from the defendant 30 shares of the capital stock at \$100 per share; that Hills made and delivered his promissory note for \$3,000, payable on or about July 1, 1911, for the 30 shares of stock, the certificates for which were to be issued and delivered to Hills whenever the note was paid; that all dividends upon the 30 shares and the 5 per cent. of net earnings were to be applied on the note until it was paid, and if not paid at maturity renewal note for balance due was to be made, to be paid off under like arrangements. It is alleged that Hills began his work as manager about January 19, 1910, and remained until about March 1, 1913, when, without reason, he was discharged. Plaintiff alleges that the 5 per cent. of the net earnings in the district would be at least \$3,000 per annum, and that the dividends earned on the stock had been at least 100 per cent., and that the market value of the shares when suit was brought was at least \$200 per share; that about July 11, 1911, the defendant required him to make a renewal of the first note, and that he made such renewal; that dividends earned upon the 30 shares of stock exceeded the \$3,000 owing by him to the defendant on the promissory note, and that the note ought to have been canceled; that the business and value of shares will greatly increase; that the stock is not for sale in the market; that the shares have a special and peculiar value, and that the defendant can deliver 30 shares.

The defendant denied that Greenlees was authorized to make the writing of December 18, 1909, or arrangements to enable it to engage in business in Montana, as alleged, and set up that about December 18, 1909, Greenlees met Hills in Great Falls and employed him as the manager of the business of the defendant company for the Great Falls district at a salary of \$120 per month, but that in doing so Greenlees acted on his own responsibility, and that the salary consideration was the only thing offered by Greenlees to Hills as an inducement for him to terminate his relations with the Continental Oil Company; that, if Greenlees made any representations to the effect that the managers must become stockholders, they were untrue and unauthorized; that Hills remained in the employ of the company until February, 1913, when he was discharged as its resident agent and manager for the Great Falls district, and was thereafter employed by the company as a clerk at \$100 a month until this action was commenced. The averments with respect to the contract are denied, as is ratification of any act of Greenlees in assuming to enter into any such contract, and it is alleged that, when Greenlees made the writing, plaintiff was fully informed that before it would have any effect it would

have to be ratified by the board of directors. It is alleged that the writing was to be regarded as temporary and informal, and a proposed arrangement, but that the formal contract was never executed or ratified, all of which the plaintiff knew; that plaintiff was discharged for incompetency about March, 1913; that if plaintiff ever made the \$3,000 note, as alleged, defendant did not know of it, and never ratified in any manner any action with respect to the note; that the contract set out in the plaintiff's complaint is illegal and void at law; that plaintiff did not render satisfactory services, disregarded instructions made to him, and caused the loss of considerable money.

The District Court heard the evidence and found that on December 18, 1909, a contract between plaintiff and defendant was made, whereby plaintiff was to become local manager for the defendant, to establish and conduct local stations at Great Falls and elsewhere in Montana for sale and distribution of oil, so long as plaintiff was in good health and attended to business; that plaintiff was to be paid \$120 per month and 5 per cent. of the net earnings of the managed territory; that plaintiff agreed to buy of defendant 30 shares of its common stock, and gave therefor his note for \$3,000, to be paid by application of dividends accruing and the 5 per cent.; that the defendant company had no directors until June, 1910, but that prior to that time Greenlees was the practical head of the company, assumed to be president, made his office the office of the company, alone transacted all business in establishing and carrying on the business, alone was actively engaged therein, sustained it with his money and credit, borrowed money on its credit, supported by his personal indorsement of its notes, executed and pledged by him as collateral, made all defendant's contracts, submitted them to no one, "and in all things did all the corporation could do"; that his co-incorporators knew and acquiesced in all that he did; that the parties intended the contract to take immediate effect; that the note of the plaintiff was delivered December 18, 1909, to Greenlees, for the corporation; that Hills actively entered the service of the company about January 19, 1909, and remained therein some three years, without any action by the directors; that reduction of the agreement to writing was not a condition precedent, but that, if it was, it was waived and performance of the contract entered upon. The court found that the directors took no adverse action, notwithstanding the fact that the incorporators and directors of the defendant company knew that Greenlees had "made some arrangement" with Hills, and that Greenlees, for the defendant, pledged Hills' note prior to the creation of the board of directors, and renewed and repledged the note; that in March, 1910, Hills' application for a fidelity bond passed through the company office and was signed by the secretary, and, notwithstanding the fact that the attorney's draft sent to Greenlees became known to the secretary and directors of the company, and that Hills had remained in the service of the company, "no one of them," finds the court, "even suggested to plaintiff, prior to the summer of 1912, that defendant denied the contract and would not perform it."

Fletcher Maddox and I. W. Church, both of Great Falls, Mont., and S. D. Bishop, of Lawrence, Kan., for appellant.

James W. Freeman and John N. Thelen, both of Great Falls, Mont., Edwin L. Norris, of Dillon, Mont., and George E. Hurd, of Great Falls, Mont., for appellee.

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

HUNT, Circuit Judge (after stating the facts as above). [1] It is urged by defendant that it was error for the court to decree that the defendant corporation should cause to be issued and delivered to plaintiff certificates for 30 shares of its stock. The assignment of error is predicated upon certain evidence that Hills had bought stock for himself in the corporation in open market within two years of the date

of the trial of the case, and that under such circumstances equity would not interfere, but would leave the plaintiff to his remedy at law. While ordinarily, complete and satisfactory remedy for failure to deliver certificates of stock may be had in damages at law, there are exceptions. For example, where the value of stock in question is not readily to be ascertained, as in *Newton v. Wooley* (C. C.) 105 Fed. 541, or where the stock cannot be had in the market, except at great inconvenience and expense, as in *Equitable G. Co. v. Baltimore Coal Tar & Mfg. Co.*, 63 Md. 285, equity will give relief. Story *Equity Jurisprudence*, 717(a), 718. The Supreme Court, in *Hyer v. Richmond Traction Co.*, 168 U. S. 471, 18 Sup. Ct. 114, 42 L. Ed. 547, in considering a contract specifically for the transfer of corporate stock, said:

"If stock has a recognized market value, courts will ordinarily leave the parties to their action at law for damages for breach of the agreement to sell; but in cases where the stock has no recognized market value, is not purchasable in the market, or has a value which is not settled, but is contingent upon the future workings of the corporation, equity will sometimes decree specific performance of a contract of purchase."

See *Express Co. v. Railroad Co.*, 99 U. S. 191, 25 L. Ed. 319; *Leach v. Forbes*, 11 Gray (Mass.) 506, 71 Am. Dec. 732; *Cushman v. Thayer Mfg Co.*, 76 N. Y. 365, 32 Am. Rep. 315; *Johnson v. Brooks*, 93 N. Y. 338; *Schmidt v. Pritchard*, 135 Iowa, 240, 112 N. W. 801.

[2] Plaintiff's evidence was to the effect that the value of shares of stock had risen to not less than \$200 per share; that the business of the company has increased, and will increase; that large dividends will be earned, the exact amount of which could not be estimated by plaintiff; that there is but a limited amount of stock issued; that it is not for sale upon the market, and cannot be readily bought; that it was impossible to determine the actual damage which plaintiff would sustain if the stock should not be delivered to him; and it is not denied that defendant has sufficient stock to enable it to live up to the agreement and deliver 30 shares. There was some testimony by the secretary of the defendant company to the effect that at the time of the trial Mr. Greenlees and another person were offering stock for \$160 per share; but it was indefinite, not only as to the amount of stock so offered, but whether there was any general market for the stock. In *Bernier v. Griscom-Spencer Co.* (C. C.) 161 Fed. 438, cited by the appellant, plaintiff did not allege that the common stock could not be bought in the market, or that it had any peculiar or special value to the plaintiff, or that the defendant retained any of its stock. The court, however, expressly recognized that equity would sustain an action for specific performance under conditions not generally unlike those presented in the present case. In our opinion the court was well within the rules which gave it jurisdiction in equity.

[3] It is contended that the contract was implied, and not expressed, and that equity should not decree specific performance, unless there was mutuality, certainty, and definiteness. But there was nothing unilateral in the agreement, for the evidence clearly shows that after the parties had been to the office of an attorney in Great Falls, with the purpose of putting their whole contract in writing, Hills gave up his position with his former company and directed all his energies to

the advancement of the interests of his new employer, the defendant company. The note for the shares of stock was given and accepted, the defendant company paid him \$120 per month, the agreed compensation, and Hills went ahead to extend the business of the company, and for a long time carried it on, apparently to the satisfaction of the president of the company and to the advantage of the corporation. The contract is enforceable for benefits corresponding with the time of performance by plaintiff. *Law v. Smith*, 68 N. J. Eq. 81, 59 Atl. 327.

[4] It is said that the contract was not expressly authorized, and was not within the implied powers of the president of the defendant company, and that there never was a subsequent ratification of the agreement. But it is plain that Greenlees, when he made the contract, had general control over the management of the business of the defendant company, and it is found that the corporation, with knowledge on the part of the incorporators and directors and secretary, accepted the benefits of the services of the plaintiff, acquiesced in the arrangement, and for several years failed to make any objection thereto. Under such circumstances it does not help the defendant that the contract was not formally brought before the board of directors until 1912, for the corporation will be bound by the contract. *Paul Steam System Co. v. Paul (C. C.)* 129 Fed. 757; *Cook on Corporations*, § 727; *Marshall on Private Corporations*, § 363.

Other errors assigned are of less importance, and we find none well founded. We think plaintiff was entitled to maintain the suit, and to have the stock transferred, and to the relief granted by the lower court to the extent stipulated upon between the parties in case of affiance.

Affirmed.

SOUTHERN PAC. CO. v. WRIGHT et al.

(Circuit Court of Appeals, Ninth Circuit. February 18, 1918. Rehearing Denied April 1, 1918.)

No. 2942.

1. NEGLIGENCE ⇨92—IMPUTED NEGLIGENCE—DRIVER AND PASSENGER.

Where deceased, for the purpose of trying out a motor truck with a view to its purchase, applied to the owner for the use of the truck, and the owner assented on condition that an experienced chauffeur should drive and demonstrate it, the deceased, who was paying for the use of the truck, must, though riding thereon and directing its general route, be deemed a passenger, and the negligence of the chauffeur cannot be imputed to deceased.

2. RAILROADS ⇨350(21)—CROSSING ACCIDENTS—JURY QUESTION.

Where deceased, while riding on a motor truck in company with a presumably competent driver, who was demonstrating it for the owner, was killed when the truck was struck by defendant's train, the fact that deceased, the view being open, did not interfere with the management of the truck when it was driven on the tracks, does not as a matter of law show that the deceased was guilty of contributory negligence, but that question is for the jury.

Hunt, Circuit Judge, dissenting.

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

Action by Gertrude Wright and others against the Southern Pacific Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

L. L. Cory, of Fresno, Cal., and Elmer Westlake, of San Francisco, Cal., for plaintiff in error.

Gallaher & Aten and Frank Kauke, all of Fresno, Cal., for defendants in error.

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

DIETRICH, District Judge. On May 22, 1914, George R. Wright, while riding upon an auto truck, was instantly killed at a railroad crossing in Selma, Cal., in a collision between the truck and the engine of a passenger train operated by the plaintiff in error, hereinafter referred to as the Railroad Company. Defendants in error, the surviving wife and children of the deceased, had judgment in the lower court for \$12,000 damages, to reverse which the Railroad Company prosecutes this writ of error.

There are numerous assignments, but, when analyzed, it is found that, in so far as they have substance, they are all comprehended in the question whether or not the court below should have held as a matter of law that the deceased was chargeable with such contributory negligence as to bar recovery by his heirs. The Railroad Company introduced no evidence, and, adopting the view of the plaintiffs' testimony which the jury might reasonably have taken, we may state the salient facts as follows:

The deceased was in the drayage business at the town of Selma, and apparently, both for the purpose of trying out an auto truck with a view to its purchase and to make certain transfers, he applied to the owner, Phelan, for the use of the truck in question. Phelan assented, upon the condition that one Tucker, an experienced chauffeur, should drive the truck and "demonstrate" it, and that Wright should pay for its use at the rate of \$15 per day. With this understanding, the truck was put into service on May 22d, and at about 9 o'clock in the morning Tucker, with the deceased sitting in the seat, on the right side, drove the truck southerly for about a quarter of a mile along a road running parallel with the railroad track, and then turned to make the crossing. The passenger train from the north was about due, and as he turned he looked in that direction, but could see no train, although the track was plainly exposed to view for approximately 1,500 feet. Up to this time his speed had been about 6 miles an hour, but as he made the turn, a distance of about 145 feet from the main track, he slowed down to 3 or 4 miles, and, proceeding at that speed, and looking down the track to the south for trains from that direction, he passed over the first and second tracks, and was just about to go upon the main track, when, again looking to the north, he saw the passenger train somewhere between 200 and 400 feet away, coming rapidly. He

made an effort to increase his speed, but not soon enough, for the engine struck the rear end of the truck, overturning it, and injuring him and killing Wright. The train was running at a speed of between 30 and 40 miles per hour, without bell or whistle, in violation of an ordinance limiting the speed to 8 miles an hour, and a statute requiring the sounding of a bell or the blowing of a whistle.

[1, 2] Undoubtedly a *prima facie* case was made of gross negligence on the part of the engineman, and the cause was properly sent to the jury, unless, as already suggested, the deceased was conclusively shown to have been guilty of contributory negligence. It is unnecessary to decide whether or not Tucker was wanting in due care, for he is not a party to the suit; and his negligence, if any there was, could not be imputed to the deceased. In no sense were the two men engaged in a joint or common enterprise. Their relation was substantially the same as the ordinary relation between passenger and cab driver. The passenger pays for the service, and assumes the right to direct where and over what general route the cab shall be driven, but has nothing to do with its operation or management. So here, if, favorably to the Railroad Company, we attach no significance to the fact that the truck was being "demonstrated," Wright was paying for the service of the truck, and presumably was directing where it should go, and over what general route, but, by express understanding, Tucker was running it. Under such circumstances, Wright was responsible only for his own conduct, not for Tucker's. *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652; *Shultz v. Old Colony Street Ry. Co.*, 193 Mass. 309, 79 N. E. 873, 8 L. R. A. (N. S.) 597, 118 Am. St. Rep. 502, 9 Ann. Cas. 402; *New York, L. E. & W. Ry. Co. v. Steinbrenner*, 47 N. J. Law Rep. 161, 54 Am. Rep. 126.

Was he himself guilty of negligence? Can we say as a matter of law that he failed to use the degree of care for his own safety which an ordinarily prudent person under like circumstances would have exercised? If so, in what respect was he careless? What did he leave undone, that he should have done? We must bear in mind that there is no evidence that he was an experienced driver; fair inferences are to the contrary. In so far as we are advised, Tucker was competent, and by Wright was believed to be competent, to operate the truck skillfully and safely. As was aptly said by Judge Marshall, in *Pyle v. Clark* (C. C.) 75 Fed. 647:

"It is a matter of common experience that passengers in a vehicle trust to the driver to avoid the ordinary dangers of the road, and I do not know of any principle of law which requires them to tender advice, unless conscious of the driver's ignorance or want of care."

It is not a case where the passenger, knowing the danger, voluntarily takes the risk, as where he rides in the nighttime over a perilous road or without lights. There was no circumstance to warn Wright of danger, or to suggest the need of assistance, or the advisability of cautioning Tucker. True, the railroad tracks were there, and they always warn of danger; and he may have known that the passenger train was about due. But until he had some reason to sus-

pect that Tucker was incompetent or careless, or was unable safely to operate the truck, he not only had the right, but it was his duty, to assume that he would not rashly or carelessly go into peril. Generally it is the duty of the passenger to sit still and say nothing. It is his duty, because any other course is fraught with danger. Interference, by laying hold of an operating lever, or by exclamation, or even by direction or inquiry, is generally to be deprecated; in the long run, the greater safety lies in letting the driver alone. And there is nothing in the circumstances here suggesting an exception to the rule. Tucker was sober, awake, and had the truck completely under control; and, so far as we know, he had shown no disposition to be reckless or venturesome. It was a bright morning, and the view of the track was unobstructed, so that in an instant he could glance either way and see an approaching train. There were no other sources of possible danger requiring vigilance, and plainly Wright's assistance as a lookout was not required. In short, it was a case where a reasonably competent, vigilant driver needed no assistance, and would in the long run be better off if left alone.

We are not advised whether or not Wright saw the train, as soon as it came into view, a quarter of a mile away, or before it was seen by Tucker. He might have seen it, and yet reasonably have remained silent, for he might naturally have assumed that, the view being unobstructed, Tucker saw it, too, and was governing himself accordingly. So that up to the very time that the truck approached the main track he may have reasonably supposed that Tucker would stop the car in time to avoid a collision. And when he realized that he was going to attempt to cross ahead of the train, what could, or should, he have done? Who can now say as a matter of law? Cry out? He might thus have confused and disconcerted the driver, and an instant of indecision in such a case may be fatal. Here, with the truck a half a second sooner or the train a half a second later, the tragedy would not have happened. It must be borne in mind that there was no time to reflect or reason. If the train was running only 30 miles an hour—the speed was probably greater—it was only about 30 seconds from the time it came into view a quarter of a mile away until it crashed into the truck.

In view of these circumstances, we are of the opinion that, in submitting the question of contributory negligence to the jury under proper instructions, the trial court gave the plaintiff in error no just ground for complaint; whether the facts were sufficient to warrant its submission over the objection of the defendants in error we need not inquire. No case has been brought to our attention where, under analogous conditions, it has been held as a matter of law that the contributory negligence of a passenger, either actual or imputed, was a bar to recovery, and the following decisions more or less directly support the view we have taken: *Little v. Hackett*, supra; *Shultz v. Old Colony Street Ry. Co.*, supra; *New York, L. E. & W. Ry. Co. v. Steinbrenner*, supra; *Partridge v. Boston & M. R. Co.*, 184 Fed. 211, 107 C. C. A. 49; *Wilson v. Puget Sound E. R. Co.*, 52 Wash. 522, 529, 101 Pac. 50, 132 Am. St. Rep. 1044; *Parmenter v. McDougall*,

172 Cal. 306, 156 Pac. 460; Pyle v. Clark (C. C.) 75 Fed. 644, affirmed 79 Fed. 744, 25 C. C. A. 190.

The judgment will therefore be affirmed, with costs to defendants in error.

HUNT, Circuit Judge (dissenting). As Tucker described the accident, he would have "to make a circle to cross the track." He said that he looked up the track, and could see with a clear vision to the oil tanks, or a little further, at the point he looked; that he saw no train and heard no warning whistle or bell; that he then directed his view to his left, easterly and toward a packing warehouse and the depot; that the warehouse was not far east of the crossing of the tracks, and hid the view of the two side tracks; that he directed his observation that way until, as he described it, he got—

"clear out beyond until I knew everything was safe the way my view was ahead. * * * I looked to the left, which would be southeasterly, down towards the depot and Castle Bros.' packing house, to see whether anything was coming northwesterly. Then, after I was through looking that way, I turned and looked the other way. When I turned my gaze from the southeasterly, and looked back the other way, I had reached the point where the truck was practically going onto the main line track, as near as I can remember, when I saw the train coming, the front end of the train; practically the front part of the truck was on the main line. I could only see the train coming, and didn't hear any whistle or bell. When I saw the train, it appeared to be coming very fast; it seemed to be 200, 300, or 400 feet away. * * * It was coming from the northwest. I then reached down and opened the throttle and tried to gain a little more speed; I was going very slow; my automobile went forward. I watched this way until the train struck. That is the last I knew."

Witness said he believed Mr. Wright looked up the track at the same time he did. On cross-examination the witness gave substantially the same account, and also said:

"I never looked that way again, to see if there was a train approaching, until I passed a clear vision of the packing house. I was practically on the main track, and looked and saw the train coming right on us. * * * The whole space was there unobstructed, and there was no reason why, if I had looked, I couldn't have seen the train approaching."

The map introduced shows a crossing of four railway tracks at the foot of the crossing street; two side tracks easterly from the main track, then the main track, and a track west of the main track. They had crossed the two easterly side tracks before reaching the main track, where the engine hit the truck. From the time they started to cross the tracks at right angles with East Front street they would have had to travel approximately 75 feet before reaching the center of the main track.

It simplifies the case to determine Tucker's attitude from the standpoint of the duty of one driving a truck across steam railroad tracks. The train was in plain view before he drove the truck upon the two side tracks, and if before crossing, or if in crossing, them, he had looked in the direction toward the oil station, he would have seen the engine coming down the main track, and could easily have stopped

and let it pass. As to Tucker, the case clearly demonstrates contributory negligence.

The question, then, is: Was Mr. Wright guilty of culpable negligence? I agree that Wright was not the master of Tucker; on the other hand, he was not a passenger for hire, intrusting himself to a carrier. As the hirer of the truck and driver, utilizing the truck and driver's services in attending to his own affairs, and with control over its movements as to direction and service, he was bound to exercise ordinary care and diligence to protect himself in the hazardous situation of crossing the tracks. Mr. Wright was on the right side of the seat of the truck, and therefore had a better view than Tucker, and if, before Tucker drove over any of the tracks, Wright had turned his eyes toward the oil station, he would have seen the train coming, and could have warned Tucker in ample time to let him stop the automobile. But, instead of exercising what seems to me to be the ordinary vigilance, specially called for when it is considered that there were four tracks ahead of them as they crossed, Mr. Wright, like Mr. Tucker, failed, until too late, to give attention to the danger of trains from the direction of the oil station.

Under the undisputed facts and circumstances, I therefore think it should have been held that Mr. Wright, as well as Mr. Tucker, failed in the duty to exercise ordinary and proper care for his own safety, and by his omission to do so directly contributed to the cause of the accident. *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652; *Schofield v. Chicago & St. Paul Ry. Co.*, 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; *N. P. R. Co. v. Freeman*, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014; *New York Central, etc., v. Maidment*, 168 Fed. 21, 93 C. C. A. 413, 21 L. R. A. (N. S.) 794; *Rebillard v. Minneapolis, St. P. & S. S. M. R. Co.*, 216 Fed. 503, 33 C. C. A. 9, L. R. A. 1915B, 953; *Green v. So. Cal. Ry. Co.*, 138 Cal. 1, 70 Pac. 926; *Martz v. Pac. Elec. Ry. Co.*, 31 Cal. App. 592, 161 Pac. 16; *Brickell v. N. Y. C. & H. R. R. Co.*, 120 N. Y. 290, 24 N. E. 449, 17 Am. St. Rep. 648; *Dryden v. Penn. R. Co.*, 211 Pa. 620, 61 Atl. 249; *Noakes v. N. Y. C. & H. R. R. Co.*, 121 App. Div. 716, 106 N. Y. Supp. 522.

But, while I think the court erred in not holding that initial contributory negligence on the part of Wright was conclusively shown, nevertheless, in my opinion, the case should have been submitted to the jury, but upon a phase which was expressly eliminated from consideration. It is this: The men in the truck were not trespassers. They were at a street crossing upon a thoroughfare which they had a right to use. An imperative duty devolved upon the engineer and fireman, who were running the locomotive through the city at a high and unlawful rate of speed, and without whistling or ringing the bell, to keep a specially vigilant lookout, in order to see whether or not people lawfully using street crossings were exposed to imminent danger upon the tracks ahead of their train.

The way ahead on both sides of the track, and toward the truck as it approached the main track, was perfectly clear for observation by the

engineer. The engineer knew the speed of his train. Therefore, in the light of the presumption that he and the fireman did keep a lookout, impartial common-sense minds could say that the most reasonable inference from the evidence is that the men on the engine did see the truck, and did observe its movements, as it slowly approached and started to go upon the track directly ahead of the train. There was, therefore, ample evidence to require the court to hold that, notwithstanding the fact that the negligence of Wright and Tucker had brought them to a situation of fearful danger, nevertheless, whether or not the engineer actually saw the truck, and, observing its movements, saw the peril of the men, yet was guilty of omission to use the means at his hand to give timely warning, and, if necessary, slow down and thus avoid collision with the truck and injury to the men in it, was for the jury to determine. *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *Fluckey v. Southern R. Co.*, 242 Fed. 468, 155 C. C. A. 244.

But, as the District Court expressly charged the jury that the "last clear chance doctrine" had no application, the jury were precluded from considering the phase of the case just referred to. It therefore results: There was material error against the railroad company in submitting the issue of initial contributory negligence, which in my opinion ought not to have been submitted, and there was material error against the defendant in error in a refusal to submit the issue of knowledge of peril which by subsequent occurrences might have avoided the consequences of the contributory negligence. Under such circumstances this court must assume that the jury obeyed the charge of the court, and that the verdict and judgment were founded upon the single theory, which I think was improperly submitted.

The remedy, I think, should be by reversal, with directions to grant a new trial.

ARMSTRONG et al. v. UNION TRUST & SAVINGS BANK.

(Circuit Court of Appeals, Ninth Circuit. February 18, 1918.)

No. 3009.

1. CORPORATIONS ⇨566(5)—“CAPITAL STOCK”—NATURE OF—“CERTIFICATE OF STOCK”—“CERTIFICATE OF INDEBTEDNESS.”

“Capital stock” of a corporation represents the capital on which it is authorized to do business, and it constitutes one of the assets to which all creditors may look for payment of their demands. Thus an owner of capital stock cannot share in the assets until all of the debts of the corporation have been paid; hence a “certificate of indebtedness,” which represents a liability of the company, is wholly distinct from a “certificate of stock.”

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Capital Stock; Certificate of Stock; First Series, Certificate of Indebtedness.]

2. CORPORATIONS ⇨566(5)—“PREFERRED STOCK”—RIGHTS OF.

“Preferred stock” is merely a particular class of capital stock, being differentiated from the ordinary stock, as endowed with some peculiar quality; but as against creditors a holder of preferred stock cannot reach corporate assets.

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

3. CORPORATIONS ⇨170—OBLIGATIONS—NAME OF INSTRUMENT.

In determining whether holders of corporate certificates are creditors or stockholders, the name given to the certificate is not controlling.

4. CORPORATIONS ⇨170—CERTIFICATES—PREFERRED STOCK.

Where a corporation, authorized to issue preferred stock, issued certificates reciting that the holder was the owner of shares of preferred stock and entitled to interest on the par value thereof, and providing for a premium in case of retirement within ten years from issuance, the holders of such certificates are preferred stockholders, and not creditors, purchasers of the certificates no doubt expecting to participate in dividends declared after payment of stipulated interest, for it cannot be assumed that the purchasers expected to be creditors, and at the same time share in dividends.

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

Bill by the Continental & Commercial Trust & Savings Bank, a corporation, and another, as trustees, against the Fidelity Lumber Company, in which the Union Trust & Savings Bank, a corporation, was appointed permanent receiver. Objections by S. G. Armstrong and others to the receiver's report of claims were overruled, and claimants appeal. Judgment affirmed.

The Union Trust & Savings Bank is receiver of the Fidelity Lumber Company, a corporation. Many claims against the Lumber Company have been filed with the receiver for adjustment. These claims consist of certain certificates, in form as follows: “This certifies that _____ is the owner of _____ shares of the preferred stock of the Fidelity Lumber Company of the par value of one hundred dollars per share, transferable only on the books of the

corporation by the holder hereof in person or by attorney, upon the surrender of this certificate of stock properly indorsed. The owner of this certificate of stock is entitled to interest on the par value hereof at the rate of seven per cent. per annum, payable semiannually on the first days of July and January of each year. The Fidelity Lumber Co. reserves the right, however, to retire this certificate of stock, or any part thereof, at any time after five years and prior to ten years from date of issuance hereof, by paying the holder hereof the par value of this certificate or such part thereof as is retired, together with accrued interest on the part so retired, and a premium of five per cent. thereof, and said company also reserves the right to retire this certificate or any part thereof at any time after ten years from date of issuance, by paying the owner thereof the par value of the part so retired, together with accrued interest thereon. This stock is issued pursuant to resolution adopted at a stockholders' meeting held January 5, 1909." Some of these certificates have what are termed "riders" attached, in effect as follows: "For value received the Fidelity Lumber Co. hereby agrees with _____, owner of preferred certificate of stock No. _____ for _____ shares of the preferred of the Fidelity Lumber Co., to redeem said stock at par, with accrued interest, at the end of five years, from the date of said certificate, upon written request of the holder or his assigns. Fidelity Lumber Co., by A. J. Wilson, Secretary."

The Lumber Company was originally incorporated with a capital stock of \$100,000, of which \$50,000 was to be preferred at the option of the company. Subsequently the capital stock was increased to \$400,000, of which \$100,000 was preferred, with optional redemption within five years, and a forced retirement within ten years. Later the capital stock was increased to \$500,000, with no provision for preferred stock. On November 15, 1907, a resolution was adopted by the board of trustees authorizing the issuance of \$250,000 of preferred certificates of indebtedness. These were to run six years, with interest at 7 per cent., payable semiannually, and to contain a stipulation that the holders should not be stockholders, but creditors. The company was accorded the option of exchanging preferred stock for the certificates, with like terms of payment and like conditions. The stockholders subsequently ratified this action of the board of trustees. On January 25, 1909, the stockholders of the company adopted a resolution increasing the capital stock of the company to \$1,000,000, of which 2,000 shares, or \$200,000, were to be preferred. The company reserved the right to redeem the preferred stock in language comporting with that contained in the form of certificate above set out. It was further resolved that "said preferred stock shall be issued in such manner that the holder thereof shall not be entitled to vote the same, unless the company has been delinquent in the payment of interest thereon for a period of one year, and in such event such owner shall be entitled to participate in the conduct of the affairs of the company in the same manner as the owner of common stock therein."

Charles P. Lund, of Spokane, Wash., and Faville & Whitney and Frederick F. Faville, all of Storm Lake, Iowa, for appellants.

Hamblen & Gilbert, of Spokane, Wash., for appellee.

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

WOLVERTON, District Judge (after stating the facts as above). The question presented for solution is whether these certificates constitute the holders thereof stockholders of the company, or creditors. If the former, they are not entitled to participate in the assets of the company until the claims of all the creditors are paid in full. If the latter, they would be entitled to share with the other creditors in the

distribution of the funds in the hands of the receiver. The Lumber Company has, without variation designated the obligation for which these certificates were issued as preferred stock, and the certificates themselves denominate it as stock. But, notwithstanding this, it is urged that the name by which the paper is called is not controlling, and that its real character is to be ascertained from the language of the entire instrument and the purposes for which it was given.

[1, 2] The company appreciated very well the difference between certificates of indebtedness and preferred stock, as it, by its board of directors, provided for the creation of each kind of liability. Capital stock has a distinct characteristic, and represents the capital upon which the corporation is authorized to do business. It may be paid up, or merely subscribed. If the latter, the subscriber is liable to the company for its par value, and it constitutes one of the assets of the company, to all of which creditors may look for payment of their demands. A certificate of indebtedness is therefore quite a different thing from a certificate of capital stock in a corporation. The one represents a liability of the company to the creditor; the other a liability to the stockholder, who has contributed of his means to the capital of the corporation, and has become in that respect a party to the venture. If the corporation loses money, he loses in the proportion of his stockholding. If it makes money, his stock is advanced in value. So, if the corporation becomes involved by debt, his stock is reduced in value, and is increased as the debt is lessened. The stockholder must therefore stand aside in the winding up of the business of a corporation until its creditors are paid, before he can share in the assets. One of the characteristics of capital stock, says the Supreme Court, "is that no part of the property of a corporation shall go to reimburse the principal of capital stock until all the debts of the corporation have been paid." *Warren v. King*, 108 U. S. 389, 396, 2 Sup. Ct. 789, 795 (27 L. Ed. 769).

Thus it is that the right of the stockholder in a failing concern of the kind is subordinated to that of the creditor. Preferred stock is a particular class of capital stock. It bears the same relation to the creditor as other capital stock, and is differentiated from ordinary stock, in that it is endowed with some peculiar quality that the ordinary stock does not possess. As between the holder of such stock and the creditor, his rights to share in the assets of a failing corporation are, like those of the ordinary stockholder, subordinated to the rights of the creditor. Preferred stock does not confer any greater or larger privilege in that respect, and, generally speaking, the holder of such stock is not a corporate creditor.

[3] Concurring in the view that the name by which an instrument is called does not attest its real character, we may inquire whether these certificates render the holders creditors or stockholders—call them preferred stockholders or what not.

[4] The Lumber Company reserves the right to retire the certificates on certain conditions specified, and further agrees to redeem "said stock" at par, with accrued interest, etc. Looking back of this

to the records of the corporation, we find that the capital stock was increased and fixed at \$1,000,000, of which 2,000 shares, or \$200,000, were to be preferred. The \$200,000 was therefore designed as, and was directly declared to be, a part of the capital stock of the corporation. So that a person, in negotiating for and acquiring this preferred stock, became a contributor to the capital stock of the company. He thus signified his desire and purpose to participate in the venture of carrying on the business for which the company was incorporated, and his willingness to share in the profits it might derive and the losses it might sustain in engaging in the enterprise. These certificate purchasers must be held to full knowledge and appreciation of the real character of their investments, and that they were to become participants in the enterprise, and not mere creditors of the corporation. To intimate otherwise would be to impugn their intelligence. No doubt they expected to share in whatever dividends were declared on the stock after payment of the stipulated interest, and to await the declaration of such dividends until the earnings of the capital stock would warrant such action. They could not well expect such dividends and at the same time claim that their certificates constituted them creditors. Creditors are entitled to no dividends on their demands. What they might get from the company would go in the way of a discharge of the liability, either partially or entirely. The two positions are wholly inconsistent. They must be considered either stockholders or creditors. They cannot be both. Whatever may be the engagement of the company as between its stockholders, it can have no bearing upon the question for determination. From a review of the entire situation we conclude that these certificate holders are stockholders—preferred stockholders, as the certificates indicate—and not creditors. The following adjudicated cases amply support the view we entertain: *Hamlin v. Toledo, St. L. & K. C. R. Co.*, 78 Fed. 664, 24 C. C. A. 271, 36 L. R. A. 826; *Ellsworth v. Lyons*, 181 Fed. 55, 104 C. C. A. 1; *Spencer v. Smith*, 201 Fed. 647, 120 C. C. A. 75; *Miller, Executor, v. Ratterman, Treas.*, 47 Ohio St. 141, 24 N. E. 496; *Rider v. Delker & Sons Company*, 145 Ky. 634, 140 S. W. 1011, 39 L. R. A. (N. S.) 1007; *Inscho v. Mid-Continent Development Co.*, 94 Kan. 370, 146 Pac. 1014, Ann. Cas. 1917B, 546; *Schulte v. Boulevard Gardens Land Co.*, 164 Cal. 464, 129 Pac. 582, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914B, 1013; *Warren v. Queen & Co.*, 240 Pa. 154, 87 Atl. 595.

The authorities relied upon by appellants as supporting the contrary view have had our particular attention. The case of *Heller v. National Marine Bk.*, 89 Md. 602, 43 Atl. 800, 45 L. R. A. 438, 73 Am. St. Rep. 212, really supports the view we entertain; so construed by the court in *Spencer v. Smith*, supra. The cases of *W. C. & Phil. R. Co. v. Jackson*, 77 Pa. 321, and *Williams v. Parker*, 136 Mass. 204, involved only preferences between different stockholders; so distinguished in *Ellsworth v. Lyons*, supra. In *Vent v. Duluth Coffee & Spice Co.*, 64 Minn. 307, 67 N. W. 70, the court held that the agreement involved was in the nature of a conditional sale and permitted recovery. The court was careful to say, at the conclusion of

its opinion: "There is no question here as to the rights of creditors." So in *Mulford v. Torrey Exploration Co.*, 45 Colo. 81, 100 Pac. 596, the court adjudged recovery on a similar agreement, saying that "such a transaction is not prohibited by the statute." But there, as in the Minnesota case, it does not appear that creditors were involved. In *Porter v. Plymouth Gold Min. Co.*, 29 Mont. 347, 357, 74 Pac. 938, 940 (101 Am. St. Rep. 569), the court has this to say:

"We believe the rule to be well settled in the United States by the overwhelming weight of authority and reason that a private corporation may purchase its own stock if the transaction is fair and in good faith, if it is free from fraud, actual or constructive, if the corporation is not insolvent, or in process of dissolution, and if the rights of its creditors are in no way affected thereby."

The rule as thus ascertained illuminates the argument for denying the relief demanded by appellants. It is said in *Schulte v. Boulevard Gardens Land Co.*, *supra*.

"Undoubtedly a creditor of the corporation would be entitled to hold the conditional purchaser as a stockholder and to insist that the amount of his subscription be made applicable to the satisfaction of the corporate debts."

The cases of *Burt v. Rattle*, 31 Ohio St. 116, and *Savannah Co. v. Silverberg*, 108 Ga. 281, 33 S. E. 908, come nearer to appellants' purpose. The first, however, arose under a statute peculiar to that state, and the latter is distinguishable by the terms of the certificate, whereby it is provided that the preferred stock is accumulative, but does not participate in any dividends or profits on the common capital stock over and above an 8 per cent. dividend. But whatever may be said for these cases, they are not in accord with the great weight of authority.

The judgment of the trial court will be affirmed.

KENTUCKY WAGON MFG. CO. v. JONES & HOPKINS MFG. CO.

(Circuit Court of Appeals, Fifth Circuit. February 21, 1918.)

No. 3143.

1. COURTS ⇨312(8)—FEDERAL COURTS—JURISDICTION.

Where a creditor, whose claim was less than \$3,000, by assignment, which was absolute, acquired claims of other nonresident creditors, which in the aggregate, with his own, exceeded \$3,000, the federal courts have jurisdiction of his suit, there being a diversity of citizenship.

2. CREDITORS' SUIT ⇨11(1)—CONDITIONS PRECEDENT.

An ordinary creditors' suit, for judgment and for cancellation of an alleged fraudulent conveyance, cannot be maintained by a creditor whose claim has not been reduced to judgment.

3. CORPORATIONS ⇨548(3)—MAINTENANCE—JURISDICTION OF EQUITY.

As equity will take jurisdiction to enforce a trust, an unsecured creditor, who had not reduced his claim to judgment, may maintain a creditors'

bill against the debtor corporation and another, which had received funds and property devoted to the payment of unsecured creditors, transferred to it in violation of the trust agreement, by the committee appointed to manage the affairs of the debtor.

4. TRUSTS \Leftrightarrow 356(1)—MISAPPROPRIATION—ACCOUNTING.

Equity will compel the restoration of a trust fund by one who has induced the trustee to unlawfully transfer it to him.

5. EQUITY \Leftrightarrow 401—REFERENCE TO MASTER—DENIAL OF HEARING BEFORE COURT.

Where the court had determined the substantial rights of the parties, reference to the master for accounting is not a denial of hearing before the court, particularly as either party, if dissatisfied with the master's findings, might except, and such exceptions would be passed on by the court.

Appeal from the District Court of the United States for the Northern District of Mississippi; Henry C. Niles, Judge.

Bill by the Jones & Hopkins Manufacturing Company, on behalf of itself and all other creditors, against the Asa W. Allen Company, a corporation, and others. From a decree for complainant, defendant Kentucky Wagon Manufacturing Company appeals. Affirmed.

W. D. Anderson and W. A. Blair, both of Tupelo, Miss., for appellant.

T. T. McCarley, of Nashville, Tenn., and John A. Sykes, of Aberdeen, Miss., for appellee.

Before WALKER and BATTS, Circuit Judges, and EVANS, District Judge.

BEVERLY D. EVANS, District Judge. This is a creditors' bill by appellee, in its own behalf and in behalf of other creditors of the Asa W. Allen Company, a mercantile corporation, and its president and manager, Asa W. Allen, against its debtors and about 25 other creditors, including appellee. All matters charged against the defendants, except appellant, have been disposed of and are not before the court. The cause resulted in a decree against appellant, from which it took an appeal. The case will not be stated, as the facts necessary to elucidate the points made in the appeal will appear from discussion of the assignment of errors.

[1] 1. The complainant alleged itself to be a corporation chartered and existing under the laws of Tennessee, and that the respondent Asa W. Allen Company was a corporation organized under the laws of Mississippi, with its principal office in Mississippi, and that the respondent Asa W. Allen was a citizen and resident of the state of Mississippi, and that these two respondents were indebted to the complainant in a sum in excess of \$3,000, principal sum. The answer challenged the jurisdiction of the court, on the ground that the claim on which the bill is based is less than \$3,000, exclusive of interest and costs. It appeared that the complainant held four notes of these respondents, aggregating \$2,083.20, and prior to the filing of the bill

had acquired by written assignment claims of other nonresident creditors against the respondents, which enlarged its indebtedness to a sum in excess of \$3,000, principal debt. If these transfers were absolute, and the assignors parted with all their interest in the debts assigned, there being diverse citizenship, the complainant could maintain an action on the aggregated claim in the federal court. *Crawford v. Neal*, 144 U. S. 585, 12 Sup. Ct. 759, 36 L. Ed. 552. The District Judge in his decree made a special finding of fact that these respondents were indebted to the complainant in a sum in excess of \$3,000, principal, and we find that there is evidence sufficient to uphold this finding of fact. There is no merit in the assignments of error based on this ground.

[2, 3] 2. Appellant raised the point that the bill was not maintainable by appellee, because the latter was a simple contract creditor of the Allen Company and of Allen, whose claim had not been reduced to judgment. If this was an ordinary creditors' suit, for judgment and for the cancellation of an alleged fraudulent conveyance, it could not be maintained by a creditor whose claim had not been reduced to judgment. *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 977, 37 L. Ed. 804. This case contains other features which bring it within the equitable jurisdiction of a federal court. The bill is brought by the complainant, in its own interest and in behalf of other beneficiaries of a trust, against appellant, as a trustee, who is alleged to have unlawfully diverted the trust fund to its own use. The appellant's alleged conduct cannot be reached by any proceeding at law, and there is no reason for requiring it to resort to legal processes. Whenever a creditor has a trust in his favor, he may go into equity without exhausting legal processes and remedies. *Case v. Beauregard*, 101 U. S. 688, 25 L. Ed. 1004. The crux of the appellee's allegations against the appellant is that the Allen Company and Allen turned over all of their property to a committee of three appointed by their creditors, for liquidation by them. Appellant's agent was a member of that committee, and he, at the instance of appellant, induced his associates on the committee to divert the funds coming into their hands for the benefit of all unsecured creditors, to the separate use and benefit of appellant. An accounting was prayed against the committee and appellant, and a recovery was asked for the funds alleged to have been misapplied, so as to be administered as a trust fund, for distribution among all creditors entitled to participate therein. Other necessary and ancillary relief was prayed. The bill presented a case of equitable jurisdiction.

[4] 3. The Allen Company was a mercantile corporation, organized and managed by A. W. Allen, its president, who was the chief, if not the only, stockholder. In fact, the corporation was used by Allen as a convenient means of doing business, and the transactions between the corporation and himself were so intermingled that it was impossible to separate them. The finances of the corporation became so involved that Allen called a meeting of its creditors for the purpose of obtaining an extension of time on its indebtedness. Appellant and appellee were among the corporation's creditors and participated in the

creditors' meeting. In the meeting of the creditors, in which Allen took part, it was agreed that a committee of three should take charge of the business of the Allen Company, and the committee was empowered to select a manager and to retain the services of Allen on a salary, and the entire business of Allen and the Allen Company was to be carried on under the direction of the committee. Allen had considerable individual property, which was incumbered, and the equities in these properties were to be administered by the committee for the benefit of the unsecured creditors of the Allen Company.

In his review of the facts the trial court found that one Palmer, the accredited agent of appellant, was made a member of that committee. Prior to his appointment, Palmer, for the benefit of his principal, had secured a deed of trust from Allen and the Allen Company to secure the payment of a debt due to appellant by the Allen Company and a sum of money which appellant had theretofore advanced for the purpose of securing an assignment to it of a deed of trust held by the Bank of Brooksville on certain land belonging to Allen. After Palmer became a member of the creditors' committee, and entered upon his duties as a trustee of the properties and assets of the Allen Company and of Allen for the benefit of the unsecured creditors of both, with the knowledge of his cotrustees and in breach of his duty as trustee, and in fraud of the rights of the unsecured creditors, Palmer procured the assignment to his principal, appellant, of certain notes amounting to \$2,100, which were a part of the assets of Allen and the Allen Company in the hands of the creditors' committee as trust funds for the benefit of the unsecured creditors of the Allen Company and Allen. Likewise Palmer procured the erection of certain houses on land to which his principal held a deed of trust, for the purpose of enhancing the security of his principal, and paid for these improvements out of the funds in the hands of the creditors' committee, held in trust for the unsecured creditors. The court decreed that appellant should account for this diversion of assets. The evidence is sufficient to support the court's finding, and its decree, that appellant should account for the collateral received and money used in enhancing its value, results from the application of familiar principles of equitable jurisprudence, which will compel the restoration of a trust fund by one who has unlawfully diverted it to his own use.

[5] 4. The court in its decree appointed a master, and directed him to take an accounting of the collateral received by appellant and of the money realized on it, and also to determine the number of houses, date of construction, and their reasonable value, to the end of ascertaining the amount of trust funds which had been misappropriated by appellant. It is urged that the effect of this part of the decree is to deprive appellant of the right to a hearing before the court. The decree determined the substantial rights of the parties, and the reference to the master only involves an ascertainment of the amount of the trust fund for which appellant was to account. If appellant should disagree with the master, it would be entitled to except, and the court would then pass on its exceptions. There is no merit in this assignment of error.

5. The record is voluminous, and involves many matters which had been eliminated. The foregoing discussion disposes of all of the assignments of error adversely to the appellant, and the decree is affirmed.

CLARK v. SCHIEBLE TOY & NOVELTY CO.

(Circuit Court of Appeals, Sixth Circuit. December 14, 1917.)

No. 3023.

1. PATENTS ⇨319(1)—ACCOUNTING FOR INFRINGEMENT—APPORTIONMENT OF PROFITS OR DAMAGES.

On an accounting for infringement of a patent for an improvement or of a part of a structure, the ultimate question is whether the real invention and its influence in bringing about the infringing sales can be so far identified as to admit of reasonable apportionment of profits or damages; if it can, the apportionment must be made.

2. PATENTS ⇨319(1)—ACCOUNTING FOR INFRINGEMENT—MEASURE OF DAMAGES.

There is no legal presumption that, but for infringement by a defendant, complainant, which was the owner of the patent and manufacturing thereunder, would have made as many sales at the same profit as were made in a like period before the infringement, when defendant was a partner in the business, and such an assumption is too conjectural to be safely taken as the measure of damages for the infringement.

3. PATENTS ⇨312(3)—DAMAGES FOR INFRINGEMENT—REASONABLE ROYALTY.

Complainant was owner of a patent for a power truck frame for locomotive toys, adapted for use with various kinds of vehicle bodies, which patent was infringed by defendant. Both parties were manufacturers and sellers of vehicle toys, on some of which the power truck was used, and others not. *Held*, that the testimony of the parties themselves, taken on an accounting before a master, as to the prices at which such toys were sold, both with and without the patented truck, afforded a basis for apportionment of profits or damages, and also for establishing a reasonable royalty for the patented device.

4. PATENTS ⇨319(1)—INFRINGEMENT—ACCOUNTING FOR DAMAGES.

On an accounting for damages for infringement, each case is controlled at last by its own peculiar facts and circumstances, and the pecuniary loss in any event can be determined only through reasonable approximation.

5. PATENTS ⇨324(5)—DAMAGES FOR INFRINGEMENT—INCREASE OF AWARD BY COURT.

The refusal of a trial court to increase the damages awarded against an infringer on an accounting *held* so far within its discretion that, on the facts shown, it would not be disturbed by the appellate court.

Appeal from the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Suit in equity by the Schieble Toy & Novelty Company against David P. Clark. From final decree on accounting, defendant appeals. Reversed.

H. A. Toulmin, of Dayton, Ohio, for appellant.

Wm. R. Wood, of Cincinnati, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. Final decree was entered below upon an accounting and report of a master. Three suits were originally brought by appellee against appellant upon three distinct patents; and interlocutory decrees were entered, adjudging that the Clark patent, No. 676,420, contested in the first suit, was valid, though not infringed, and that the Turner patents, Nos. 930,107 and 930,633, involved, respectively, in the second and third suits, were invalid. Upon appeals to this court the interlocutory decree in the first suit was reversed, with direction to enter the usual decree for injunction and accounting, and the decree in each of the other suits was affirmed. The interlocutory appeals were heard here together, and the facts and rulings in respect of them are reported in 217 Fed. 760, 133 C. C. A. 490. The master awarded as damages, instead of profits, the sum of \$30,611.70 in the first suit. Exceptions were reserved in behalf of Clark to the master's report, and also to his rulings upon objections to evidence; the exceptions were overruled, and decree was entered, Clark appealing.

The assignments, 24 in all, are in substance and effect involved in the questions we find it necessary to discuss. The record, as counsel interpret it, presents a number of intricate questions, which do not lead to any decisive and satisfactory conclusion, and their contentions also obscure the identity of the infringing device and the value attributable to it in ascertaining either the profits or the damages recoverable. The patent in suit purports to be an improvement upon a previously patented device called in this litigation the Boyer patent. The earlier invention and the later one are each a combination patent; and it is stated in each specification that the invention is an improvement in "locomotive toys." The patents are both described sufficiently in our original opinion. 217 Fed. 764, 766, 133 C. C. A. 490. It may, however, be remarked that unpatented toy bodies, each comprising locomotive boiler, cab, cylinders, and pilot, an automobile or other vehicle body, were mounted on the patented structure, which comprised the operative parts, that is, the running wheels, inertia wheel, idlers, truck frame, etc. Indeed, it was provided in the specification of the patent in suit:

"That the truck frame may serve as a support for any suitable vehicle body or other toy mounted thereon, and this weight in addition to the truck frame and of the inertia wheel and its axle is utilized to increase the efficiency of the contact between said axle and the running wheels."

Appellee (hereafter referred to as complainant) called an expert before the master, who testified in reference to the patented structure in suit:

"I do not find in such toy structures any mechanical basis by which profits could be apportioned as between patented and unpatented portions of the structure, because from a mechanical standpoint each device stands as an indivisible combination of elements."

Upon a similar theory it is insisted for complainant that toy bodies mounted on the patented structures are themselves elements of the patent, and must be so considered in estimating either profits or damages. It is true that in practice both parties frequently extended the side walls of the toy bodies downwardly, and adapted their lower portions so as to use them as complete equivalents of the truck frame described and shown in the patent specification and drawings and called for in the claims. It is said that the toy body thus constitutes the actuating element of the combination in the sense that the body, instead of the truck frame, affords a convenient handhold for starting the toy, and also that the weight of the body thus becomes effective in producing the wedging contact between the inertia wheel shaft and the rims of the running wheels without friction. Such features as these, however, could neither avoid infringement of the patent in suit nor make the whole toy body a truck frame within the meaning of the patent. In many instances the toy body was fastened to the top of the truck frame, literally mounted upon it, instead of having the side walls extended and in part substituted for the truck frame. Surely a toy body so connected with the truck frame does not become an element of the patent; nor does the extension method of connecting the toy body with the patented device in any material sense efface the truck frame proper; the added weight and the starting facilities are the same, regardless of the method of connection. Further, the toy bodies in question were specifically described and claimed in the Turner patents; and the present complainant, as assignee of Turner, relied on those patents to prevent Clark's use of the toy bodies; but both this court and the court below held the Turner patents invalid. 217 Fed. 772, 133 C. C. A. 490. Is it to be said now that the right to use the toy bodies as patented articles resides exclusively in complainant simply because they were either mounted on the present patented device or were in the lower portions of their side walls made to infringe it?

[1] Another contention made for complainant is that if the body, as distinguished from the truck frame or its equivalent, is not part of the patent in suit, the act of Clark in connecting the bodies with the infringed device was to unite the parts so as to prevent ascertainment of the value to be attributed to either of the parts in estimating profits or damages, and consequently that the rule of confusion of goods must be applied. If this is a true interpretation of the record, it may be conceded, as counsel claim, that such decisions as *Westinghouse Co. v. Wagner Mfg. Co.*, 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653, and *Dowagiac Mfg. Co. v. Minnesota Plow Co.*, 235 U. S. 641, 35 Sup. Ct. 221, 59 L. Ed. 398, are applicable; but we are not satisfied with this view of the record. The ultimate inquiry in all such cases is whether the real invention and its influence

in bringing about the infringing sales can be so far identified as to admit of reasonable apportionment of profits or damages; if this can be answered affirmatively, the long-settled rule is that apportionment must be made. *Garretson v. Clark*, 111 U. S. 120, 121, 4 Sup. Ct. 291, 28 L. Ed. 371; *Westinghouse Co. v. Wagner Mfg. Co.*, supra, 225 U. S. 614, 615, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653; *Hamilton Shoe Co. v. Wolf Brothers*, 240 U. S. 251, 260, 261, 36 Sup. Ct. 269, 60 L. Ed. 629. This results from the rule that, while the owner of an infringed patent, as well as the owner of any other kind of property tortiously taken and used, is entitled to be recompensed for the injury so committed (section 4921, U. S. Rev. Stat.; *Westinghouse Co. v. Wagner Mfg. Co.*, supra, 225 U. S. at page 615, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653; *United States Frumentum Co. v. Lauhoff*, 216 Fed. 610, 615, 132 C. C. A. 614 [C. C. A. 6]), yet, apart from acts that would charge the infringer or other tort-feasor as a trustee *ex maleficio*, of course no owner can be suffered to recover anything in respect of property which does not belong to him or as to the use of which he has no rightful control.

[2] How, then, may the amount complainant should recover be rightly estimated? The infringement extended over a period of about four years. The master found that during this period the profits earned by Clark through his sales of infringing toys were \$22,748.13; but the profits so found include those derived from sales of both the infringing device and the toy bodies. The master further found that "the infringed patent gave the entire marketable value to the toy," and he was of opinion that "there should be no apportionment." His ultimate holding, however, was that "damages should be awarded rather than profits"; accordingly he examined into the subjects of impaired profits and diverted profits, finding the former to be \$16,015.70 and the latter \$14,596, which sums were awarded as damages, \$30,611.70. The basis of the impaired profits was complainant's "reduction of selling prices and increase of cost attributable to defendant," and that of the diverted profits was "profits on sales complainant would have made had defendant not been in the market." It is to be observed of the last two findings that the master allowed impaired profits only on toys with the power in suit (i. e., toys containing the patented device), while he allowed diverted profits on all toys, those with and those without this power. Besides the apparent inconsistency of these allowances, the first is based on the master's conclusion that, in the absence of Clark's infringing competition, complainant could have earned as an average profit on each toy having the power device it sold during the infringing period a sum equal to the mean of the total profits earned on each toy (both with and without such power) by the copartnership before and by itself during that period; and as ground for the second the master concluded that, but for such competition, the complainant's sales of both classes of toys during the infringing period would have equaled the highest average of the partnership sales in a series of four years prior to that period. There is no presumption of law that complainant could have accomplished these ends (*United States Frumentum Co. v. Lauhoff*, supra, 216 Fed. at 614, 132 C. C. A. 614;

Seymour v. McCormick, 57 U. S. [16 How.] 489, 490, 14 L. Ed. 1024); and the evidence shows that such doubtful considerations enter into the findings in this behalf as to render them unduly speculative and conjectural, as, for instance, the increase in cost of manufacture, large sales made by both parties of toys without the power device, though otherwise substantially like those with the device, Clark's greater experience and capabilities in the toy business, which were not only lost to but also exercised against Schieble as well as complainant, and which seem to have enabled Clark to gain distinct preference over complainant among toy dealers—these and kindred considerations would (even assuming that no infringement had taken place) make it unsafe in the instant case to adopt the master's method of so measuring complainant's pecuniary loss. Further, if we presently lay to one side the question of apportionment of profits, the finding as to profits received by Clark presents questions of much doubt. The master was not satisfied that even the whole of these profits as he found them, much less any apportionment of them, would furnish the true measure for recovery. Complainant's expert accountant fixed Clark's profits at \$19,247.05, while the opposing accountant first fixed them at \$5,537.09, and later at \$2,702.48. The master says of these results:

"The great difference shown is due, not to different reading of the books, but to different views as to items to be allowed for expense."

We need not attempt here to analyze or reconcile these differences between the accountants or between them and the master; for this would lead to an extended discussion of expenses, such as depreciation of Clark's machinery, deduction of his salary, also other subjects affecting profits, and in the end to an unsatisfactory solution of the ultimate problem.

[3] Moreover, even if Clark's profits were resorted to as a measure of damages, the rule of apportionment would have to be applied. Testimony was offered showing that complainant sold toys which, apart from the running wheels and axles, did not contain the power device; and enough appears as to the prices at which these toys were sold to show approximately complainant's own estimate of the value of the body portion and of the power device separately. Mr. Schieble, president of complainant, testifying in reference to locomotive toys illustrated in complainant's catalogue of 1911 and sold within the infringing period, said:

"This engine body was precisely the same as the engine or locomotive No. 1 of that catalogue, which has the power in suit, and was made from the same die. * * * These locomotives without power so sold, had the same body as the locomotives with power, and sold without power for \$4.15 a dozen. The locomotives with the power in suit sold at \$7.20 per dozen, and the locomotives without the power in suit at \$4.15 per dozen, or a difference of \$3.05 per dozen, or 25⁵/₁₂ cents apiece."

Thus the complainant sold locomotives equipped with the power device for 60 cents each, and others having exactly the same body, though without the power device, save as to the wheel and axle fea-

tures, for 35 cents each. The object of including the running wheels and axles of the power device in sales of the body portion was obviously to supply contrivances called "pull toys." The power device proper would therefore appear to add, not only 25 cents to the selling price of the toy, but also the reasonable value of the running wheels and their axles; for in view of the patent in suit any estimate of relative values would be manifestly erroneous which would subtract from the power device its running wheels and axles and add them to the toy body. *Yesbera v. Hardesty Mfg. Co.*, 166 Fed. 120, 125, 126, 92 C. C. A. 46 (C. C. A. 6); *Herman v. Youngstown Car Mfg. Co.*, 216 Fed. 604, 608, 609, 132 C. C. A. 608 (C. C. A. 6). According, then, to Mr. Schieble's testimony, it would seem safe to treat the toy body alone and the power device proper as substantially equal in value. This view is strengthened by Mr. Clark's testimony concerning his own sales. Testifying in relation to a locomotive with cars attached as illustrated in his catalogue of 1912, and the retail prices at which they were sold within the infringing period, he stated:

"The retail price of No. 550 train engine retails for \$1, and each car attached to the engine, that has no power, retails at 50 cents each."

He also stated that this locomotive "has the power in suit," but that the cars of the train, passenger cars, "have no power"; and it is significant that the cars each sold for one-half the price of the engine. Although the bodies of the cars differ in form from the body of the locomotive, yet we understand that the bodies are each struck up from a single sheet; and Clark's testimony does not indicate that the difference in prices was due to anything other than the presence of power in the locomotive and its absence in the cars. We have in mind that the toys sold by the respective parties were not all of the same dimensions; and yet we infer from the catalogues and exhibits that those embraced in the sales mentioned are equal to, if not above, the average toys involved. The importance of such sales cannot well be overestimated; they represent the concurring estimate and judgment of both buyer and seller in actual transactions. They represent the selling or commercial value of the toys in both wholesale and retail transactions; but above all they effectively establish the relative values of the patented and unpatented parts of the toys in issue. The master points out, it is true, that no separate cost account was kept of either infringing or noninfringing toys, though some disputed estimates of cost appear. The commercial values alone, however, as the parties themselves thus separately determined them, furnish an answer to the insistence of counsel, as well as the ruling of the master, that apportionment could not be made as to profits or damages arising from the use of the infringing device; for, when it is once clear that the selling value was fairly attributable half to the patented and half to the unpatented features, it follows that profits should be attributed in the same proportions—unless it appears that due regard to the cost element calls for another inference. It is enough to say that we are not satisfied that there was any materially different relation between cost and selling value in the patented and in the unpatented parts.

[4] What has been said of the master's report might seem to require a further accounting, but we think this is not necessary; on the contrary, enough appears in the record safely to dispose of the case, and it is certain that the litigation should be brought to an end. It scarcely need be said that cases of this class are each controlled at last by their own peculiar facts and circumstances, and that the pecuniary loss in any event can be determined only through reasonable approximation. Our consideration of the record is convincing that the difficulties entering into the present case may be solved best by ascertaining the value of the patent property taken, or of the earning capacity of that property. Such a course was approved in *Dowagiac Mfg. Co. v. Minnesota Plow Co.*, *supra*, 235 U. S. 648, 35 Sup. Ct. 224, 59 L. Ed. 398, the court saying:

"As the exclusive right conferred by the patent was property, and the infringement was a tortious taking of a part of that property, the normal measure of damages was the [real] value of what was taken."

As this court said in *United States Frumentum Co. v. Lauhoff*, *supra*, 216 Fed. at page 616, 132 C. C. A. 620:

"The real value—the actual value—of what has been taken is always the ultimate question."

The opposed expert accountants furnished estimates of the total net profits earned by the copartnership, composed of Schieble and Clark, for the five years next preceding the infringing period, and likewise of complainant's as well as of Clark's profits during the latter period. The accountants do not agree in amount as to the first period, though they substantially agree as to complainant's profits during the infringing period; and their differences concerning Clark's profits in the latter period have already been pointed out. In view of the circumstances of the infringement and the established rule of apportionment, we cannot think that Clark's profits, even as the master found them, would afford a reasonable measure of complainant's loss or show the true worth of the use of the patented power device; indeed, if either estimate of Clark's accountant were accepted, he would in effect be rewarded for his own wrong.

The complainant's accountant and likewise the master estimated the average profit on each toy containing the power device which was produced by the copartnership and by the complainant and Clark respectively thereafter and during the infringing period; and these profits can in the same manner also be estimated from data furnished by Clark's accountant, such as the total net profits on all toys and the number of toys produced by the parties respectively during both periods; but for reasons already stated in respect of the infringing period we need not consider the estimates of profits made during that time. The value as well as the earning capacity of the power device may, however, be safely based on the average profit earned upon each of the toys containing that device during the noninfringing period. As it seems to us, that is the normal period from which such value is to be derived; it was the time in which Clark, as well as Schieble,

devoted his unbiased efforts to ascertain the utility and advantage of the invention, the power device, "over the old modes or devices for working out similar results" (Suffolk Co. v. Hayden, 70 U. S. [3 Wall.] 320, 18 L. Ed. 76; United States Frumentum Co. v. Lauhoff, supra, 216 Fed. 618, 132 C. C. A. 614); certainly Clark is in no position to question such utility and advantage; he subsequently appropriated the patented device through infringement. In Bemis Car Box Co. v. J. G. Brill Co., 200 Fed. 749, 764, 119 C. C. A. 229, 244 (C. C. A. 3), when refusing to disturb the finding of a referee who had taken an average of selling prices occurring part in the infringing and part in the noninfringing years, Judge Buffington said:

"* * * * There is strong reason for basing the selling price on the non-infringing years and excluding the infringing years, for the former represent the normal legal status during which the plaintiff was reaping the legitimate profits from its patent monopoly, while the latter represent that price depreciated by the wrongful competition of the defendant. * * *"

Considering the opposed accountants' estimates of the net profits earned by the partnership during its life of five years, in connection with the number of toys the firm produced in that time containing the power device, and giving effect to the rule of apportionment, and considering also the tortious character of the taking and the value of the cultivated trade field which Schieble had bought from the partnership, we conclude that a conservative estimate of the value of the patent property taken, or of the earning capacity of that property, is 21 cents per dozen toys, or $1\frac{3}{4}$ cents each, one size and style with another. By either name (value of property or earning capacity) we merely describe the damage suffered by complainant, reduced to a unit basis. We do not see that it would be improper to call this a royalty, whether fixed by a court or jury after the event, instead of by the parties in advance; the name is immaterial.¹ The total number of toys produced by Clark during the infringing period and containing the power device—1,026,172—is not in dispute. The resulting sum to be recovered as damages is \$17,958, with additional damages for delay in payment, which are to be estimated upon this sum at the rate of 6 per cent. per annum from the close of the infringing period to the date of the final decree to be entered in the court below.

It is urged that the allowance made to the master as compensation for his services is excessive. In the face of the trial judge's knowl-

¹ In the Frumentum Case, supra, 216 Fed. 617, 132 C. C. A. 621, it is said: "This damage or compensation is not, in precise terminology, a royalty at all, but it is frequently spoken of as a 'reasonable royalty'; and this phrase is a convenient means of naming this particular kind of damage." Again in Dowagiac Mfg. Co. v. Minnesota Plow Co., supra, 225 U. S. 648, 35 Sup. Ct. 224, 59 L. Ed. 398, when speaking of a patent that had been kept in close monopoly, it was said: "In that situation it was permissible to show the value by proving what would have been a reasonable royalty, considering the nature of the invention, its utility and advantages, and the extent of the use involved." And see Hunt Co. v. Cassidy, 64 Fed. 585, 586-7, 12 C. C. A. 316 (C. C. A. 9); Cassidy v. Hunt (C. C.) 75 Fed. 1012, 1017; Bemis Car Box Co. v. J. G. Brill Co., supra, 200 Fed. 759 to 762, 119 C. C. A. 229.

edge of the services, we cannot say that the allowance exceeds the bounds of a sound discretion.

[5] It is strenuously urged for complainant that the recovery allowed below ought to be materially increased by the addition of an arbitrary sum in the nature of damages; and we assume that a like view will be entertained in respect of the present allowance. There was no foundation for treble damages. Clark first operated under a patent; the court below held there was no infringement; hence Clark can scarcely be treated as having intended a willful injury. *Vrooman v. Penhollow*, 222 Fed. 894, 899, 138 C. C. A. 374 (C. C. A. 6); *Seymour v. McCormick*, 57 U. S. (16 How.) 479, 488, 14 L. Ed. 1024. Further, upon the coming in of the master's report the court below declined to impose a penalty. The matter was so far within the discretion of the court that we are not inclined to disturb the ruling. *Topliff v. Topliff*, 145 U. S. 156, 174, 12 Sup. Ct. 825, 36 L. Ed. 658; *Fox v. Knickerbocker Engraving Co.*, 165 Fed. 442, 444, 91 C. C. A. 386, and citations (C. C. A. 2).

The decree below is reversed, and the cause remanded, with direction to enter final decree for the recovery above allowed; the costs of this court will be divided.

CHRISTENSEN et al. v. GENERAL ELECTRIC CO.

(District Court, N. D. New York. January 15, 1918.)

No. 186.

1. COSTS ⇨48—DISMISSAL—SUITS IN EQUITY.

Legal and allowable taxable costs are in the discretion of the court on the dismissal of a bill in equity.

2. COSTS ⇨48—DISMISSAL—"FINAL DETERMINATION"—"FINAL HEARING."

Where, in a patent infringement suit, it was stipulated and ordered that each party should furnish the other a copy of all depositions, without making any charge before the decision of the case, but that the cost should be taxed as part of the costs of the suit on the final determination thereof, the dismissal of the suit at plaintiffs' cost on their motion was a "final determination," and entitled defendant to tax the items mentioned in the stipulations; the dismissal being a "final hearing" in one sense, though not in the usual sense of a hearing on the merits.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Determination; Final Hearing or Order.]

3. PATENTS ⇨325—INFRINGEMENT SUITS—DISMISSAL—COSTS.

Under District Court rule 11, requiring all papers furnished the court in calendar causes, with certain exceptions, to be printed, and Rev. St. § 983 (Comp. St. 1916, § 1624), providing that the amount paid printers, etc., shall be taxed, the cost of printing the record in a patent infringement suit was taxable, though, in the absence of a rule or statute requiring such printing, the expense is not taxable.

4. PATENTS ⇨313—INFRINGEMENT SUITS—DISMISSAL—COSTS.

In granting a motion to dismiss a patent infringement suit without prejudice to the bringing of a new action, the court had power to dismiss it at plaintiffs' cost.

5. PATENTS ⇨313—INFRINGEMENT SUITS—DISMISSAL—COSTS—“AT COST OF PLAINTIFFS.”

The dismissal of a patent infringement suit without prejudice “at the cost of the plaintiffs” was a dismissal with taxable costs, which included disbursements incurred and paid, which would have been taxable, had the case gone to a final hearing and decision favorable to defendant.

6. PATENTS ⇨325—INFRINGEMENT SUITS—DISMISSAL—COSTS.

On dismissal of a patent infringement suit at the cost of plaintiffs on their motion, charges for transcribing five copies of depositions were not taxable.

*7. PATENTS ⇨313—INFRINGEMENT SUITS—DISMISSAL—COSTS.

An order dismissing a patent infringement suit, “without prejudice, however, to the plaintiffs to commence a new action within one year, upon the payment to the defendant of the taxable costs,” did not impose costs as a condition of dismissing the suit, but conditioned the bringing of a new action within one year on the payment of costs.

In Equity. Suit by Niele A. Christensen and others against the General Electric Company. From a taxation of costs, plaintiffs appeal. Affirmed.

Visscher, Whalen & Austin, of Albany, N. Y., for appellants.

Charles Neave and Clarence D. Kerr, both of New York City, for appellee.

RAY, District Judge. This suit was at issue and on the calendar for final hearing at the February, 1917, term of this court. The solicitors for the plaintiffs presented and filed a petition, accompanied by an affidavit, the material part of which stipulation reads as follows:

“Wherefore they pray that the said bill may stand dismissed out of this court without prejudice. These plaintiffs present herewith a stipulation, duly executed by their duly authorized attorneys, agreeing that all depositions hitherto taken in this cause may be used in any subsequent or other pending litigation between the above-named plaintiffs and defendant.”

The affidavit related to the inability of plaintiffs to procure funds to prosecute the suit. On a hearing of both parties, an order of dismissal was entered February 15, 1917; in place of same, and on a further hearing an amended order was substituted March 20, 1917, reading, so far as material, as follows:

“Ordered, that the said bill stand dismissed out of this court at the cost of plaintiffs, without prejudice, however, to the plaintiffs to commence a new action within one year; and it is further

“Ordered, that all depositions stipulated or otherwise hitherto taken in this cause may be used in any other pending or subsequent litigation between the above-named plaintiffs and defendant on any of the patents involved herein; and it is further

“Ordered, that as a condition of the dismissal the defendant may take by deposition the testimony of such witnesses as it deems necessary to perpetuate for the defense of its case, and that any such depositions so taken may be used by defendant in any other pending or subsequent litigation between the above-named plaintiffs and defendant or any of the patents involved herein.”

October 31, 1917, the defendant duly presented a bill of costs for taxation, on notice, amounting to \$844.45, and the matter was ad-

journed to November 27, 1917. Objections were filed: (1) That there had been no final determination of the cause; (2) the bill of costs was not verified; (3) "the taxed bills covering the fees of the clerk, attorneys and solicitors, notaries, amount paid printers, amount paid witnesses and for copies of exemplification, etc., have not been filed with the clerk;" (4) the items included in the bill of costs under the heading, "Costs of Reporting Defendant's Record," are not authorized by any law of the United States; (5) a docket fee in any equity case is not taxable, where there has been no final hearing and determination of the cause; (6) in an equity case solicitors' fees for the taking of depositions are not taxable as costs, where there has been no final determination of the case.

On the taxation the clerk struck out the "docket fee, \$20;" "solicitors' fees, at \$2.50;" defendant's depositions, \$27.50; also \$86.80 of the charge "costs of reporting defendant's record," viz., paid for transcribing certain depositions of named witnesses (5 copies), which was charged at \$217; part of the charge for transcribing depositions of certain witnesses named (5 copies), and one-half of a notary's fee and photo copies, \$24.75—in all, \$184.83, and taxed the bill of costs at \$659.62. Of this \$146.37 is for transcribing certain depositions of witnesses, \$32 for notary fees, \$62 for certifying defendant's record for file \$376.80 for printing defendant's record, and the balance for witness fees and mileage.

[1] Legal and allowable taxable costs are in the discretion of the court on the dismissal of a bill in equity. Here on plaintiffs' motion it was ordered that "said bill stand dismissed out of this court at the cost of plaintiffs." It was without prejudice, however, to the commencement of another action for the same cause. There was no final hearing, and no decree on the merits.

[2] What costs may a defendant recover in an equity action, where there has been no final hearing and decree and it is dismissed on the motion of the plaintiff "at the cost of plaintiffs"? September 12, 1916, it was stipulated between the parties to the suit that the deposition of one Potter and the stipulated testimony of Priest, Libby, and Day be used at the trial the same as if taken without the district, and "that a printed copy of said testimony may be filed in lieu of the original typewritten copy thereof." December 12, 1916, it was stipulated between the parties, and on filing same an order of the court was entered thereon December 28th, that "each party shall furnish to the other a copy of all depositions taken in its behalf without making any charge therefor before the decision of the case, but the cost of such copies, as well as of the original, shall be taxed as part of the costs of the suit upon the final determination thereof." This plainly indicates that copies of depositions taken by the one party were to be furnished the other without charge therefor at the time, but that on the termination of the suit, if costs were awarded, the cost of such copies and of the original should be taxed in favor of the one furnishing the same, if successful in the suit, against the other. No charge was to be made therefor before the "decision of the case," but the cost thereof was to be taxed "as a part of the costs of the suit upon the final termina-

tion thereof." It was then contemplated there would be a trial or final hearing and a "decision of the case" and "a final determination thereof."

The order of December 28th was not in exact accordance with the stipulation thereto annexed. The order added the words "upon the final determination thereof." February 15, 1917, a stipulation dated December 12, 1916, was filed, and an order made "that each party shall furnish to the other a copy of all depositions taken in its behalf, without making any charge therefor before the decision of the case, but the cost of such copies, as well as of the original, shall be taxed as part of the costs of the suit, and that an order of court may be entered in accordance herewith." I think this stipulation is numbered in this case erroneously, and belongs with the second case between the same parties, to which attention will be directed.

This suit has been dismissed on motion and application of the plaintiffs and finally disposed of. It has not been decided on the merits, as the plaintiffs saw fit to take the course they did and the court granted the dismissal on terms—that is, "at the cost of the plaintiffs," which means with costs, if the words used have any significance whatever. The cause of action has not been passed upon, or its merits decided. Another suit may be brought thereon. When the plaintiffs moved for a dismissal, and it was granted, there was a "final hearing" in one sense, so far as this suit is concerned. It was not a "final hearing" in the usual sense; that is, on the merits.

In *Ryan v. Gould* (C. C.) 32 Fed. 754, an equity suit, the bill was dismissed on complainant's motion "with the usual costs to defendant," and, as was done here, the docket fee of \$20 was disallowed by Judge Lacombe, as was the charge for copies of file wrapper and certain patents procured by defendant to enable him to properly prepare his defense. In *Wooster v. Handy* (C. C.) 23 Fed. 49, Judge Blatchford said "that to constitute a final hearing in equity * * * there must be a hearing of the cause on its merits." The first stipulation referred to does not state that the cost of the documents or copies are to be taxed as a part of the costs of the suit upon a final hearing thereof, but "upon the final determination thereof." In *Kaempfer v. Taylor* (C. C.) 78 Fed. 795, Judge Townsend held that, "to constitute such a 'final hearing' as will authorize the taxation of a solicitor's docket fee of \$20 under section 824, Rev. St. [Comp. St. 1916, § 1378], there must be a hearing of the cause on the merits." Is "final hearing," as used in the statute, the same as "final determination," as used in the stipulation referred to?

The plaintiffs here place the same meaning on the words "upon the final determination thereof" as if the stipulation read "upon the final determination thereof after a hearing on the merits." Taking the second stipulation and order, it is absolute that "the cost of such copies as well as the original shall be taxed as part of the costs of the suit." This seems to mean that such costs are to be taxed, without regard to whether the suit was decided on "final hearing" or dismissed "at cost of plaintiffs" prior to a final hearing. Why may not the parties so stipulate? The costs of the suit are such as the court, acting within

its powers, grants. *Stallo v. Wagner*, 245 Fed. 636, — C. C. A. —, is not concerned with stipulations, but there are numerous cases where they have been recognized. See *Sedlacek v. Bryan* (C. C.) 192 Fed. 361. My impressions are very strong that these stipulations were intended to carry to the prevailing party the cost of the items mentioned therein on a dismissal or final determination of the suit for any cause. The court on motion of plaintiffs determined to finally dismiss the pending suit at the cost of plaintiffs.

[3] The cost of printing the record is another matter and is not covered by stipulation. In this district, rule 11 (old circuit rule, now district rule 11) provides:

"The cases and points and all other papers furnished to the court in calendar causes, other than causes for trial before a jury, except the papers sent up from the District Court on appeals in admiralty cases, shall be printed on white writing paper, with a margin on the outer edge of the leaf not less than two inches wide. The printed page, exclusive of any marginal note or reference, shall be seven inches long, and three and a half inches wide. The folios, numbering from the commencement to the end of the papers, shall be printed on the outer margin of the printed page. But the court or either judge thereof, may, before the papers are printed, and at least ten days before the time for which the cause is noticed, or is to be noticed for hearing, by written order, dispense with the printing of papers as aforesaid, a copy of which order shall be served on the attorneys of the parties to the suit interested in such hearing, at least ten days before the day appointed for such hearing. (October Term, 1864)."

This rule has never been abrogated or changed. It was adopted at the October term, 1864, by the judge then in office in this district. This has the force of law, and requires the printing of the record in equity cases, unless the judge by order dispenses therewith. This I have always done on request. When a rule of court makes it obligatory on a party to print his record, it would seem that the cost thereof ought to be a proper charge against the losing party. See *Stallo v. Wagner*, 245 Fed. 636, 638, — C. C. A. —, and section 983, R. S., there quoted. In *Kelly v. Springfield Ry. Co.* (C. C.) 83 Fed. 183, page 187, the court expressly held:

"In no case is the printing of the record and of briefs a taxable cost, except where there is a rule of court requiring the same to be printed, or where there is a stipulation to the same effect."

It is evident the papers and witnesses and depositions of witnesses allowed for by the clerk were obtained for use on the trial or final hearing, then anticipated, and are allowable under *Monahan v. Godkin* (C. C.) 100 Fed. 196. There are statutory costs allowable only when a final hearing is had, as we have seen, and as the clerk recognized; but this does not apply to all disbursements when awarded as a condition. This printing was necessary if the defendant would comply with the rule of court. The record was not printed for the convenience of counsel or the parties plaintiffs. The rule quoted is silent as to the taxation of the cost of printing the record, but section 983, R. S. (U. S. Comp. Stat. 1916, vol. 3, p. 3223, § 1624), provides:

"The bill of fees of the clerk, marshal, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of

papers necessarily obtained for use on trials in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. Such taxed bills shall be filed with the papers in the cause."

This expressly names "amount paid printers." I think the allowance for the charge of printing defendant's record clearly right under the statute and following authorities: *Hake v. Brown* (C. C.) 44 Fed. 734; *Dennis v. Eddy*, Fed. Cas. No. 3,793; *Neff v. Pennoyer*, Fed. Cas. No. 10,084; *Jordan v. Agawam Woolen Co.*, Fed. Cas. No. 7,516. These cases demonstrate, I think, that where there is a rule requiring it the cost of printing the record is taxable. In the absence of a rule or statute requiring such printing such expense is not taxable. *Atwood v. Jaques* (C. C.) 63 Fed. 561.

[4-6] My conclusions are that under the rule in this district and the statutes referred to the cost of printing defendant's record was properly allowed by the clerk, that the items mentioned in the stipulations were properly allowed, and that there has been a final determination of this case within the meaning of such stipulation; also that this court had power, on granting the order on plaintiffs' motion dismissing the case without prejudice to the bringing of a new action on the same cause of action, to dismiss it "at the cost of the plaintiffs," and that the words used mean with taxable costs, and that these costs include disbursements incurred and paid by defendant prior to such dismissal, which would have been taxable, had the case gone to a final hearing and decision favorable to defendant. If this is not the intent and meaning of the language used, it is difficult to ascribe to the words any meaning at all. During the proceedings on taxation the bill of costs was verified and the bills were filed, and as the docket fee and solicitor's fees were stricken out by the clerk, these various objections are out of the case. The clerk struck out the charge for five copies properly.

[7] These observations are determinative to an extent of the appeal from taxation of costs in equity cause No. 195 between the same parties. In that case, however, there is no charge for printing, and the order of dismissal, so far as material, reads:

"Ordered that said bill stand dismissed out of this court, without prejudice, however, to the plaintiffs to commence a new action within one year, upon the payment to the defendant of the taxable costs."

On merely reading this order, made on plaintiffs' motion to dismiss and granted by the court, it becomes a question whether the action was dismissed upon the payment to the defendant of the taxable costs, or dismissed without the imposition of costs as a condition of such dismissal, but with a provision that such dismissal is without prejudice to a new action by plaintiffs within a year upon payment to the defendant of the taxable costs; that is, are costs imposed as a condition of dismissing the suit, or is the payment of taxable costs made a condition of bringing a new action for the same cause within a year? I have given the punctuation as found in the original order which was drawn by plaintiffs' counsel and "approved as to form" by defend-

ant's counsel. Both causes, 186 and 195, were up at the same time, and the original order in 186 was entered at the same time as this order just quoted from in No. 195. So far as costs are concerned, the conditions of dismissal in both cases read the same; but, as stated, an amended order, with a decided change of language as to costs, was substituted in case No. 186. There was no amended order of dismissal or change of language in the order in No. 195. In No. 186 the original order read:

"Ordered that said bill stand dismissed out of this court, without prejudice, however, to the plaintiffs to commence a new action within one year, upon the payment to the defendant of the taxable costs."

The amended and substituted order reads:

"Ordered, that the said bill stand dismissed out of this court at the cost of plaintiffs, without prejudice, however, to the plaintiffs to commence a new action within one year."

This change is significant, and points to the conclusion that, while defendant may tax its costs and enforce payment as a condition of the plaintiffs bringing a new action for the same cause within a year from such dismissal, it cannot collect or enforce payment unless such new action is brought within the time specified. In No. 195 the suit was dismissed without costs as a condition of such dismissal, but with leave to plaintiffs to commence a new action for the same cause within one year and with the condition of dismissal that in case such action is brought the defendant is to recover the taxable costs of the first suit. The object was to make the practice conform to the New York state practice that where a cause is dismissed, but not on the merits, and a new action is brought for the same cause against the same defendant, as in such case it may be, it cannot be prosecuted until the costs of the first action are paid. The amount of the bill of costs in 195 as finally taxed by the clerk is correct. With this limitation and condition, and for this purpose, the taxation in 195 is also affirmed.

UNITED STATES v. SCHAEFER et al.

(District Court, E. D. Pennsylvania. January 23, 1918.)

No. 89.

WAR ⚡—PRECAUTIONARY MEASURES—ESPIONAGE ACT—INDICTMENT.

Under an indictment charging violation of the Espionage Act June 15, 1917, c. 30, 40 Stat. 217, by making "false reports and statements, with intent to promote the success of the enemies of the United States," whether the acts charged sufficiently show the intent is a trial question, and not a question of pleading.

Criminal prosecution by the United States against Peter Schaefer, Paul Vogel, Louis Werner, Martin Darkow, and Herman Lemke. On demurrers to indictment. 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 demurrers are filed separately on behalf of each one of the defendants. The grounds of demurrer set forth apparently go only to a challenge of the criminal character of the acts charged, but the argument extended also to a criticism of the form of the indictment. We will refer to both features.

The present unhappy state of the Russian people and the bayonet thrust which has been made at the heart of Italy are commonly thought to be illustrations of the baneful results which may follow an enemy propaganda when permitted to undermine the defensive strength of a nation at war. This is the offense, the guilt of which is the charge laid at the door of these defendants, in that they "did knowingly, willfully, and unlawfully make and convey false reports and statements, with intent to promote the success of the enemies of the United States"; the particular enemy whose success was meant to be promoted being named. When we reflect upon the immeasurable calamity which the victory of such an enemy over us would be to all our people, a denial of the guilt of the commission of any act which would in the least degree promote it can be understood and would be expected. It is not easy to understand, however, how it could possibly be that such acts had not been made to constitute an offense against the law, if there was any law upon the subject.

The point made is that the acts charged here are not acts of the kind and character condemned by the law, in that they "are not such as constitute the making and conveying of false reports and statements with the intent to promote the success of the enemies of the United States," and are not such as to constitute the offense of "obstructing recruiting and enlistment," and the like. All which need now be said is that the act of Congress of June 15, 1917, brands as a crime reports and statements made with the intent indicated, and as equally criminal with obstructing recruiting and the like, and this indictment charges these defendants with the commission of these acts. Whether what they did was in legal intendment and effect what they are charged with doing is a trial question, not a question of pleadings.

We refuse to sustain the demurrers in this respect, basing our refusal on the familiar ground that the question raised can always be at least as well raised at the trial as by demurrer, and we think is here one which can be properly ruled only at the trial. *United States v. Pierce* (D. C.) 245 Fed. 878, is a case which presents the only thought which can properly be advanced in cases of this kind. Freedom of political discussion, either through the printed page or otherwise, is without doubt a right essential to the cause of democracy, and is one to which the American people are so devoted that, without a change in our Constitution, made with their sanction and approval, such discussion cannot be made unlawful, nor this freedom curtailed. Whenever this right is involved, it will be upheld by courts and juries alike. This is a far cry, however, from the judicial finding that the right is in-

volved whenever it suits the purposes of a defendant to assert that it is involved. It is the whole act done which determines its character. This is sometimes disclosed by the surface indications, but criminality is no less real because accompanied with subtle and cunning attempts to hide itself under the cloak of constitutional privileges.

The vice of duplicity in pleading ascribed to this indictment does not appear to be present. *Ammerman v. United States*, 216 Fed. 326, 132 C. C. A. 470, presented a wholly different question. There one act of Congress made it a criminal offense to introduce liquor into a political territorial division, defined as the Indian Territory, and prescribed a punishment for the offense; another act of Congress made it an offense to introduce liquor into any Indian country, defining the meaning of that term as used in the act, and prescribing a different penalty. Not only did the punishment to be imposed differ, but the offenses were created by different acts and were wholly separate and distinct offenses, and the evidence by which guilt could be established was different. The court held that the two offenses could not be charged together in one count. It is clear that R. S. § 1025 (Comp. St. 1916, § 1691), justified the court in sustaining the demurrer. The ruling has, however, no application to the present case. R. S. § 1025, supplies us with an all-sufficient guide to determine what indictments are good.

We find no defects in the present indictment which can prejudice the rights of the defendants. The only substantial thing they are claiming by these demurrers is that the court shall say, in advance of the evidence being heard, that the acts charged to be criminal are not criminal. The defendants by this are invoking no right which belongs to them.

The demurrers are overruled, and judgment is entered in accordance with R. S. § 1026 (Comp. St. 1916, § 1692).

In re ARMSTRONG.

(District Court, S. D. California, S. D. January 28, 1918.)

No. 3055.

1. BANKRUPTCY ⇨405—CREDITOR'S RIGHT TO OPPOSE DISCHARGE.

Bankruptcy Act July 1, 1898, c. 541, § 14b. 30 Stat. 550, provides for opposition to discharge by the trustee or other parties in interest, and clause 3 prohibits discharge where the bankrupt has obtained money or property on credit on a materially false statement in writing. This clause was added by the amendment of 1903 (Act Feb. 5, 1903, c. 487, § 4 [Comp. St. 1916, § 9598]). Section 17 (2) declares that a discharge in bankruptcy shall not release a debtor from liabilities for obtaining property by false pretenses or false representations. That section likewise was amended in 1903 (Act Feb. 5, 1903, § 5 [section 9601]); the word "liabilities" being substituted for "judgment," which formerly was used. *Held*, in view of the amendments, that one holding a provable claim, and to whom the bankrupt made a materially false statement in writing for the purpose of obtaining credit may oppose discharge, though his claim would not be barred for such person must be considered a party in interest.

2. BANKRUPTCY ⇨404(1)—DISCHARGE—RIGHT TO.

The right to a general discharge in bankruptcy is purely statutory, and can be granted or withheld, as the legislative department may deem best.

3. BANKRUPTCY ⇨405—DISCHARGE—OPPOSITION—"CREDITOR."

As Bankruptcy Act July 1, 1898, § 1 (9), being Comp. St. 1916, § 9585, declares that "creditor" shall include any one who holds a demand or claim provable in bankruptcy, one having a provable claim is a creditor and party in interest, entitled to oppose the discharge of the bankrupt, even though he has not proven his claim.

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

In Bankruptcy. In the matter of the bankruptcy of Robert F. Armstrong. On opposition to discharge. Objections to the report of Referee Force Parker of Los Angeles, Cal., recommending discharge, sustained, and discharge denied.

Robert L. Williams, of Los Angeles, Cal., for creditor.

Chas. La Verne Larzelere, of Los Angeles, Cal., for bankrupt.

BLEDSOE, District Judge. Before the referee on special reference on opposition to granting a discharge, one A. C. Nelson, who seems to have represented some sort of a "loan company," gave evidence that he had loaned \$25 to the bankrupt, taking his note therefor in the sum of \$32.70, no part of which has been paid. The loan was given pursuant to a written application signed by the bankrupt, which stated, among other things, that the total amount of his then "present indebtedness" did not exceed \$15. As a matter of fact, the bankrupt was then indebted to another "loan company" in a sum in excess of \$90, which amount is also still unpaid. Objection to the discharge was based upon the ground that the bankrupt had obtained credit from Nelson on a written statement of his financial condition relied on by Nelson, but which was materially false, and that it was made by the bankrupt to Nelson for the purpose of obtaining credit from him, etc.

[1] The referee has recommended the discharge of the bankrupt, but with his conclusions I am constrained to disagree. It is assumed by all, apparently, that in virtue of clause 2 of section 17 of the Bankruptcy Act a discharge of the bankrupt herein would not operate to relieve him from liability on the debt due to Nelson, because of the provision that such a discharge shall not operate as a release as to "liabilities for obtaining property by false pretenses or false representations," and the referee is of the opinion that because of this provision the creditor will not now be heard in opposition to a general discharge of the debtor; in other words, that such creditor is not a "party in interest" entitled to oppose a discharge in bankruptcy (section 14b), that "section 14 of the Bankruptcy Act is modified by the provisions of section 17," and that, in consequence, "those creditors or parties in interest whose claims would not be released by a discharge have no right to oppose the same." Some cases are cited in support of this view. In re Servis (D. C.) 140 Fed. 222; In re Gara (D. C.) 190 Fed. 112. To which might be added In re Maples (D. C.) 105 Fed. 919, and In re Main (D. C.) 205 Fed.

421. And it is also true that the matter has been determined adversely by other courts. In *re Reed* (D. C.) 191 Fed. 920, 931; In *re Mezzin* (D. C.) 233 Fed. 333; In *re Lewis* (D. C.) 163 Fed. 137.

The conclusion of the referee, however, seems to overlook the essentially penal provision of section 14b, respecting a denial of general discharge from debts. If Congress had not intended to provide a general penalty for the obtaining of "money or property on credit upon a materially false statement in writing" made "for the purpose of obtaining credit"—section 14b (3)—it would not have made the existence of that fact a ground of opposition and a reason for refusing a general discharge. It would have contented itself merely with the provision contained in section 17, *supra*, that a particular liability based on such a circumstance should not be released though a general discharge was granted. To hold, however, that the owner of a provable claim falling in the category above referred to may not voice a successful opposition to the general discharge of the bankrupt, because under section 17 (2), *supra*, his claim is in no event a dischargeable one, is to overlook and put out of consideration the clause of section 14 above referred to. The result inevitably would be that no opposition could ever be considered, if drawn pursuant to that clause of the section. Practically it is to read the Bankruptcy Act as if clause 3 of section 14b were not included therein. This may not, of course, be done under any circumstances, and particularly in view of the fact that clause (3) was added to section 14 by the amendments of 1903. U. S. Comp. Stat. vol. 9, p. 11187. Up to that time no provision existed for opposition to a discharge on the ground considered herein, and no exemption from the operation of a general discharge save as to debts evidenced by "judgments," now "liabilities." Comp. Stat. p. 11239. By the same act of Congress, in 1903, both sections were amended in the particulars mentioned, and with me the conclusion is irresistible that both sections as thus amended are to be given full force and efficacy. In other words, if any part of section 14 is to be considered as "modified," the phrase "party in interest," inserted in 1898, is modified by the amendment of 1903, so that now a creditor, presenting opposition to a discharge based on clause (3) of the section, is to be considered *ex proprio vigore* a "party in interest."

[2] The right to a general discharge of one's debts in bankruptcy is purely statutory, and can be granted or withheld as the legislative department may deem best. Under the present Bankruptcy Act it is granted only under certain conditions, to wit, that the bankrupt has refrained from conducting himself in certain forbidden ways. The proof being that he has so conducted himself in violation of the statute, then he is to be denied a general discharge, and this is entirely unrelated to—or, rather, in addition to—the fact that, even in the face of a general discharge, certain specific obligations are nondischargeable.

[3] The suggestion is indulged in that the opposition herein is not well based, because of the fact that the creditor, Nelson, did not file a claim in the estate. It is difficult to see, however, how this is material. It is the holding of a "provable" claim rather than a "proved" one—section 1 (9), Bankruptcy Act—which constitutes him a creditor of the

bankrupt. Being a creditor, surely he is a "party in interest" as that phrase is used in the act.

Objections made to the report of the referee are sustained, and an order denying the discharge of the bankrupt will be entered.

In re SNOW.

(District Court, D. Massachusetts. April 2, 1915.)

No. 20983.

1. BANKRUPTCY ⚡126—REVIEW OF ELECTION OF TRUSTEE—CONFIRMATION OF FINDINGS OF REFEREE.

On petition to review the election of a trustee in bankruptcy, in the absence of the evidence on which the referee acted in making his decisions as to the rights of certain claims to be voted, the referee's findings of fact as to all the claims must be confirmed.

2. BANKRUPTCY ⚡125—ELECTION OF TRUSTEE—DISCRETION OF REFEREE TO ADJOURN MEETING OF CREDITORS.

The referee in bankruptcy has the discretion to adjourn the first meeting of creditors from time to time, to investigate disputed claims before the voting for trustee is completed.

In Bankruptcy. In the matter of the bankruptcy of William J. Snow. Petition for review of the election of a trustee dismissed, and report of the referee confirmed.

W. Edwin Ulmer, of Boston, Mass., for Gurney Heater Mfg. Co.
Rudolph W. Currier, of Lynn, Mass., in pro. per.

MORTON, District Judge. This is a controversy over the election of a trustee. The errors complained of relate, in substance, to the action of the referee in allowing certain claims to be voted, in disallowing other claims from voting, and in declaring Currier elected trustee.

[1] As to the disputed claims: It appears from the referee's report that material evidence upon which he acted in making his decision concerning the Coburn claim is not before the court. On the other disputed claims, no evidence whatever has been sent up. The referee's findings of fact as to all the claims must be confirmed. His rulings of law upon the Coburn claim were clearly correct. This claim, in addition to those about which no question is now open and which were voted for Currier, was sufficient to elect Currier, even if the Usher and Wright claims had been allowed and had been voted against him. It is therefore not necessary to decide in these proceedings the questions of law concerning those claims.

[2] Upon the facts stated in the report, it does not appear that the referee abused his discretion in the adjournments of the first meeting, which he ordered from time to time for the purpose of investigating disputed claims before the voting for trustee was completed. There is

no evidence before the court on which it can be found that Currier is not a proper person to act as trustee.

The petition for review is dismissed, and the report of the referee is confirmed.

COLUMBUS MERCHANDISE CO. v. KLINE.

(District Court, S. D. Ohio. 1917.)

1. SALES Ⓒ451—**CONDITIONAL SALE CONTRACT—LAW GOVERNING.**

A conditional sale contract for property, which is delivered and to be resold in the same state, is governed by the law of that state.

2. BANKRUPTCY Ⓒ184(2)—**LIENS—CONDITIONAL SALE CONTRACTS—SUFFICIENCY OF RECORD—"THEREON."**

Gen. Code Ohio, § 8568, provides that the condition, in conditional sale contracts retaining title in the seller until the property is paid for, shall be void as to subsequent purchasers and mortgagees in good faith and creditors of the purchaser, unless the conditions are evidenced by writing signed by the purchaser "and also a statement thereon under oath," made by the seller or his agent, of the amount of the claim, and the same, or a copy thereof, be filed with the county recorder of the county where the purchaser resides. The statute contains similar provisions respecting chattel mortgages. Such instruments are not required to be recorded, but merely filed and indexed. At various times during more than two years claimant sold and delivered machinery to bankrupt under separate contracts, taking notes therefor. Such contracts were not filed for record, but a short time before the bankruptcy claimant took seven renewal notes; each being a conditional sale contract and describing the property covered thereby. Its agent made an affidavit on a separate sheet, stating the aggregate amount due on the notes and of the property, as though it was a single transaction. This sheet and the notes were attached together by a brass fastener and filed. *Held* that, under the rule of the Ohio courts requiring strict compliance with the statute, the affidavit, being readily removable from any one or all of the several contracts and giving an opportunity to substitute others, was not indorsed "thereon," as required by the statute, and was insufficient to sustain the seller's claim of prior right to the property as against general creditors of the bankrupt.

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

In Bankruptcy. In the matter of George W. Kline, bankrupt. On review of order of referee denying claim of International Harvester Company of America to certain property. Order confirmed.

Watson, Stouffer, Davis & Gearhart, of Columbus, Ohio, for plaintiff.

O. H. Mosier, of Columbus, Ohio, for International Harvester Co.

SATER, District Judge. The International Harvester Company (hereinafter called the vendor) and the defendant, Kline, as vendee, on October 12, 1912, entered into a contract of conditional sale for certain farming implements which were delivered to the vendee. On October 24, 1913, he gave his note for their price. A series of other like contracts were entered into in the years 1913 and 1914 under each of which like property was delivered to Kline, who was engaged

in the business, inter alia, of selling farming implements, and at the settlement made with him by the vendor, towards the end of each of such years, for goods furnished under each of such contracts, he gave it, conformably to such contract, his promissory note of the ordinary form for all unsold goods received by him under it. Each of the contracts contained the provision that:

"The title to, and ownership of, all goods which may be shipped under the terms of this contract, shall remain in and their proceeds (in case of sale) shall be the property of International Harvester Company of America, and subject to the order of said company until full payment shall have been made by the purchaser to said company for said goods or of any notes taken for the purchase price thereof, but nothing in this clause shall release the purchaser from making payments as above stipulated."

No affidavit was entered on any of said contracts, nor were any of them ever filed for record in the office of the county recorder of Hocking county, Ohio, in which county Kline resided. On January 9, 1915, seven other notes were given by Kline to the vendor in alleged renewal of those hereinbefore mentioned. Each of such renewal notes specified the property for which it was given and related to and was for a separate contract or shipment, and contained this provision:

"This note is given for [here follows a description of the property sold]. I agree that the title thereto, and to all repairs and extra parts furnished, shall remain in said company, its successors and assigns, until this and all other notes given for the purchase price shall have been paid in money. If I fail to pay this note when due, or if said property is misused or seized for my debts, the holder of this note may seize and sell the same at public or private sale, with or without notice, pay all expenses thereby incurred, and apply the net proceeds upon this note and other notes given for the purchase price thereof, whether due or not due, and retain all payments before made as rent for the use of said property. I expressly agree to pay any balance on this note remaining unpaid after such property is sold, or if the same be burned or otherwise damaged or destroyed after its delivery to me."

On January 29, 1915, an agent of the vendor duly subscribed and swore to a typewritten affidavit before a notary public, which recites:

"That Exhibits A, B, C, D, E, F, and G, hereto attached, are true and correct copies of seven certain notes executed and delivered to said corporation, evidencing the conditional sale by said corporation as the vendor of the following described property:

"5 No. 1 cream harvesters.

"5 I. H. C. spreaders.

"8 8-8, 6 9-7, and 2 10-7 Empire Jr. grain drills.

"1 6-ft. McCormick binder.

"16 Peg. Sec. 1-2 in. teeth, 1 riding and 1 walking cultivator.

"1 S-D 9-ft. rake.

"1 Hoosier alfalfa seeder.

"3 in. oil, 1-3¼ oil wet wagons, 1-3 in. and 2-3¼ Cols. wagons

—to the maker of said notes. That of the amount, specified to be paid for said property, there is unpaid the said vendor the sum of two thousand six hundred ninety-three and ⁹⁰/₁₀₀ dollars (\$2,693.90) and interest as specified therein."

Copies of such seven purported renewal notes, with the above mentioned affidavit attached to them as an entire lot by a McGill brass fastener, were filed with the recorder of Hocking county on January 30th. On March 12th following the American Wire & Steel Company

obtained a judgment against Kline for \$2,136.68. On April 3d, the Livingston Seed Company took judgment against him for \$188. On April 9th executions issued on such judgments and the sheriff levied on that day on the bankrupt's property and closed his place of business. On April 15th at 11:15 a. m., an involuntary petition in bankruptcy was filed against Kline. Adjudication was had four days later. A trustee was duly elected, and having qualified, took possession of the bankrupt's property and also, in so far as he was able to do, of that mentioned in the renewal notes.

The vendor claims that the sheriff and the attorney of the American Wire & Steel Company released the property named in the notes from the levy made in behalf of such company, but there is no claim of a release of the levy made by the Livingston Seed Company. The vendor further claims by reason of the filing of its so-called renewal notes that its rights were preserved and that it is entitled as owner to the goods delivered by it to Kline. It obtained possession of a portion of the property and still retains the same, its contention being that possession was taken on the morning of April 15th before the petition in bankruptcy was filed.

The validity of such taking and the claim of release by the sheriff are disputed by the trustee in bankruptcy, one of the grounds being that in bankruptcy fractions of a day are disregarded, which point need not be decided. The trustee also petitioned to preserve the lien of the judgments and execution levies for the benefit of Kline's general creditors. His prayer in that behalf was sustained by the referee, who further found that as to certain property mentioned in the renewal notes the trustee was entitled to possession and also to a considerable amount of the property of which the vendor took charge on the day the petition in bankruptcy was filed, the reasons for which need not be here stated. The vendor seeks a review of the referee's order, except as to certain undelivered property which it was permitted to retain.

Each of the so-called renewal notes is a contract of conditional sale as regards the property mentioned in it, was manifestly intended to supersede the original contract in which such property is specified, and embraces terms not found in the original contract. Were such notes verified and filed as required by law?

[1, 2] As the property was delivered in Ohio, for sale in that state, the Ohio statute as to conditional sales controls. *Title Guaranty Co. v. Witmire*, 195 Fed. 41, 43, 115 C. C. A. 43; *Potter Mfg. Co. v. Arthur*, 220 Fed. 843, 845, 136 C. C. A. 589, Ann. Cas. 1916A, 1268. Section 8568, G. C. of Ohio, provides that the condition in a contract of sale of personal property that the title to such property shall remain in the vendor until the property shall have been paid for, shall be void as to all subsequent purchasers and mortgagees in good faith and creditors—

"unless the conditions are evidenced by writing, signed by the purchaser * * * and also a statement thereon [i. e., on the contract], under oath, made, by the person selling * * * the property, his agent or attorney, of the amount of the claim, or a true copy thereof, with an affidavit that it is a copy, be deposited with the county recorder of the county where the person

signing the instrument resides at the time of its execution, if a resident of the state, and if not such resident, then with the county recorder of the county in which the property is situated at the time of the execution of the instrument."

Section 8564, relating to chattel mortgages, directs that:

"The mortgagee, his agent, or attorney, before the instrument is filed, must state thereon, under oath, the amount of the claim, and that it is just and unpaid, if given to secure the payment of a sum of money only," etc.

On account of the similarity of statutory provisions touching chattel mortgages and contracts of conditional sale, decisions touching the original filing of the one are applicable to the original filing of the other. *Hamilton v. David C. Beggs Co.* (C. C.) 179 Fed. 949, approved in *Cincinnati Equipment Co. v. Degnan*, 184 Fed. 834, 842, 107 C. C. A. 158. The state Supreme Court has never, in so far as diligent counsel and myself have been able to discover, been called upon expressly to decide whether a chattel mortgage or a contract of conditional sale, which has been filed with the proper recording officer, having no affidavit made thereon, but merely an affidavit on a separate sheet attached thereto by fasteners, as in the present case, is valid as against the vendee's creditors; but in several instances in opinions and syllabi (which in Ohio state the law of the case) are utterances that in the case of chattel mortgages the affidavit must be on the mortgage itself. *Blandy v. Benedict*, 42 Ohio St. 295, 297, 298; *Benedict v. Peters*, 58 Ohio St. 527, 51 N. E. 37; *Hanes v. Tiffany*, 25 Ohio St. 549; *Cross, Trustee, v. Carstens*, 49 Ohio St. 548, 574, 31 N. E. 506; *Ashley v. Wright*, 19 Ohio St. 291; *Gardiner v. Parmelee*, 31 Ohio St. 551; *Voss v. Murray*, 50 Ohio St. 19, 32 N. E. 1112; *Boyer v. Knowlton Co.*, 85 Ohio St. 104, 113, 97 N. E. 137, 38 L. R. A. (N. S.) 224. The intermediate and trial courts have expressed themselves to the same effect. See *National Cash Register Co. v. Closs*, 32 Ohio Cir. Ct. R. 649 (12 N. S. 15); *Engleright v. Annesser*, 10 O. C. D. 406; *Id.*, 19 Ohio Cir. Ct. R. 73, 75, 76; *National Cash Register Co. v. Friedlander*, 4 Ohio Dec. 347 (7 N. P. 170, 171); *Re Merling*, 5 Ohio S. & C. P. Dec. 390 (1 N. P. 35, 37).

The rule of strict compliance to preserve the priority of the chattel mortgagee or the vendor who makes a conditional sale obtains. *Benedict v. Peters*, supra; *Boyer v. Knowlton Co.* supra; *Boyer v. Howland*, 31 Ohio Cir. Ct. R. 139 (11 N. S. 564, 568); *National Cash Register Co. v. Closs*, supra; *Engleright v. Annesser*, supra; *Whitaker v. Westfall*, 1 O. C. D. 509; *Id.*, 2 Ohio Cir. Ct. R. 321, 322, 323. In *National Cash Register Co. v. Closs*, supra, it was expressly ruled that a contract of conditional sale which has been filed, but which bears no affidavit other than one written upon a separate sheet of paper and attached to such contract, is insufficient and not in compliance with the statutory requirement. The manner of attachment in that case is not stated. The same court, but differently constituted as to its majority, overruled the *Closs* Case in *Oglesby v. National Box Board Co.*, 25 Ohio Cir. Ct. R. N. S. 61, and held that the attachment of an affidavit on a separate sheet by brass fasteners to the contract was sufficient,

relying on *Norman v. Shepherd*, 38 Ohio St. 320. An examination of the *Norman Case*, however, differentiates it, in my judgment, from the *Oglesby Case*. In the *Norman Case* the court found that the mortgage was so written that no fraudulent use could be made of it without actual forgery, and that the crime could be as easily perpetrated by writing a whole mortgage as the half of one. It further held that there is no Ohio rule requiring a deed or a mortgage (i. e., the body of such instrument) to be written entirely upon one sheet of paper. The statutory requirement (section 8510) that the certificate of the officer taking the acknowledgment of a deed, lease or mortgage shall be "on the same sheet" on which the instrument is printed or written was said to have no application to the case then under consideration and that such case was distinguishable from *Winkler v. Higgins*, 9 Ohio St. 599, in which a deed was held not to be executed according to law because the acknowledgment thereof was on a separate sheet of paper and attached to the deed by a wafer. The statute fixes the place on which the oath to a chattel mortgage or contract of conditional sale is to be located, just as it determines the place for locating the certificate of acknowledgment to a deed, lease or mortgage. The location designated in each instance is on the instrument itself. If an affidavit on a separate sheet be so securely attached to a chattel mortgage or contract, by means of some adhesive substance or otherwise, that its removal would result in the mutilation of the instrument, or leave behind sufficient evidence that the instrument had been tampered with, I doubt not but that such instrument, when properly filed, would be held sufficient.

As neither the *Closs* nor the *Oglesby Cases* are binding on a federal court, because not decided by the state's highest judicial tribunal, this court is at liberty to adopt its own views, and is inclined to believe that the right result was attained in the *Closs Case*, unless the affidavit was so affixed that it could not be removed without leaving behind proof that the instrument as originally filed had been tampered with. To hold that the affidavit to a chattel mortgage or a contract of conditional sale of personalty need not be on the instrument, and that it may be merely fastened thereto in an easily removable manner or in any manner which will not afford evidence of removal, if its detachment be made, is to hold that the syllabi of such cases as *Blandy v. Benedict*, *Benedict v. Peters*, and *Hanes v. Tiffany* are mere dicta. Note also the language of *Cross v. Carstens* and *Voss v. Murray*. A federal court, in view of such repeated announcements, may well assume, until the Supreme Court has modified the same, that such utterances correctly state the Ohio law. The rule thus announced does not militate against the modern use of the typewriter in the preparation of legal instruments, for the reason that the pages of such instruments may be so fastened or pasted together as to be nondetachable and the affidavit may still be written thereon, or, like the acknowledgment to a deed, be made an integral part thereof. Unless some such method be pursued, if an instrument of the character in question be inclosed in a cover and the county recorder enters the date of filing on such cover; the removal of one or more pages and the

substitution of others in their stead is not a difficult matter, especially in view of the fact that such instruments may be temporarily withdrawn from the files. *Stevenson v. Colopy*, 48 Ohio St. 237, 27 N. E. 296. As the law is satisfied by the mere appropriate filing of a duly verified chattel mortgage and contract of conditional sale and does not require their recording, the opportunity for making alterations in such instruments is greater than in the case of deeds, mortgages, and leases whose recording is required.

The Ohio statute is exacting as to the location of affidavits and acknowledgments on the instruments requiring the same, and the safeguards against fraud which the statute has thrown about them have been scrupulously preserved by the Supreme Court, as I interpret its decisions. As the vendor cannot for other reasons prevail, it is not necessary, however, for the purposes of this case, to determine which of the opposing conclusions reached in the *Closs* and the *Oglesby Cases* respectively is correct. In each of those cases, and in every reported case that has come under my observation, there has been but one chattel mortgage or contract of conditional sale concerned. In this case seven separate contracts (each note being a contract of conditional sale), with an affidavit on a separate sheet, are all held together by an easily removable brass fastener. The goods for which the respective notes or contracts were executed were furnished at different times under distinct sales and under different original contracts. The date on which the goods were delivered whose price is represented by any given note is not stated in such note. The affidavit recites that the notes evidence "the conditional sale (not conditional sales) * * * of the following described property." It does not show that each note represents the value of goods contained in a separate shipment made in pursuance of a distinct contract entered into on a given date, or that there were, as the fact is, as many contracts and shipments as there are notes. It does not contain a statement of what goods were delivered at any one time or what amount is due on any note for goods so delivered. The amount due on the seven contracts (notes) is stated in the aggregate and as if such amount represents a single transaction. The affidavit, fairly interpreted, means that the goods were all shipped at one time and represent a single sale, and consequently does not speak the truth.

The vendor was compelled to resort to extrinsic evidence, written and parol, to show when the goods were delivered for which the notes were executed—some being delivered in 1913, others in 1914, and still others in 1915. The date of maturity of the remaining notes is not stated. The statute characterizes as an instrument every deed, mortgage, lease (section 8510), chattel mortgage (sections 8562, 8563, 8564), and every contract for the conditional sale of personal property (sections 8568, 8569, 8571). Each contract of conditional sale, as well as each of such other instruments of whatever kind, is treated as a distinct and separate entity. The law contemplates that it shall be complete within itself. In this connection it may be noted that sections 8562 and 8569 require the county recorder to indorse on each chattel mortgage and contract of conditional sale the date on which

it was filed, which indorsement, if a certified copy of the instrument be made, must appear in such copy (section 8571).

The law intends that every instrument belonging to either of such classes shall speak the truth and fix with all reasonable certainty the rights of the parties to it. If, in the instant case, any one or more of the notes in question should be paid, the vendee would at once be entitled to have the same delivered to him; but this would involve the unfastening and opening up of the package of notes for the removal of the note or notes which have been satisfied, and a refastening together of those remaining—a procedure not contemplated by the statute—after which the affidavit, in whatever aspect viewed, would cease to represent the amount claimed to be due. If the satisfied note or notes be not delivered to the vendee and should the property mentioned therein remain in his possession, he would, as to prudent purchasers, be obstructed in its sale, although the title thereto would have fully passed to him; and his creditors, relying on the disclosures made by the notes and affidavit, might be hindered and delayed and perhaps entirely defeated in the collection of their just claims. Should any note not be paid at maturity, the right to sue thereon as an independent cause of action would at once arise. The vendor would not, however, be able to prove compliance with the law and maintain his right to the property described in such note as against any subsequent purchaser or mortgagee in good faith, or as against any creditor, because the affidavit neither states the amount of such note nor does it correctly or specifically set forth the property for which such note was given. Parol evidence would be necessary to establish the relations of the vendor and vendee and the nature of the transaction between them, but this is not permissible, nor was the statute framed to meet contingencies such as are above enumerated. The rule stated in *Benedict v. Peters* as to chattel mortgages is applicable. It is said (58 Ohio St. at pages 534 and 535, 51 N. E. at pages 37, 38):

“The statement required by this section to be made under oath by the mortgagee on the mortgage, as to the amount of his claim and that it is just and unpaid, is vital to the spirit of the statute in the light of the mischief it was intended to prevent. It subjects the conscience of the party to the severe test of an oath as to the amount and justice of his claim to be secured by the mortgage. * * * All that is required to make it a mortgage as against creditors must appear upon the instrument filed as such. It cannot be helped out by parol.”

Gardiner v. Parmalee, 31 Ohio St. 551, cannot be rightfully claimed as an authority favorable to the vendor, because the affidavit in that case related to but one mortgage in which the notes were fully described. The statement of the amount due in the affidavit coincided with the amount shown in the mortgage.

If the claim of the vendor may be upheld, a person may, in his dealings with another, accumulate any number of chattel mortgages or contracts of conditional sale of personal property, no two of which relate to the same transaction, bear the same date, describe the same property, or designate the same amount as due, and withhold them at his pleasure from the files of the county recorder and at his conven-

ience make oath as to them all on a separate sheet of paper, fasten such oath and the instruments together into a single package, and preserve his rights as to each of such instruments by filing the package as an entirety. What entry or entries the county recorder would make on the index which he is required to keep under section 8562 is not apparent. If he should index the instruments separately, the affidavit will not meet the statutory requirements of any one of them. To index them as a single instrument is to disregard the obvious fact disclosed by the package itself that there has been filed with him not a single instrument, but a number of instruments.

The vendor's claim of prior right to the property by virtue of its contracts (notes) cannot be sustained. The referee is affirmed.

GENERAL INV. CO. v. BETHLEHEM STEEL CORP. et al.

(District Court, D. New Jersey. February 6, 1918.)

1. CORPORATIONS ⇨382—CERTIFICATES OF INCORPORATION—STATEMENT OF OBJECTS—NATURE.

A certificate of incorporation, containing a statement of the objects of the corporation, is a limitation of the purposes to which the incorporators, as between themselves, have agreed that the joint capital shall be devoted.

2. CORPORATIONS ⇨196—RESOLUTIONS—VALIDITY—STOCKHOLDERS VOTING.

The question whether the requisite number of qualified stockholders were present and affirmatively voted for a resolution is one of fact, and, where the resolution was adopted by the requisite number, it is not subject to attack on the ground that it was not passed at a legally constituted meeting of the stockholders, because the inspectors of election failed to examine the books, to determine whether the persons voting were registered stockholders.

3. CORPORATIONS ⇨370(3)—POWERS—CHARTERS.

A corporation possesses only such powers as have been expressly conferred by its charter or certificate of incorporation, or such as are necessary for carrying such powers into effect; but those powers arising by implication are as much within the grant as those clearly expressed.

4. CORPORATIONS ⇨374—POWERS—IMPLIED POWERS—"NECESSARY."

In determining whether powers are implied as necessary to those granted to a corporation, the word "necessary" should not be defined as indispensable, but as including those powers suitable and proper for carrying into execution the ones granted.

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

5. CORPORATIONS ⇨484(3)—POWERS—EXECUTION OF CONTRACTS OF GUARANTY.

A corporation organized under the New Jersey Corporation Act (P. L. 1896, p. 277), which in sections 2, 7, 49, and 51 authorized corporations to exercise all the powers and privileges contained in the act, in addition to those enumerated in their certificates of incorporation, so far as the same are necessary or convenient to the attainment of the objects set forth in such certificates, and empowered corporations to purchase, sell, pledge, or otherwise dispose of the shares of stock of other companies, was under its certificate of incorporation empowered to acquire the capital stock of corporations engaged in any of the businesses mentioned in the certificate, which included steel and coke business, to aid in any manner any corporation whose stocks it owned, and to borrow money and issue obligations for moneys borrowed. *Held*, that such corporation,

which owned the stock of a subsidiary steel company, had implied authority to guarantee bonds issued to take up a note given in payment for property of a coke company, whose property was acquired for the benefit of the steel company, and to furnish it with a supply of coke and gas, for the corporation might have advanced the money for the purchase.

6. CORPORATIONS ⇨297—AUTHORITY OF DIRECTORS—INTRA VIRES TRANSACTIONS.

In view of Corporation Act N. J. § 12, vesting the management of corporate affairs in a board of directors, the propriety of the directors' action as to an intra vires matter is, in the absence of fraud or breach of trust, exclusively a question for the directorate.

7. CORPORATIONS ⇨484(3)—CONTRACTS OF GUARANTY—AUTHORITY TO EXECUTE.

Corporation Act N. J. § 6, as amended by Act March 26, 1907 (P. L. p. 35), declaring that incorporations are authorized for any lawful purpose whatever, excepting insurance and surety companies, is not an inhibition on the authority of a corporation organized under the act to guarantee bonds issued by one of its subsidiaries; the purpose of the section being merely to prevent insurance and surety companies from incorporating under the act.

In Equity. Bill by the General Investment Company against the Bethlehem Steel Corporation and others. On petition for preliminary injunction. Writ denied.

McCarter & English, of Newark, N. J. (Elijah N. Zoline, of New York City, and Robt. H. McCarter and Arthur F. Egner, both of Newark, N. J., of counsel), for complainant.

Pitney, Hardin & Skinner, of Newark N. J. (John R. Hardin, of Newark, N. J., of counsel), for defendant Bethlehem Steel Corp.

RELLSTAB, District Judge. The complainant, a Maine corporation, is a holder of common stock of the Bethlehem Steel Corporation, a New Jersey corporation. The general purposes of the bill, as stated by complainant's counsel, are:

"To enjoin the Bethlehem Steel Corporation from guaranteeing the bonds and obligations of other corporations and mortgaging its property to secure such guaranties and the debts of other corporations, on the ground that the corporation has no authority to do the things complained of; also, to declare invalid the guaranty by the defendant Bethlehem Steel Corporation of the bonds of the Eastern Coke Company, which have been purchased by the defendants Mellon National Bank and Union Trust Company, of Pittsburgh."

The present application (on an order to show cause) is for a preliminary injunction to restrain the Bethlehem Steel Corporation (hereinafter called the Bethlehem Corporation) from guaranteeing the obligations of any other corporation, under its resolution passed by the stockholders of that company on April 3, 1917, and was heard on bill, answer, and affidavits. This resolution, as will presently appear, is not the one under which the guaranty of the Eastern Coke Company's bonds was made, which was passed previously, to wit, March 21, 1917, and which is set forth at length in a subsequent part of this opinion; but, as the attack of the bill is not limited to this specific guaranty, so much of that resolution as relates to guaranties of the

bonds of other corporations, or indicates proposed corporate action in respect to such bonds, is here set forth:

"Resolved, that the stockholders of Bethlehem Steel Corporation do hereby consent that said corporation mortgage and pledge the property, rights, privileges and franchises now owned by it or which it may hereafter acquire, or such part thereof as its board of directors may determine and as shall be described and specified in the mortgage or mortgages or deed or deeds of trust or instrument or instruments of pledge by which said mortgage and pledge shall be created, or as shall be subjected thereto in accordance with provisions therein contained, for any or all of the following purposes as said board of directors may, in its discretion, determine:

(a) To secure the payment of the principal and interest of bonds or other obligations of said corporation;

(b) To secure the payment of bonds or other obligations of subsidiary companies, now outstanding or hereafter issued and for the payment of which said corporation is now or may hereafter become liable; and

(c) To secure the guaranty by said corporation of the principal and interest, or both, of bonds or other obligations of any subsidiary company or companies: Provided, however, that the aggregate principal amount of bonds or other obligations the payment of which or the guaranty of the payment of which shall be secured by said mortgage and pledge (including bonds and other obligations issued or reserved for issue to pay off or retire existing bonds or other obligations of the corporation or of subsidiary companies) shall not exceed at any one time \$200,000,000 or an amount equal to twice the aggregate amount of the capital stock of said corporation of all classes at the time outstanding, whichever shall be the larger amount; and provided, further, that said aggregate principal amount of bonds or other obligations, secured and to be secured as aforesaid shall not exceed in any event at any one time \$200,000,000 without the consent of the holders of two-thirds of the capital stock of said corporation of each class having voting powers represented and voted upon in person or by proxy at a meeting specially called for the purpose of procuring such consent, or, if such purpose be specified in the notice thereof, then at any annual meeting."

[1] The Bethlehem Corporation was incorporated about December 10, 1904, under the New Jersey act concerning corporations (Rev. 1896) P. L. 1896, p. 277, and the acts supplementary thereto and amendatory thereof, and in the third section of its certificate of incorporation, as amended about February 17, 1917, the objects of the corporation are stated to be:

"To manufacture, buy, sell, or otherwise deal or traffic in iron, steel, manganese, nickel, copper, coal, coke, lumber, and other metals, minerals, or materials, and all or any products or articles, consisting or partly consisting of iron, steel, manganese, nickel, copper, coal, coke, lumber, or other metals, minerals or materials. To acquire, own, lease, occupy, use, develop, or deal in any lands containing coal, iron, manganese, nickel, copper, stone, or other ores or minerals, gas or oil, and in woodlands or other lands, and to mine or otherwise extract or to remove coal, ores, stone, timber, gas, oil, or other minerals, materials, or substances from any lands. To construct or purchase, or otherwise acquire, buildings, machinery, engines, apparatus, locomotives, cars, railroad equipment, railroads, docks, ships, elevators, water works, gas works, electric works, bridges, viaducts, aqueducts, canals, and any other waterways, and any other means of transportation, and to sell or otherwise dispose thereof, or to maintain or operate the same, except that the corporation shall not maintain or operate any railroad or canal within the state of New Jersey. To manufacture, buy, sell, or otherwise deal or traffic in ordnance, large and small arms, armor, armor plate, explosives, munitions, and stores of war, and military, naval, maritime, marine, and submarine materials, substances, appliances, engines, articles, and contrivances of any and every sort. To design, build, construct, repair, operate, maintain, buy, sell,

charter, or otherwise manage, deal, or traffic in ships, boats, and vessels of all kinds, and their equipment, furnishings, and appurtenances, armor and armament, boilers, engines, tackle, and apparel, together with all materials, articles, tools, machinery, docks, and appliances entering into or suitable and convenient for the construction, equipment, maintenance, or operation thereof. To transport goods, merchandise, and passengers upon land or water, to own, operate, and maintain steamship lines, vessel or other lines, for water transportation. To construct, purchase, lease, or otherwise acquire, maintain, operate, or use wharves, warehouses, piers, docks, dry docks, floating docks, and all other structures, buildings, or works. To apply for, obtain, register, purchase, lease, or otherwise to acquire, and to hold, use, own, exercise, develop, operate, and introduce, and to sell, assign, grant licenses in respect of, or otherwise dispose of, any trade-marks, trade-names, patents, or inventions, improvements, or processes used in connection with or secured under letters patent of the United States or elsewhere, or otherwise, in relation to any of the other purposes herein stated, and to acquire, use, exercise, or otherwise turn to gain licenses in respect of any such trade-marks, patents, inventions, processes, and the like, or any such property or rights. To engage in any manufacturing, mining, construction, transportation, or other business connected with any of the purposes herein stated, but not to engage in any business hereunder which shall require the exercise of the right of eminent domain within the state of New Jersey. To act as financial, commercial, or general agent for other corporations engaged in business similar or allied to that of this corporation, or in any business in which any product of this corporation is employed, or in the production of anything used in the business of this corporation. To enter into any contracts or arrangements with any government or authority, national, state, municipal, local, or otherwise, conducive to the other purposes herein stated, and to obtain from any such government or authority any and all rights, privileges, grants, or concessions relating to any of the objects herein stated. To carry out, exercise, comply with, and enforce any such contracts, rights, privileges, and concessions. To subscribe for, acquire, invest in, sell, or dispose of any bonds, securities, or obligations of any nature issued by any such government or authority, or guaranteed thereby. To acquire by purchase, subscription, or otherwise, and to invest in, hold, or dispose of stocks, bonds, securities, or other obligations of any other corporation or corporations, domestic or foreign, formed for, or then or theretofore engaged in, any one or more of the kinds of business, purposes, objects, or operations herein stated, or owning or holding or producing any property of any kind herein mentioned, or of any corporation owning or holding the stocks or obligations of any such corporation, and while owner of any such stocks, bonds, securities, or other obligations to exercise all the rights, powers, and privileges of ownership, including the right to vote thereon for any and all purposes. To aid in any manner any corporation whose stock, bonds, or other obligations are owned or held by it, or in which, or in the stocks, bonds, securities or other obligations of which, it is in any way interested, and to do any other acts or things for the preservation, protection, improvement, or enhancement of the value of any such stocks, bonds, securities, or obligations. To borrow money. To issue bonds, debentures, or obligations of the corporation from time to time, for moneys borrowed or in payment for property purchased, or for any of the other objects or purposes of the corporation. To secure the same by mortgage or mortgages or deed or deeds of trust upon, or pledge of any or all of the property, rights, privileges, or franchises of the corporation, wheresoever situated, acquired or to be acquired, and to sell or otherwise dispose of any or all such bonds, debentures and obligations: Provided that no such mortgage or pledge shall be made without the consent of the holders of two-thirds of the capital stock of the corporation of each class having voting powers represented and voted upon in person or by proxy at a meeting specially called for the purpose of procuring such consent, or, if such purpose be specified in the notice thereof, then at any annual meeting; but no approval of stockholders shall be requisite in respect of the execution of any purchase-money mortgage or any other purchase-money lien, or in respect of any pledge of assets in the ordinary course and conduct of the business of the corporation. To conduct its business in all or any of its

branches in the state of New Jersey and in other states of the United States of America, and in the territories and the District of Columbia, and in any or all dependencies, colonies, or possessions of the United States of America, and in foreign countries, and for or in connection with such business, to hold, possess, purchase, mortgage, and convey real and personal property and to maintain offices and agencies either within or anywhere without the state of New Jersey. In general, to do any and all things, and exercise any and all powers, which it might now or hereafter be lawful for the corporation to do or exercise under and in pursuance of the act of the state of New Jersey under which the corporation is incorporated, or any act amendatory thereof or supplemental thereto that may be now or hereafter in force, or any other act that may be now or hereafter applicable to the corporation. The board of directors shall have plenary power and discretion to sell, lease, or otherwise dispose of, from time to time, any part or parts of the properties of the corporation, and to cease to conduct the business connected therewith or again to resume the same, as it may deem best."

This statement of objects is "a limitation of the purposes to which the incorporators as between themselves have agreed that the joint capital shall be devoted." *Colgate v. United States Leather Co.* (E. & A.) 75 N. J. Eq. 229, 236, 72 Atl. 126, 19 Ann. Cas. 1262.

[2] The first contention is that the resolution was not properly passed at a legally constituted meeting of the stockholders. The alleged infirmity in this respect is said to be that the inspectors of election, acting at such meeting, did not examine the stockbooks to ascertain whether the persons voting were registered stockholders. No law is referred to as requiring such an examination. Whether the requisite number of qualified stockholders were present and affirmatively voting for said resolution is a question of fact. The affidavits used on the hearing hereof show that there were present, and affirmatively voting for the passage of the resolution, the requisite number of registered stockholders. Therefore this contention is without merit.

The remaining contention, and the one mainly pressed on the argument and in the briefs, is that the Bethlehem Corporation has no power to guarantee the obligations of other corporations. The Bethlehem Corporation is not an operating company. It holds the capital stock, other than directors' shares, of other corporations which are authorized to engage in, and which carry on, one or more of the objects mentioned in its certificate of incorporation. Some of these corporations also hold the capital stock of other corporations, which also are authorized to, and do, engage in one or more of those objects. The largest of these corporations, whose stocks are held by the Bethlehem Corporation, is the Bethlehem Steel Company, a Pennsylvania corporation (hereinafter called the Bethlehem Company). The stock so held by the Bethlehem Corporation is its trading capital.

Prior to the events now to be stated, in carrying out the objects of its incorporation, the Bethlehem Company obtained coke and gas from the Lehigh Coke Company (hereinafter called the Lehigh Company). On February 9, 1917, the Bethlehem Company, to be assured of a continuance of the supply of coke and gas from such source, purchased from the Pittsburgh By-Products Coke Company all the capital stock of the Lehigh Company for the sum of \$8,000,000, of which \$7,000,000 was represented by the Bethlehem Company's promissory note,

payable May 7, 1917. The payment of this note was secured by a pledge of all the capital stock so purchased.

The Bethlehem Company, deeming it unwise to pay that promissory note out of its cash working capital, proposed to exchange therefor 14-year 5 per cent bonds, aggregating a like sum, to be issued by a new coke company to be organized to acquire the properties of the Lehigh Company. This offer was accepted by the defendant Union Trust Company of Pittsburgh, the then holder of the promissory note, upon the condition that the payment of the bonds, principal and interest, should be guaranteed by both the Bethlehem Company and the Bethlehem Corporation. This condition was agreed to by the latter two companies.

On February 23, 1917, the Bethlehem Company organized the Eastern Coke Company under the laws of Pennsylvania (hereinafter called the Eastern Company), to which the Lehigh Company conveyed all of its properties. All the capital stock of the Eastern Company, except directors' shares, was taken and is held by the Bethlehem Company. Subsequently, the \$7,000,000 14-year bonds referred to, and secured by a mortgage on its properties so acquired from the Lehigh Company, were issued by the Eastern Company and became the property of the Bethlehem Company in distribution upon a reduction of the capital stock of the Lehigh Company. Thereupon the Bethlehem Company and the Bethlehem Corporation respectively indorsed their guaranties upon the bonds, and on April 20, 1917, the same were delivered to the defendant Union Trust Company of Pittsburgh, in exchange for the promissory note referred to. The guaranty by the Bethlehem Corporation was made under the authority of a resolution passed by its directors on March 21, 1917, of which the following is a copy:

"Whereas, this corporation is, and for many years past has been, the owner of all of the shares of stock of Bethlehem Steel Company, hereinafter termed the 'Steel Company' (except directors' qualifying shares), and the Steel Company in the conduct of its manufacturing business has received a large part of its supply of coke and of gas from the by-products coking plant formerly of Lehigh Coke Company, situate at South Bethlehem, Pa., contiguous to the properties of the Steel Company, the said plant having been constructed primarily for the purpose of supplying coke and gas to the Steel Company; and

"Whereas, the Steel Company has deemed it advantageous and essential in the proper conduct of its business that it acquire the entire control of the management and operation of said by-product coking plant, and for that purpose has purchased the entire capital stock of said Lehigh Coke Company, and, in order to make part payment therefor, borrowed upon its short time collateral promissory note the sum of seven million dollars (\$7,000,000), which obligation the Steel Company and this corporation are, each of them, desirous shall be promptly paid and the indebtedness evidenced thereby funded so that the same may be made payable over a series of years; and

"Whereas, the Steel Company has caused or is about to cause said coking plant to be sold and transferred to said Eastern Coke Company, of which it owns all of the outstanding capital stock, in consideration whereof the Steel Company will acquire seven million dollars (\$7,000,000) of the first mortgage five per cent. fourteen-year sinking fund gold bonds of Eastern Coke Company, secured by mortgage upon the properties and assets of said Eastern Coke Company, and the Steel Company has arranged with the holder of said collateral promissory note to accept payment of said note by the delivery to such holder on or before May 7, 1917, of said seven million dollars (\$7,000,000) of first mortgage five per cent. fourteen-year sinking fund gold

bonds of Eastern Coke Company, on condition, however, that the payment of the principal thereof and interest thereon shall be guaranteed by the Steel Company and by this corporation; and

"Whereas, the board of directors of this corporation deems it advisable that payment of said indebtedness of seven million dollars (\$7,000,000) now owing by the Steel Company be provided for, and that the arrangement proposed by the Steel Company is an advantageous one and to the best interest of the Steel Company and of this corporation; and

"Whereas, the form of said bonds and of the mortgage securing the same, and, as well, the form of guaranty to be executed by the Steel Company, and by this corporation have been duly submitted to and considered by this board:

"Resolved, that, in order to provide for the payment of seven million dollars (\$7,000,000) owing by the Bethlehem Steel Company, and to aid said company advantageously to sell and dispose of said seven million dollars (\$7,000,000) first mortgage five per cent. fourteen-year sinking fund gold bonds of the Eastern Coke Company, this corporation guarantees the punctual payment of the principal and interest of said seven million dollars (\$7,000,000) of bonds.

"Resolved, that the guaranty to be indorsed upon each of the permanent bonds of said issue of seven million dollars (\$7,000,000) of first mortgage five per cent. fourteen-year sinking fund gold bonds of Eastern Coke Company shall be substantially in the following form:

"Guaranty.

"Bethlehem Steel Corporation, a corporation created and existing under the laws of the state of New Jersey, for value received, does hereby guarantee to the holder, or, if registered, to the registered owner, of this bond, the punctual payment of the principal of and interest on said bond, as the same shall become or be made due and payable according to the terms of said bond and of the indenture therein mentioned, dated February 1, 1917, made by Eastern Coke Company to the Union Trust Company of Pittsburgh, as trustee, to secure the same.

"In witness whereof, said Bethlehem Steel Corporation has caused its corporate seal to be hereunto affixed, and to be attested by its secretary or an assistant secretary, and these presents to be signed by its president or a vice president, as of the first day of February, 1917.

"Bethlehem Steel Corporation, by _____.

"Attest: _____.

"Resolved, that the president or one of the vice presidents of this corporation be and hereby they are, severally and respectively, authorized and directed from time to time, as said bonds shall be authenticated by the trustee, to execute said guaranty in the name and on behalf of the Bethlehem Steel Corporation (not exceeding, however, the aggregate principal sum of seven million dollars (\$7,000,000), and that the secretary or one of the assistant secretaries of this corporation be and hereby they are, severally and respectively, authorized and directed, at the same time, to affix to every such guaranty the corporate seal of the Bethlehem Steel Corporation, duly attested by the signature of such secretary or assistant secretary.

"Resolved, that, pending the preparation and execution of the permanent bonds, the officers of this corporation, hereinbefore named, be and hereby they are, severally and respectively, authorized and directed, whenever any temporary bond or bonds issued under said first mortgage of the Eastern Coke Company shall be authenticated by the trustee, to execute on said bonds (not exceeding, however, the aggregate principal sum of seven million dollars [\$7,000,000]), said guaranty, substantially in the form hereinbefore set forth, with appropriate variations, omissions, and additions, in the name of and on behalf of Bethlehem Steel Corporation, and to affix to every such guaranty the corporate seal of Bethlehem Steel Corporation, duly attested by the signature of such secretary or assistant secretary.

"Resolved, that the proper officers of this corporation be and hereby they are authorized and directed to do such other acts and things as may be requisite fully to carry out and perform upon the part of this company the terms and provisions of this resolution."

It is this guaranty by the Bethlehem Corporation that furnishes the basis of the principal attack made by the present bill.

[3, 4] In general, a corporation possesses only such powers as have been expressly conferred by its charter or certificate of incorporation, or by statutes applicable thereto, or such as are necessary for carrying into effect the objects and powers expressly granted. *Green Bay & Minnesota R. R. Co. v. Union Steamboat Co.*, 107 U. S. 98, 100, 2 Sup. Ct. 221, 27 L. Ed. 413; *Penna. R. R. Co. v. St. Louis, Alton & Terre Haute R. R. Co.*, 118 U. S. 290, 308, 6 Sup. Ct. 1094, 30 L. Ed. 83; *State of New Jersey, etc., v. Hancock, Collector, etc. (E. & A.)* 35 N. J. Law, 537; *State of New Jersey v. Atlantic City & Shore R. R. Co. (E. & A.)* 77 N. J. Law, 465, 72 Atl. 111. The powers which are thus necessary arise by implication, and are as much within the grant as those clearly expressed (*Rabe v. Dunlap*, 51 N. J. Eq. 40, 45, 25 Atl. 959; *Tod v. Kentucky Union Land Co.* [C. C.] 57 Fed. 47, 50; *Marbury v. Same*, 62 Fed. 335, 10 C. C. A. 393), and "the word 'necessary' in this connection does not mean 'indispensable.' It embraces all things suitable and proper for carrying into execution the powers granted." *State of New Jersey, etc., v. Hancock, Collector, etc.*, supra.; *Ellerman v. Chicago Junction Rys. & Union Stockyards Co.*, 49 N. J. Eq. 217, 241, 23 Atl. 287; *McCauley v. Ridgewood Trust Co.*, 81 N. J. Law, 86, 91, 79 Atl. 327.

[5] The power to guarantee the bonds of another corporation, whether independent or subsidiary, is not expressly granted to the Bethlehem Corporation by its certificate. Nor is express power to guarantee given by the New Jersey act (P. L. 1896) under which that corporation was organized, nor by any other legislation of that state. However, by this act of 1896 (section 2) corporations are authorized to exercise all the powers and privileges contained in the act, in addition to those enumerated in their certificates of incorporation, "so far as the same are necessary or convenient to the attainment of the objects set forth in such * * * certificate of incorporation." This section further provides that "no corporation shall possess or exercise any other corporate powers, except such incidental powers as shall be necessary to the exercise of the powers so given." By section 6, as amended by P. L. 1907, p. 35, incorporations are authorized "for any lawful purpose * * * whatever," excluding insurance and surety companies and certain other companies carrying on businesses not involved in the present controversy. By section 7 a corporation is authorized to "conduct business, * * * hold, purchase, mortgage and convey real and personal property out of this state [New Jersey], provided such powers are included within the objects set forth in its certificate of incorporation." By section 49 it is empowered to purchase property necessary for its business, or the stock of any company "owning, mining, manufacturing or producing materials, or other property necessary for its business," subject to certain limitations not pertinent to this controversy. By section 51 corporations are empowered to purchase, sell, pledge, or otherwise dispose of "the shares of the capital stock of, or any bonds, securities or evidences of indebtedness creat-

ed by any other corporation * * * and while owner of such stock * * * exercise all the rights, powers and privileges of ownership, including the right to vote thereon."

While some of these sections, notably 49 and 51, have undergone legislative changes since their enactment in 1896 (see N. J. P. L. 1913, pp. 28, 32; 1915, p. 180; 1917, p. 566), yet, so far as affects the power of the Bethlehem Corporation in respect to the acts challenged in this bill, the powers hereinbefore mentioned in substance and legal effect are as stated. As neither the statutes nor the certificate of incorporation expressly authorized the making of a guaranty, the validity of the Bethlehem Corporation's guaranty of the Eastern Company's bonds, here specifically challenged, as well as that corporation's power to guarantee bonds of other of its subsidiaries and their subsidiaries, depends upon whether the same is necessary or convenient to the attainment of one or more of the objects expressly set forth in the Bethlehem Corporation's certificate of incorporation.

Among the numerous objects mentioned in the certificate referred to, it is noted that the Bethlehem Corporation was empowered (a) to acquire the capital stock of other corporations authorized to engage in one or more of the kinds of business, objects, or operations mentioned in its certificate, or of corporations which owned the capital stock of any such corporations; (b) to aid in any manner any corporation whose stocks it owned "or in which or in the stock * * * of which it is in any way interested, and to do any other acts or things for the preservation, protection, improvement or enhancement of the value of any such stocks; * * * (c) to borrow money; * * * to issue obligations * * * for moneys borrowed or in payment for property purchased or for any of the other objects or purposes of the corporation; to secure the same by mortgage * * * upon or pledge of any or all of the property, * * * of the corporation: * * * Provided that no such mortgage or pledge shall be made without the consent of the holders of two-thirds of the capital stock of the corporation of each class having voting powers;" (d) to conduct its business or any part thereof in any of the states of the United States of America, and in connection therewith to purchase, hold, mortgage, and convey real and personal property within or without the state of New Jersey; and (e) in general to do all things lawful under the legislation of New Jersey, now or hereafter in force applicable to that corporation.

If the Bethlehem Corporation, instead of its subsidiary, the Bethlehem Company, had purchased the capital stock of either the Lehigh Company or the Eastern Company, and had issued its own bonds to pay the \$7,000,000 promissory note representing part of the purchase price of the stock, such purchase of stock and issue of bonds would have been clearly within its corporate power; or if, instead of guaranteeing the payment of the Eastern Company's bonds, the Bethlehem Corporation had loaned the \$7,000,000 to the Bethlehem Company and the latter had used it in paying for the stock of the Lehigh Company, such loan unquestionably would have been within the Bethlehem Corporation's powers, for that character of aid is expressly granted. By its guarantee of the Eastern Company's bonds, the Bethlehem Com-

pany avoided the necessity of using its cash working capital, or increasing its indebtedness by borrowing money to meet the greater part of the purchase price of the capital stock of the Lehigh Company; and the Bethlehem Corporation, without using its cash or borrowing powers, was enabled to aid the Bethlehem Company in consummating said purchase, without the use of cash by the latter, and in securing for it an unhampered supply of coke and gas, materials essential to the carrying out of its operations, thereby enhancing the value of the Bethlehem Company's stock which, as already noted, was owned by the Bethlehem Corporation.

[6] As an aid, it was as effective as if the cash had been advanced; and, as a business proposition, it seemingly was a preferable mode of taking care of its purchase, as it deferred the payment of cash for such purpose, thus permitting its use for other objects. But whether it was good business—a matter *intra vires*—is, in the absence of fraud or breach of trust, a question to be determined exclusively by the board of directors. *New Jersey Corporation Act*, *supra*, § 12; *Berger v. United States Steel Corporation*, 63 N. J. Eq. 809, 829, 53 Atl. 68; *Hawes v. Oakland*, 104 U. S. 450, 459, 26 L. Ed. 827; *Wilson v. American Ice Co. (D. C.)* 206 Fed. 736, 743; *United Copper Securities Co. v. Amalgamated Copper Co.*, 244 U. S. 261, 263, 264, 37 Sup. Ct. 509, 61 L. Ed. 1119.

[7] The complainant argues that this guaranty is a surety transaction within the prohibition of section 6 of the *New Jersey Corporation Act*. That section, as already noted, excludes insurance and surety companies from the operation of the act. The legislative purpose there is not to forbid the carrying on of the businesses indicated by the names of the companies excluded, but to prevent insurance and surety companies, and the others named in the excluding provisions of that section, from organizing under that act and from invoking its powers. See *Robotham v. Prudential Insurance Co. of America*, 64 N. J. Eq. 673, 53 Atl. 842; *McCarter, etc., v. Imperial Trustee Co.*, 72 N. J. Law, 42, 60 Atl. 223; *State v. Atlantic City & Shore R. Co.*, 77 N. J. Law, 465, 479, 72 Atl. 111. The Bethlehem Corporation is not an insurance or surety company, and the guaranty under consideration is not insurance or surety, within the contemplation of that section.

The cases cited by complainant, as authorities in support of its further contention that a corporation may not guarantee, unless power to do so has been expressly granted, on examination will be found to deal with guaranties of the obligations of other persons, natural or artificial, for which there was no other warrant than that it aided an independent business enterprise, the successful operation of which would or might inure to the pecuniary benefit of the guarantor. Of such citations the following are typical:

Best Brewing Co. v. Klassen, 185 Ill. 37, 57 N. E. 20, 50 L. R. A. 765, 76 Am. St. Rep. 26, wherein the execution of an appeal bond by a brewing company as surety for the benefit of one of its customers was held *ultra vires*, notwithstanding that some incidental advantage might accrue to the company's business.

Humboldt Min. Co. v. American Mfg., Min. & Milling Co., 62 Fed.

356, 10 C. C. A. 415, wherein a guaranty of performance of another's contract for the erection of a mining plant and accompanying warranties by a company organized to make iron work for mining plants was invalid, though the guarantor by reason of such guaranty, was enabled to sell the iron work used in the plant.

Western Maryland R. Co. v. Blue Ridge Hotel Co., 102 Md. 307, 62 Atl. 351, 2 L. R. A. (N. S.) 887, 111 Am. St. Rep. 362, wherein a guaranty by a railroad company to pay the interest and dividends on the bonds and stock of a hotel company located along the guarantor's line of railway, was held invalid, notwithstanding that the business of the hotel would increase the travel on the railroad, and consequently the receipts of the guarantor.

Davis v. Railroad Co., 131 Mass. 258, 41 Am. Rep. 221, wherein a donation to support a musical festival, upon the well-founded supposition that it would increase the travel on the railroad, was held void, as altogether a too remote benefit.

In none of these cases, or any others brought to the court's attention, were the bonds issued, or the obligations incurred, by a subsidiary of the guarantor, or one of its subsidiaries, nor were the guaranties made pursuant to power expressly conferred on the guarantor to render financial aid to the obligor.

In Ellerman v. Chicago Junction Rys. & Union Stockyards Co., supra, the power of a corporation organized under an earlier New Jersey statute than the one applicable to the Bethlehem Corporation was considered. That statute (Act April 7, 1875 [G. S. N. J. p. 907]) did not expressly authorize corporations to purchase, etc., the shares of stock of other corporations. With reference to such power it was held: First, that a corporation organized thereunder was authorized to include it among the objects specified in its certificate of incorporation; and, second, that, having purchased such stock, it was authorized to guarantee the bonds of a corporation whose stock it had purchased. Concerning the guaranty attacked in that case Green, V. C., said:

"By this means, instead of paying the money itself, which might have been required, it gains a credit for all the years during which these bonds have to run; instead of pledging its own credit directly, as by issuing its own bonds, or debentures, or notes, it lets the Tolleston Company remain the principal debtor, while it assumes the formal position of surety. If it received no consideration and was only guaranteeing for the accommodation of the Tolleston Company, in which it had no interest, the contract would be ultra vires and void—it would be a fraud on the stockholders; but given as part of the consideration, the transaction amounts simply to this: The packers did not exact money, nor even the bonds of the Junction Company for the money; they agreed to accept the direct promise of the Tolleston Company, secured by its mortgage, and a conditional agreement of the Junction Company that the promise should be kept. It is just as lawful for the corporation to give a conditional contract to its creditor to pay him money as it is to give him a contract to pay directly and without provision. It is the business of the creditor to determine whether he will take one or the other. Both are equally binding, if there is consideration for them. The form of the contract is nothing. The whole question turns on the consideration." 49 N. J. Eq. 247, 248, 23 Atl. 297.

In Zabriskie v. Cleveland, Columbus & Cincinnati R. R. Co., 64 U. S. (23 How.) 381, 16 L. Ed. 488, the defendant railway company was

empowered by the Ohio statutes to aid connecting roads by subscribing for their stock, or otherwise, provided such aid should not be furnished until two-thirds of the stock represented and voted at a meeting called by the directors should have assented thereto. The defendant purchased some of the stocks of a connecting railway and indorsed some of its bonds. This guaranty was held to be within the powers of the guaranteeing company. See *Louisville, New Albany & Chicago Ry. Co. v. Louisville Trust Co.*, 174 U. S. 552, 571, 19 Sup. Ct. 817, 43 L. Ed. 1081.

In *Tod v. Kentucky Union Land Co. (C. C.)* 57 Fed. 47, approved on the point of the present reference, sub nom. *Marbury v. Kentucky Union Land Co.*, 62 Fed. 335, 10 C. C. A. 393, a land company empowered to mine, manufacture, and dispose of the products of its mineral and timber lands, was authorized to effect a consolidation with any railroad company in furtherance of such granted powers; and to exercise the powers of both companies. Instead of so consolidating, it acquired all the capital stock of a railroad company and guaranteed the latter's bonds and dividends on its preferred stocks. It was held that such acquisition of stock was similar to, and included within the express power to consolidate, and that the guaranty was valid as such railroad was necessary to the success of the land company's business.

The opinions in these last-cited cases fully discuss the authorities on the question of corporate power to guarantee and are most important and instructive. The complainant's contention that *Bijur v. Standard Distilling & Distributing Co.*, 74 N. J. Eq. 546, 70 Atl. 934, is opposed to the *Ellerman Case* on the point here considered, and that *Louisville, New Albany & Chicago Ry. Co. v. Louisville Trust Co.*, 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081, has rendered the *Zabriskie Case* negligible as an authority for the rule here invoked, is, to my mind, a misconception, as is also its further insistence that the facts of the *Tod Case* are so different from the instant case as to make it inapplicable as an authority for the position here taken.

There is nothing in these cases, or in any others that have been brought to the court's attention, that in any way qualifies or limits the *Ellerman*, *Zabriskie*, or *Tod Cases* as authorities for the doctrine that where one corporation is authorized to acquire the stock of another, and to aid it in carrying out its objects, a guaranty by the former of the latter's obligations is valid, where it carries forward some of the powers expressly granted to the guaranteeing company. These cases, in my judgment, control the instant case. Irrespective of statutory authority, express or implied, permitting one corporation to guarantee the obligations of another, the cogent reason against the right so to do is that it devotes the credit of the guarantor in a venture not contemplated by the subscribers to its capital stock, and compels them to assume a risk not within the objects for which the guarantor was incorporated. *Tod v. Kentucky Union Land Co.*, supra, 57 Fed. 51. This reason is not present in the guaranty under consideration, as it in no way diverts the trade capital or the credit of the *Bethlehem Corporation* into channels other than those authorized by its certificate of incorporation. It does not fasten upon the invested capital a charge

or liability other than that contemplated by the subscribers thereto. The liability incurred by the Bethlehem Corporation in guaranteeing the Eastern Company's bonds was not a risking of the former's capital in another's enterprise, but in aid of its own, and over which, through its subsidiaries, it had complete control.

I am therefore of the opinion that the guarantee of the Eastern Company's bonds specifically attacked in the present proceedings is within the corporate powers of the Bethlehem Corporation. With reference to the bill's attack generally upon the powers of the Bethlehem Corporation to guarantee the bonds of other corporations, and to secure the same by a pledge or mortgage of its property, it is sufficient to say that, on this application for a provisional injunction, the answer and supporting affidavits deny any present intention or purpose to guarantee the bonds of any other corporation. However, it is not amiss to add that, if the views here expressed as to the right to make the guaranty specifically challenged are correct, any other guaranty made by the Bethlehem Corporation for a like purpose would be within its powers.

The application for a preliminary injunction is denied.

PENNSYLVANIA R. CO. v. SWIFT & CO.

(District Court, E. D. Pennsylvania. February 13, 1918.)

No. 3822.

CARRIERS \Leftrightarrow 211—INTERSTATE CARRIAGE OF LIVE STOCK—TWENTY-EIGHT HOUR LAW—PROPER FEEDING.

Under Act June 29, 1906, c. 3594, §§ 2, 3, 34 Stat. 608 (Comp. St. 1916, §§ 8652, 8653), which require railroad carriers of live stock to unload the same into pens for rest at least once in each 28 hours, and unless provision is made therefor by the shipper, to properly feed and water such stock during the rest period, under penalty, and giving them a lien for the reasonable expense thus incurred, a railroad held entitled in such case to recover for 250 pounds of hay prepared in advance and furnished to each carload of a shipment of cattle, although a quantity of hay amounting to 150 to 200 pounds, was placed in the racks in each car by the shipper when the shipment was made, the statutory obligation of the carrier being to feed during the period of rest, and it being the opinion of the Department of Agriculture, stated in a circular issued for the information of carriers, that 250 pounds per car is a proper allowance.

At Law. Action by the Pennsylvania Railroad Company against Swift & Co. On motion by defendant for new trial. Discharged.

See, also, 242 Fed. 92.

John Hampton Barnes, of Philadelphia, Pa., for plaintiff.

R. D. Rynder, of Chicago, Ill., and M. Hampton Todd, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The plaintiff's action was based upon the provisions of the act of Congress approved June 29, 1906. The pertinent provision is that which gives the right to a railroad com-

pany to collect the reasonable expense incurred in the feeding of live stock required by the act to be fed by the railroad carrier. The denial of liability by the defendant grows out of certain fact features of the feeding out of which the demand has grown. One which may be deemed the moving feature is that the defendants at the time the cattle were shipped placed them in cars which were provided with racks in which from 150 to 200 pounds of hay had been placed to sustain the cattle, or help sustain them during the journey, which was expected to occupy something more than 24 hours.

The secondary fact, or the fact upon which what may be termed the secondary defense, or the second line of defense, is based, is this: The cattle were unloaded at Pittsburgh and received there in a stockyard. In order to facilitate the transportation of the cattle, or of their feeding, in order to speed their final delivery at their destination, the practice had grown up, with the concurrence of all parties concerned, including the shippers, that in preparation for the arrival of the cattle 150 pounds of hay should be placed in the racks of the pens in the stockyard into which the cattle were received after unloading, and 100 pounds of hay should be placed in the cars from which they had been unloaded and into which they were reloaded. This was upon the basis of the cattle requiring 250 pounds of hay for each carload.

The Department of Agriculture, in response to, or in anticipation of, a request from the railroad carriers of the quantity of feed which the carriers might properly feed the cattle thus unloaded, put out a circular in which the opinion was expressed that proper feeding of cattle called for the issue to them of 250 pounds of hay during every 24 hours. The soundness of the opinion thus expressed is confirmed by all the evidence in the case, including that offered on behalf of the defendants. There was no controversy over this in the case, and a virtual admission on all sides that what may be called the government requirement was the minimum quantity which could be considered as constituting a proper feeding. The opinion thus expressed by the Department, however, did not take into consideration the fact, which as applied to the shipments in question was an uncontroverted fact, that the cattle which were fed by the carrier were not cattle which had fasted for 24 hours; but cattle which within a period of from something more than 24 hours up to a maximum of 28 hours, or at the most 36 hours, had all been fed from 150 to 200 pounds.

The shippers were therefore disposed to take issue with the railroad carrier, and through them with the Department of Agriculture, not over the opinion that cattle which had not been fed should properly be fed 250 pounds, but over the proposition that cattle which had already been fed from 150 to 200 pounds of hay would require over 100 pounds additional. In consequence, the shippers asserted that, in view of the fact above stated, 100 pounds, and not 250 pounds, constituted a proper feeding within the meaning of this act of Congress at the place at which and the time when the cattle were unloaded. The shippers in further consequence notified the railroad to limit the feeding at the relay stations to 100 pounds. With this demand the

defendants did not feel justified in complying, and continued the practice of feeding 250 pounds, in the manner above stated. To raise the question suggested, the shippers paid the railroad company for 100 pounds, refusing to pay for the additional 150 pounds. This action was then brought as a test case.

What may be termed the two main thoughts presented by the defense are these:

(1) The act of Congress has as its purpose to save the cattle from suffering. What is proper feeding within the meaning of the statute must be determined in the light of the facts. If the fact had been that the cattle had not been fed for 24 hours, the propriety of a feeding of 250 pounds would not have been questioned. Inasmuch, however, as they had already been fed 150 or 200 pounds, the propriety of feeding more than 100 pounds additional is questioned. What is proper feeding must therefore be determined in the presence of the fact of this prior feeding.

If we were dealing only with the question of a proper feeding, the proposition upon which this part of the defense rests must be accepted. We are not dealing, however, with this question, but the narrower and more technical question of the feeding which is required by the statute. We assume Congress to have legislated within its powers. The requirement of the statute is that cattle in transit must be unloaded, rested, watered, and fed within every 24-hour period of their transportation in cars. This requirement must be met, and it is not met by any substitute provision for feeding in transit. The requirement of the statute is not limited to cattle which have been confined in cars without feed, but to all cattle which have been in transit for more than 28 hours. What may be termed the administrative reasons for the requirement as written are obvious. Congress, it is true, did not dictate, as is well pointed out by defendants, specifically what weight or quantity of feed should be given. The carrier is, however, required to feed, and to properly feed. The reasonable expense thus incurred it may recover. The thought is not lost sight of that the obligation which rests upon the shipper is an imposed obligation, and is limited to the command of the statute. The other command, however, to feed, rests with its full weight upon the carrier. It must feed, and is given the right to be reimbursed "the reasonable expense" thus incurred.

The thought expressed in the charge is that if, in the performance of this imperative duty, the carrier does not incur an expense beyond that which a reasonably good judgment would approve as, under all the facts and circumstances, the outlay which proper feeding demanded, it may enforce its right to reimbursement. To this view, we adhere. There is no denial by the defendants of the thought that the statute must permit of a practical working rule in its application. Such a rule should have sufficient elasticity, to allow, not only for feeding, but also for provision for feeding. They do not criticize the practice, in which they acquiesced, of preparing in advance for the feeding by having feed placed in the stockyard racks, nor of the transportation of the cattle being facilitated by feed being placed in the cars.

Their own practice of placing feed in the cars is, in their view, wholly in line with the practice followed by the carrier.

The real defense is founded upon the claim of equality of treatment. They take their stand upon the aphorism that what is "fish for one should not be made flesh for another." They view the obligations as the same, and demand a corresponding likeness in the applications. The obligations, however, are not the same, or rather the question which arises is not quite the same. If it successfully argued, for illustration, that the command of Congress is that the feeding shall be during the rest hours, and that in consequence a feeding outside of these hours (either before or after) is not a compliance with the statute, the proper application of this principle is in a case in which the carrier is charged with the penalty for noncompliance. The principle does not have the same exact application to a case between the carrier and the shipper. A carrier, for further illustration, who had disembarked the cattle, rested them for the 5 hours, and watered them, might be liable to an imposition of the penalty because it had not fed them, or because, although it had fed, it had not properly fed, them. Certainly, in the latter case, the shipper could not defend an action against him by the carrier. There must be a somewhat different principle which controls as between the carrier and the shipper than that which controls between the United States and the carrier. The controlling principle applied in the former case is that which we have already formulated. It is that, when the carrier has performed the duty of feeding, it has the right to recover the "reasonable expense" thereby incurred, and if it has exercised a reasonable judgment in determining what is fed in the kind and quantity of feed supplied, this determines the question of a proper feeding.

Here again, of course, what is proper feeding is to be determined under all the facts and circumstances as before. The defendants have, in consequence, no just ground of complaint that they have not been given the benefit of the application of the same principle in the cases of feed put into the cars by them, and in the case of feed put into the cars by the carrier. So far as the cases are alike, the same principle has been applied. Back of the whole discussion is this basic fact. The shippers are by the act of Congress protected in their right to feed their own cattle. If they assert this right by feeding the cattle, the carrier is not called upon to feed, because the latter is required to feed only in case of the default of the owners of the cattle. The whole defense, so far as it has merit, is seen upon analysis to rest upon the unstable foundation of the assertion of a right in the shipper to refuse to feed, and yet reserve to themselves to dictate in what manner the duty shall be performed by the carrier. They have no such right.

The only remaining complaint is the admission in evidence of the Department circular. This was one fact among the facts and circumstances in the light of which the determination of what was a proper feeding was to be determined. They asked to have, and were allowed to have, go in evidence their own demand that 100 pounds was a proper food supply. The Department demand of 250 pounds stands

on the same support. The probative effect of each was limited to that of each being an expression of opinion which entered into the circumstances and made up the atmosphere in which the carrier made up its own judgment and through which what was done was to be viewed in order to be judged.

The motion for a new trial is discharged, and plaintiff has leave to enter judgment on the verdict.

HICKSON et al. v. DAVENPORT et al.

(District Court, W. D. South Carolina. February 23, 1918.)

1. DEEDS Ⓒ93—WILLS Ⓒ457—CONSTRUCTION—MEANING OF LANGUAGE—TECHNICAL WORDS.

Though, under a statute providing that every devise shall be considered one in fee simple, unless against the manifest intention of the testator, words in a will would carry a fee simple, when the same words in a deed could carry only a life estate; and, while words may have a technical meaning in a will which they do not have in a deed, the courts, in construing either, seek to ascertain the intention and give it effect, and technical words, when used in their technical sense in a will, must be given effect as though found in a deed.

2. DEEDS Ⓒ128—WILLS Ⓒ608(1)—CONSTRUCTION—RULE IN SHELLEY'S CASE.
The rule in Shelley's Case, when applicable, applies alike to a will or a deed.

3. DEEDS Ⓒ128—CONSTRUCTION—APPLICATION OF RULE IN SHELLEY'S CASE —“ISSUE OF HER BODY.”

Though it is the rule in South Carolina that the word “issue” is a word of limitation, except when the language of the deed shows that it was intended as a word of purchase, where a deed conveyed to B. during her natural life, and after her death to the “issue of her body,” with habendum to her “and then to the issue of her body, them, their heirs and assigns forever,” but, if she should die without leaving issue, then the land to revert back to the grantor's estate, the words “issue of her body” meant children, and they took as purchasers, and the rule in Shelley's Case did not apply.

[Ed. Note.—For other definitions, see Words and Phrases, Issue of the Body.]

4. DEEDS Ⓒ123—ESTATES CREATED—“RIGHT HEIRS.”

“Right heirs” means heirs general, and creates an estate in fee simple.

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

In Equity. Suit by one Hickson and others against one Davenport and others. On motion by defendants to dismiss the bill. Motion denied.

McCullough, Martin & Blythe, of Greenville, S. C., for complainants.

Cothran, Dean & Cothran and Haynsworth & Haynsworth, all of Greenville, S. C., for defendants.

JOHNSON, District Judge. This is a motion by the defendants to dismiss the bill for want of equity. The rights of the parties depend

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

upon the construction of a deed. In 1844 Tully Bolling conveyed the land described in the bill "to my said daughter, Martha Ann Bolling, during her natural life and after her death to the issue of her body." The habendum clause is:

"Unto the said Martha Ann Bolling, and then to the issue of her body, them, their heirs and assigns, forever; but if any child of Martha Ann should die before she does, leaving issue, then the child or children to take the share its father or mother would of been entitled to if alive; but if Martha Ann should die without leaving issue living at her death, then this tract of land is to revert back to my estate and be disposed of as directed in my will."

Martha Ann subsequently intermarried with William Hickson. In 1875, after issue born, she conveyed the land to Francis M. Davenport, under whom defendants claim. In 1897 William Hickson died, and in 1915 Martha Ann died. The complainants are her children. If Martha Ann took a fee conditional under the deed of 1844, her conveyance in 1875 was effectual to carry the fee to Francis M. Davenport, and defendants' motion to dismiss the bill should be granted; but if she took a life estate only, the complainants are entitled to relief.

The decision of this motion has been delayed, as the court desired to examine practically all of the decisions of the highest courts of the state construing common-law deeds, trust deeds, and wills, with particular reference to the limitation of estates. It is essential, if possible, to harmonize the decisions and to conform to them, in order that there may be uniform rules of property, and so that both the state and federal courts may administer justice by the same standard. There have been many cases, and much confusion arises from loose expressions about the leniency of the courts in construing wills and brushing aside all forms in order to carry out trusts.

[1, 2] In this state the statute on wills provides that:

"No words of limitation shall be necessary to convey an estate in fee simple, but every gift of land by devise shall be considered a gift in fee simple unless such meaning is against the manifest intention of the testator;" etc.

Of course, under this statute, words in a will would carry a fee simple, when the same words in a deed would carry no more than a life estate. It is also true that the same words may have a technical meaning in a will which they do not have in a deed. Nevertheless, the purpose of the courts in construing a will, a deed, or any other written instrument is to ascertain the intention of the maker, and to give effect to such intention if it can be done without violating established principles of law. Thus, when it is found that technical words are used in their technical sense in a will, the courts are bound to give effect to such words, just as they would if the same words were found in a deed. The rule in Shelley's Case, when applicable, applies alike to a will or a deed.

[3] The words used in the conveying clause of the deed we are called upon to construe are "issue of the body." If "issue" is used as a synonym of "heirs," the conveying clause would create a fee conditional in Martha Ann, and the rule in Shelley's Case would apply; but if the word "issue" was used in the sense of "children," the words in the conveying clause would carry to Martha Ann a life estate only, and

the rule in Shelley's Case would not apply. It is clear, therefore, that the meaning of the word "issue" will determine the character of the estate conveyed to Martha Ann. Technical words are given their technical meaning, unless the context shows clearly that they were used in some other sense. The words "heirs," or "heirs of the body," have a clearly defined and well-understood technical meaning. The word "issue" in a deed is not an apt word with a well-defined meaning, like "heirs" or "heirs of the body." The Supreme Court of South Carolina says that, whenever the word "issue" is used in either a deed or a will, it must be used in one of three senses: (1) It may describe a class of persons who are to take as joint tenants with the parties named; (2) it may be descriptive of a class who are to take at a definite, fixed time as purchasers; (3) it may denote an indefinite succession of lineal descendants, who are to take by inheritance. At the common law there can be no doubt that the word "issue" was not considered an apt word in a deed. Blackstone, who has no peer in clearness and accuracy of statement, says:

"As the word 'heirs' is necessary to create a fee, so in farther limitation of the strictness of the feudal donation, the word 'body' or some other word of procreation is necessary to make it a fee tail and ascertain to what heirs in particular the fee is limited. If, therefore, either the words of inheritance or words of procreation be omitted, albeit the words are inserted in the front, this will not make an estate tail. As, if the grant be to a man and the issue of his body, to a man and his seed, to a man and his children, or offspring--all these are only estates for life, there wanting the words of inheritance, 'his heirs.'"

In *McMillan v. Hughes*, 88 S. C. 298, 70 S. E. 804, the court quoted from *McMichael v. McMichael*, 51 S. C. 557, 29 S. E. 403, the following:

"The technical rule of the common law makes it essential to the creation of an estate in fee simple in a natural person by deed that there be in the deed an express limitation to such person and his 'heirs.' This rule is generally and inflexibly enforced in the United States, except where abrogated or modified by statute. While many states have altered this rule by statute, no such statute, as applicable to deeds, has been adopted in this state, and our courts have repeatedly and uniformly recognized and enforced the strict rule of the common law."

To support this the court cites *Knotts v. Hydrick*, 12 Rich. (S. C.) 318; *Bratton v. Massey*, 15 S. C. 284; *Varn v. Varn*, 32 S. C. 85, 10 S. E. 829; *Jordan v. Neece*, 36 S. C. 298, 15 S. E. 202, 31 Am. St. Rep. 869; *Harrelson v. Sarvis*, 39 S. C. 18, 17 S. E. 368; *Bradford v. Griffin*, 40 S. C. 468, 19 S. E. 76; *Wilson v. Watkins*, 48 S. C. 341, 26 S. E. 663.

Washburn, in his work on Real Property, in the fourth edition, at page 604, says:

"'Issue' in a will is either a word of purchase or inheritance, as will best answer the intention of the devisor. In the case of a deed, it is always taken as a word of purchase."

Lord Chancellor Hardwicke says:

"The word 'issue' in a will would be a word of limitation, but in a deed is always a word of purchase."

In *Markley v. Singletary*, 11 Rich. Eq. (S. C.) 397, the court said:

"It must be observed that the instrument which created these estates is a deed, and the term used to describe those to whom the remainder is limited is 'issue.' The word 'issue' in a deed is designatio personæ, always a word of purchase. An estate in fee conditional * * * could not be created * * * by the use of this word, even when clearly designed as a word of limitation as 'to A. and his issue.'"

In *Bradford v. Griffin*, 40 S. C. 470, 19 S. E. 77, the court says:

"All the authorities from Lord Coke to the present time lay down the rule that (with certain exceptions unnecessary to be here mentioned, as this case cannot be brought within any of them), in order to create a fee by deed, the word 'heirs' is necessary to be used. Coke's Littleton, § 1; 4 Kent, 5; 2 Bl. Com. Mr. Preston, in his treatise on Estates (volume 2, p. 1), says: 'To the creation or transfer of an estate in fee by deed it is requisite that the land should be limited, as to individuals, to the individual and his heirs.'"

The words in the deed in *Bradford v. Griffin*, supra, were to a son "for life and after his death to the issue of his body" forever. The words in the deed we are called upon to construe are "to Martha Ann for life and after her death to the issue of her body." Tiedeman on Real Property, 434, says:

"Limitation to the sons, children, or issue of him who takes the life estate, will not be converted by the rule into a fee in the first taker, unless they are created by will and from a consideration of the whole will it appears that these words were used in the sense of heirs."

The early decisions in South Carolina harmonize perfectly with the common-law rule, but in the case of *Holman v. Wesner*, 67 S. C. 307, 45 S. E. 206, the word "heirs" was not used in a deed. The grant was "to John Lewis Haigler during his life and after his death to the lawful begotten issues of his body, and should the said John Lewis Haigler die without leaving such issues as above, or should his issues as above die without leaving lawful issues, then" over. The court held that this deed created a fee conditional in John Lewis Haigler. The court cited to sustain its conclusion two cases. *Whitworth v. Stuckey*, 1 Rich. Eq. (S. C.) 410, and *Bethea v. Bethea*, 48 S. C. 440, 26 S. E. 716. In *Whitworth v. Stuckey*, the devise was "to his son, 'for and during his natural life, and at his death to the lawful issue of his body; and if he should die without lawful issue, living at the time of his death, then'" over. Held a fee conditional. The court said:

"The words 'heirs of the body' and 'issue' are generally equivalent in a will, though the former are regarded as the stronger and more technical words."

In *Bethea v. Bethea*, supra, the devise was to the "wife 'during her natural life, and at her decease to my son R., and to the lawful issue of his body, and if the said R. should die without lawful issue,'" then over. It was held a fee conditional in R. Unquestionably, the decisions in these cases are sound and in perfect consonance with the general weight of authority; but it is obvious that the cases cited were not authority for the decision that the word "issue" in a deed was synonymous with the words "heirs of the body."

Standing alone, *Holman v. Wesner* would not be very persuasive or authoritative; but it is not alone. It has been distinctly recognized in *Williams v. Gause*, 83 S. C. 265, 65 S. E. 241. The court, reviewing various cases and after referring to *Mendenhall v. Mower*, 16 S. C. 311, *McIntyre v. McIntyre*, 16 S. C. 290, *Holman v. Wesner*, supra, and *Markley v. Singletary*, 11 Rich. Eq. (S. C.) 393, said:

"The correct rule is * * * that 'issue' is a word of limitation, except when the * * * deed shows that it was intended as a word of purchase."

In *Adams v. Verner*, 102 S. C. 9, 86 S. E. 211, the court again referred to the case of *Williams v. Gause*. In that same decision, in referring to *Porter v. Lancaster*, 91 S. C. 300, 74 S. E. 374, the court said:

"It will be observed that the word 'issue' was there used, which, though generally equivalent to the words 'heirs of the body' in a will, is not as strong, even in a will, as a word of limitation, as the words 'heirs of the body.'"

It being clearly established by the late decisions in this state that the word "issue" is a word of limitation, except when the language of the deed shows that it was intended as a word of purchase, it becomes necessary to examine the deed to see in what sense the grantor used that word. The same words in the same instrument should be given the same meaning. *Bell's Rules of Interpretation*, 161. The grantor says in the habendum:

"But if any child or children of Martha Ann should die before she does leaving issue, then the child or children to take the share its father or mother would of [have] been entitled to, if alive."

In *Guy v. Osborne*, 91 S. C. 293, 74 S. E. 617, the devise was "to my nephew, Samuel Blair, during his natural life, * * * and at his decease I give and bequeath to his surviving issue * * * my tract of land, * * * but should my said nephew die without any surviving issue of his body, * * * the said lands * * * herein bequeathed to his children, I allow to descend," etc. The court held that, in using the words "the said lands herein bequeathed to his children," the testator had evidently used the preceding words "surviving issue" in the sense of children.

I am not discussing the legal effect of the clause, but I am looking at it solely to ascertain if *Bolling* used "issue" as a synonym of "child," or "children," or "heirs." The meaning of the word in the granting clause being doubtful, we may resort to the habendum and other parts of the deed to find the quantity and quality of the estate to be enjoyed. We there find that unto Martha Ann is attached no word of inheritance, but it is to have and to hold "unto Martha Ann and then to the issue of her body, them, their heirs and assigns, forever." The grantor seems to have known the meaning of the word "heirs," for, if he used "issue" in the sense of children, he used the apt word in the right place to constitute Martha Ann's children purchasers of the fee. Thus the grantor clearly evinced an intention to qualify the words "issue of her body," so that they should not be descriptive of an indefinite line

of descent, but to indicate a new stock of inheritance, and to prevent the application of the rule in Shelley's Case.

Mr. Moorman, who is an authority on limitations of estates, says:

"The rule in Shelley's Case may be controlled by the manifest intention of the testator or grantor, where it appears upon the face of the instrument, first, that he meant to confine the first taker to an estate for life; and, second, that he meant to effectuate that intention by some clear and intelligent expression of a design to have the issue, heirs, or heirs of the body take by purchase, and not by descent."

In support of that proposition he cites *Dott v. Willson*, 1 Bay (S. C.) 457; *Lemacks v. Glover*, 1 Rich. Eq. (S. C.) 141; *Myers v. Anderson*, 1 Strob. Eq. (S. C.) 346, 47 Am. Dec. 537; *Whitworth v. Stuckey*, 1 Rich. Eq. (S. C.) 404; *McLure v. Young*, 3 Rich. Eq. (S. C.) 576; *McIntyre v. McIntyre*, 16 S. C. 297. Again he says:

"The authorities conclusively show that, when the words 'heirs,' 'heirs of the body,' or 'issue,' are so qualified by additional words as to evince an intention that they are not to be taken as descriptive of an indefinite line of descent, but are used to indicate a new stock of inheritance, the rule does not apply" citing *Henry v. Archer*, Bailey, Eq. (S. C.) 536; *Myers v. Anderson*, 1 Strob. Eq. (S. C.) 344; *McLure v. Young*, 3 Rich. Eq. (S. C.) 576; *Templeton v. Walker*, 3 Rich. Eq. (S. C.) 543, 55 Am. Dec. 646; *Cox v. Buck*, 5 Rich. (S. C.) 605; *Evans v. Godbold*, 6 Rich. Eq. (S. C.) 26; *Fields v. Watson*, 23 S. C. 46; *McCown v. King*, 23 S. C. 236.

Further he says:

"As where the words 'and to their heirs' are added, they so qualify and the remaindermen take as purchasers"—citing *Shearman v. Angel*, Bailey, Eq. (S. C.) 351, 23 Am. Dec. 166; *Dott v. Cunningham*, 1 Bay (S. C.) 455, 1 Am. Dec. 624; *Lemacks v. Glover*, 1 Rich. Eq. (S. C.) 143; *McLure v. Young*, 3 Rich. Eq. (S. C.) 576; *McIntyre v. McIntyre*, 16 S. C. 294.

The case of *Danner v. Trescot*, 5 Rich. Eq. (S. C.) 362, holds that the qualification by the addition of the words "and to their heirs" is too broadly laid down, and applies to personal estate, and not to real estate. But that is not true, because the courts have decided real estate cases since *Danner v. Trescot* and affirmed the older cases. Mr. Moorman says that it may be that *Danner v. Trescot* was distinguished from the older cases on the ground, stated by the circuit's decree, that the limitation there was to the heirs general and their heirs, and it seems to be authority to modify this qualification as stated to that extent.

[4] In the case of *Danner v. Trescot*, the limitation was "to D. for life, and after her death to and for the right heirs of her, their heirs and assigns, forever." "Right heirs" means heirs general, and creates an estate in fee simple. Once that is done, such superadded words can have no effect, as it is impossible to make the estate larger and the law prohibits an estate in fee simple, having once been given, from being cut down. Judge Wardlaw, in delivering the circuit decree in *Danner v. Trescot*, quotes Jarman as follows:

"Where the superadded words amount to a mere repetition of the preceding words of limitation, they are, of course, inoperative to vary the construction."

Judge Wardlaw proceeded to say:

"But to make the most of the" quotation from "Myers v. Anderson, it is simply this, that 'if the limitation be to the heirs of the body, or to the issue, and to their heirs, this constitutes them purchasers.'" "

But he asks: "Where is the authority for saying, * * * if the limitation be to the heirs general * * * and their heirs," that the words "their heirs" can qualify heirs generally? Thus it is seen upon close analysis that Judge Wardlaw never questioned the soundness of the rule that "heirs of the body" or "issue" could be qualified by the addition of the words "and their heirs." The doctrine of qualification is as well established by the English decisions and by the decisions in this state as the rule in Shelley's Case itself.

Another case which seems to question the doctrine of qualification is *Clark v. Neves*, 76 S. C. 484, 57 S. E. 614, 12 L. R. A. (N. S.) 298. Here the limitation was to C. "for and during her natural life, and at her death the said premises are to belong of right in fee simple to the lineal heirs of the said Eleanor B. Clark forever." The only words of inheritance are "lineal heirs." The court properly held that it was a fee conditional. The plaintiff in the action, however, was contending that the words "of right in fee simple, forever," were words of qualification, which constituted lineal heirs purchasers. This contention was untenable. I subscribe unhesitatingly to the court's construction of the deed, but I cannot agree with the court in its reasoning in one or two particulars. For instance, the court said:

"If the deed in the present case had been unto A. for life, and at her death to her lineal heirs, their heirs and assigns, forever, A. would take a fee conditional."

The court was not construing any such limitation, and this expression must be regarded as a dictum, for it is absolutely contrary to the decisions in this state. To sustain this dictum, the court referred to four cases—*Danner v. Trescot*, 5 Rich. Eq. 356; already referred to; *Miller v. Graham*, 47 S. C. 288, 25 S. E. 165; *Kennedy v. Colclough*, 67 S. C. 122, 45 S. E. 139; and *Davenport v. Eskew*, 69 S. W. 292, 48 S. E. 223, 104 Am. St. Rep. 798. It is not necessary to say more than has already been said in regard to *Danner v. Trescot*. In *Miller v. Graham*, the land was conveyed "to * * * India J. Miller and the heirs of her body," * * * 'to have and to hold, etc., unto the said India J. Miller and the heirs of her body, to her and their heirs and assigns, forever.'" In that case there was no life estate, but the conveyance was to take effect immediately, and of course Mrs. Miller had no heirs. The only question determined by the case was that it was an ordinary common-law deed, without a life estate being carved out, and that the superadded words were not sufficient to make the words "heirs of the body" mean children. In *Kennedy v. Colclough*, the limitation was "to A. for life and after her death to her heirs at law forever." "Heirs" was the only word of limitation and inheritance, and hence the first taker unquestionably took an estate in fee. The word "forever," not being a word of inheritance, could have and did have

no effect whatever on the estate conveyed. In *Davenport v. Eskew*, the grant was "to A. for life and then to be distributed equally between her remaining heirs." The only word of limitation was "heirs," which created in the first taker an estate in fee simple, and the rule established in the case of *Danner v. Trescot* would apply.

One other loose expression in the case of *Clark v. Neves* should not pass unnoticed. That is where the court, in referring to a number of cases that had established the doctrine of qualification in this state, passed the cases by with the remark that they were will cases, and more latitude was allowed in the construction of wills than in the construction of deeds. The case the court was considering had no qualifying words, and this is another unnecessary dictum, and is in direct conflict with numerous authorities. When the rule in *Shelley's Case* does apply, there is no difference in its application in will cases and deed cases, nor is there any difference in construing the qualifications which will take a case out of the rule. If the superadded words are sufficient, whether in a will or in a deed, to show that the maker intended to create a new stock of inheritance in the heirs of the body or the issue, then such new stock take by purchase, and not by descent.

Reading and construing the deed under consideration in the light of the decisions of the highest courts of this state prior to *Holman v. Wesner*, there can be no doubt that *Martha Ann Bolling* took a life estate, with remainder to her children as purchasers; and read even in the light of the recent decisions, omitting unnecessary and uncalled-for dicta, I am still impelled to hold that the "issue of the body" meant children, and that the superadded words in the habendum so qualified them as to make them purchasers.

If the decisions in this state are irreconcilable, then under the authority of *Seligman v. Burgess*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359, and *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, 30 Sup. Ct. 140, 54 L. Ed. 228, it would be the duty of this court to construe the deed in the light of the decisions at the time of its execution, because the maker is presumed to have known the established rules of property and contracted with reference thereto.

Wherefore the motion to dismiss the bill for want of equity is refused.

Ex parte BLAZEKOVIĆ.

(District Court, E. D. Michigan, S. D. February 20, 1918.)

No. 6054.

1. ARMY AND NAVY ⇨20—CONSCRIPTION ACT—EXEMPTIONS.

As Conscription Act May 18, 1917, c. 15, 40 Stat. 76, which in section 5 declares that all male persons between the ages of 21 and 30 shall be subject to registration in accordance with regulations to be prescribed by the President, except officers and enlisted men of the regular army, etc., and that all persons so registered shall be and remain subject to draft, unless exempted or excused, provides in section 4 that local and district exemption boards to be created by the President shall have power within their respective jurisdictions to hear and determine all questions of exemption, such boards have jurisdiction over nondeclarant aliens, and as such aliens are required to register, they are not, though the act provides for their exemption automatically, excluded from its provisions, but must present their claims to the proper boards in compliance with the rules provided.

2. CONSTITUTIONAL LAW ⇨318—DUE PROCESS OF LAW.

A nondeclarant alien, although by the terms of Conscription Act May 18, 1917, exempt from service, is not denied due process of law because required to present and secure his exemption through the exemption boards provided for; the requirement as to due process of law not entitling him to a judicial trial as to the question of exemption.

3. TREATIES ⇨5—SUSPENSION—CONGRESS.

As Conscription Act May 18, 1917, § 14, declares that all laws in conflict with the act are suspended during the emergency of existing war, a treaty entered into before the enactment of the statute, exempting an alien from military service, does not, unless he was duly exempted by the act, entitle him to such exemption, for the treaty, if in conflict with the act, was repealed; Congress having the same right to suspend or abrogate a treaty as any other law.

4. TREATIES ⇨11—NONDECLARANT ALIENS—TREATY RIGHTS.

That Conscription Act May 18, 1917, which provides for the exemption of nondeclarant aliens, requires them to present their claims for exemption to the exemption boards created by the President pursuant to the act, does not deprive such aliens of treaty rights securing them against liability for military service; it not being an infringement of the treaty exemption to prescribe the conditions under which it should be claimed.

5. ARMY AND NAVY ⇨20—CONSCRIPTION ACT—EXEMPTION—PRESENTATIONS.

The filing of an exemption claim as required by Rules and Regulations. § 10, for the selective draft provided for by Conscription Act May 18, 1917, and the affidavit required by section 18, showing that the registrant was a nondeclarant alien, is a condition precedent to exemption on that ground, and, where the exemption is not claimed as provided, such alien is not entitled to be exempted from military service.

6. CONSTITUTIONAL LAW ⇨70(3)—SEPARATION OF POWERS—WISDOM OF LEGISLATION.

The courts have no concern with the expediency or policy of a statute.

7. ARMY AND NAVY ⇨20—CONSCRIPTION ACT—ENEMY ALIENS.

As Conscription Act May 18, 1917, § 14, suspends all inconsistent statutes, and, while exempting subjects of Germany, makes no provision as to others who might become alien enemies, a subject of Austria-Hungary, unless excused as a nondeclarant alien, is not entitled to exemption because, by reason of a subsequent declaration of war against Austria-Hungary, he had become an alien enemy.

8. ARMY AND NAVY ⇨20—CONSCRIPTION ACT—DECISION OF EXEMPTION BOARDS.

Though the provisions of Conscription Act May 18, 1917, making the decision of the exemption boards final, is constitutional, the civil courts, while they cannot review such decisions, may, where the boards have acted in excess of their jurisdiction, or have denied a fair hearing, grant relief.

9. HABEAS CORPUS ⇨23—CONSCRIPTION ACT—DECISION OF LOCAL BOARDS.

Rules and Regulations, § 14, for the selective draft provided for by Conscription Act May 18, 1917, declares that, as soon as practicable after the order in which persons are liable to be called for military service shall have been determined, a list of the names and residences of such persons in the order of their liability shall be posted in the offices of the respective local boards in a place accessible to the public view, that as promptly as practicable a complete copy of such list shall be made accessible to the press, and that, when any person is called by a local board, notice shall be mailed by the clerk, directed to the address on his registration card. Petitioner, a nondeclarant alien and a subject of Austria-Hungary, was certified into military service, not having presented his objection to the local or district boards. *Held*, in the absence of any showing, other than petitioner's assertion that he received no notice, that the local board had not performed its official duty, petitioner is not, as the provisions of the act making the determination of such exemption boards final, are constitutional, and there is a presumption of performance of official duty, entitled to habeas corpus to secure his release on the theory that he was denied a fair hearing by the exemption boards.

10. HABEAS CORPUS ⇨23—CONSCRIPTION ACT—CERTIFICATION INTO SERVICE—HABEAS CORPUS.

A nondeclarant alien is not entitled to habeas corpus to obtain his release, having been certified into service under Conscription Act May 18, 1917, as he failed to claim his exemption on account of alienage, where it did not appear that in accordance with Rules and Regulations, §§ 28 and 50, that he had by proper affidavit, together with an excuse for failure to earlier present the same, made claim for exemption to either the district or local board after certification.

11. HABEAS CORPUS ⇨6—RELIEF—DISCRETION.

Where petitioner, who was certified into the service under Conscription Act May 18, 1917, having failed to comply with the rules and regulations as to claim for exemption, was not absolutely entitled to relief on account of his alienage, the issuance of habeas corpus to secure release rests in the sound discretion of the trial court.

12. HABEAS CORPUS ⇨6—CONSCRIPTION ACT.

Where petitioner, who was certified into service under Conscription Act May 18, 1917, after appealing to his commanding officer for relief on the ground that he was a nondeclarant alien, did not file a petition for habeas corpus until nearly two months thereafter, and he had not presented his claim for exemption in accordance with the rules and regulations governing the draft, it is not an abuse of discretion to deny his application, for such claim should be presented at the earliest possible moment, and an alien should not be allowed to receive maintenance, pay, and allowances for a considerable time and then assert his exemption.

13. ARMY AND NAVY ⇨20—CONSCRIPTION ACT—SCOPE OF.

As the Conscription Act provides for the exemption of nondeclarant aliens, and as such aliens would prove unsatisfactory soldiers, if unwilling to serve, it is against the policy of the law for local draft boards to attempt to include such aliens in the army; it being for the benefit of the service that they be excluded.

14. HABEAS CORPUS ⇨85(1)—WRIT—PETITION—ISSUANCE OF WRIT.

One petitioning for habeas corpus to secure release from military service, into which he was certified under Conscription Act May 18, 1917, must, in view of the authority of the independent executive tribunals and military officers to first determine claims of exemption, affirmatively show on the face of his petition that he is entitled to such writ, and on hearing will be able to make at least a prima facie case entitling him to the release, or the petition will be dismissed, and neither will the writ be granted, nor will a rule to show cause why it should not be granted be issued, as in ordinary cases.

Habeas Corpus. In the matter of the petition of Dragutin Blazekovic. Petition denied.

Joseph B. Beckenstein, of Detroit, Mich., for petitioner.
John E. Kinnane, of Bay City, Mich., U. S. Dist. Atty.

TUTTLE, District Judge. This is a petition for a writ of habeas corpus, alleging that petitioner has been illegally and without warrant of law drafted into the military service of the United States under the conscription statute.

The petition alleges that petitioner is an alien, 25 years of age and a citizen of Austria-Hungary, who has not declared his intention to become a citizen of the United States; that on June 5, 1917, he duly registered under the provisions of the act of Congress of May 18, 1917, known as the Conscription Act; that when he presented himself for registration he informed the registration clerk that he was an alien, and had not declared his intention to become a citizen of the United States, which fact said clerk duly noted on his registration card; that he was given a serial and order number by one of the local boards in the city of Detroit, where he resided and registered; that he received no call to appear for physical examination, and that he first knew that he had been drafted when he was arrested, on or about September 26, 1917; that thereupon he immediately advised the persons who arrested him that he was not aware that he had been called, that he was an alien who had not declared his intention to become a citizen of the United States, and that he desired to claim exemption on that ground; that while in jail he notified one of the members of said local board to the same effect; that he was certified for military service without having been given an opportunity to present a claim for exemption therefrom; that, after being in custody for about two weeks, he was, in the month of October, 1917, transported to Camp Custer, near Battle Creek, Mich., within the jurisdiction of this court, where he is now detained by the commanding officer of said camp; that he has never taken any oath of enlistment in the National Army, has never released any of his rights in the premises, but has persistently and at all times asserted his right of exemption, and contended that he had been illegally drafted; that on or about November 16, 1917, by counsel, he presented to the local board a petition, stating the facts hereinbefore set forth and requesting said board to reopen his case and to grant him exemption as an alien, which request was denied;

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

that on or about November 22, by counsel, he presented to the district board a petition stating said facts, and requesting said board to reopen his case and to grant him said exemption, the nature of the decision on which petition is not alleged; that on or about November 23d, by counsel, he petitioned said commanding officer, stating the said facts and requesting relief, which was refused; that said local board has no jurisdiction over his person, because an alien who has not declared his intention to become a citizen of the United States is not subject to military service, being expressly excluded from the operation of the draft by section 2 of the Conscription Act, and that his status is not subject to determination by the exemption boards; that he is also excused from liability to military service by the provisions of a treaty between the United States and Austria-Hungary, promulgated June 29, 1871, and in force at the time of his drafting, the United States then not being at war with Austria-Hungary, such treaty "containing a clause for the rights of Austro-Hungarians in the United States as existing by the most favored nation clause"; that at said time there existed between the United States and Switzerland a treaty, ratified November 6, 1854, article 2 of which provided that "the citizens of one of two countries residing or established in the other shall be free from personal military service," and that under the "most favored nation clause," referred to in the first treaty mentioned, he was not liable to such military service; that under the rules and regulations governing the draft petitioner has no means of reviewing the decisions of said boards, and his only resort is to this court, and his only remedy in the premises a writ of habeas corpus; that after he had been transported to said camp, and on December 11, 1917, war was declared by the United States against Austria-Hungary, and he thereupon immediately became an alien enemy, and is now being held in the military service of the United States "contrary to the law of the land and to the policy of the government of the United States"; that the proceedings of said local board were illegal and void; that he was fraudulently and illegally denied the opportunity of a fair hearing; that he was denied the right of due process of law guaranteed to him by the United States Constitution; that the decision of said board was illegal, and contrary to the evidence presented, and without any support of fact or evidence. Wherefore he prays for a writ of habeas corpus, directed to said commanding officer and to all officers in the military service of the United States, so that inquiry may be made into the legality of his detention. The petition is signed and verified by petitioner as required by the federal statute applicable.

As I view this petition and the issues which it raises, the following questions are presented for consideration:

(1) Are nondeclarant aliens subject to the jurisdiction of the boards established under the Conscription Act for the purpose of executing the provisions of such act and of enforcing the rights and liabilities created thereby?

(2) What effect, if any, on the jurisdiction of such boards, or on the rights of a nondeclarant alien, has a treaty between the United States and the nation of which such alien is a citizen, entered into before the enactment of the Conscription Act, and providing for the exemp-

tion of citizens of such nation from the military service of the United States?

(3) May a nondeclarant alien be drafted into the military service of the United States by reason of his failure to file any claim for exemption in the manner provided by the rules and regulations governing the draft as prescribed by the President?

(4) May a citizen of Austria-Hungary, who has been drafted into the military service of the United States before the declaration of war between the United States and Austria-Hungary, if properly so drafted, be retained in such service against his will after the declaration of such war?

(5) To what extent, if at all, may the federal courts interfere with the decisions or actions of the exemption boards established under the Conscription Act and of the proper military authorities with respect to the drafting of nondeclarant aliens?

(6) How far must one seeking relief in the federal courts from the decisions of such boards and officers show his previous exhaustion of the remedies afforded by the Conscription Act?

(7) To what extent, if any, must one seeking such relief show diligence on his part in instituting proceedings for the enforcement of the rights which he claims?

[1] 1. I cannot agree with the contention presented in this petition to the effect that exemption boards have no jurisdiction over nondeclarant aliens, and that the latter are excluded entirely from the operation of the Conscription Act. It is true that by section 2 of the act it is provided that this draft "shall be based upon liability to military service of all male citizens or male persons not alien enemies who have declared their intention to become citizens" between certain ages, and that nondeclarant aliens are entitled to be excused from military service under the act. It does not follow, however, that such aliens are so excused automatically merely by the fact that they are nondeclarant aliens. Section 5 of the act provides, among other things:

"That all male persons between the ages of 21 and 30, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President; and upon proclamation by the President or other public notice given by him or by his direction stating the time and place of such registration it shall be the duty of all persons of the designated ages, except officers and enlisted men of the Regular Army, the Navy, and the National Guard and Naval Militia while in the service of the United States, to present themselves for and submit to registration under the provisions of this act; * * * and all persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this act provided."

Section 4 of the act authorized the President to create certain boards, and conferred upon such boards when so created—

"power within their respective jurisdictions to hear and determine, subject to review as hereinafter provided, all questions of exemption under this act, and all questions of or claims for including or discharging individuals or classes of individuals from the selective draft, which shall be made under rules and regulations prescribed by the President."

I think it clear that jurisdiction was thus conferred upon these boards to pass on the claims for exemption, or discharge, or excusal,

or whatever term be used, filed by nondeclarant aliens, and that the latter are required to comply with the requirements of the rules and regulations governing the procedure of such boards for that purpose. This, it seems to me, is the clear intention of the language of section 5 of the act already quoted, to the effect that:

"All persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this act provided."

It is not denied that petitioner was required to register, or that he did so register. Clearly, therefore, he is thus expressly made "subject to draft" unless he be "exempted or excused therefrom as in this act provided." The method provided by the act for enforcing and applying such exemption or excuse consists of the establishment of the boards, exercising the jurisdiction referred to in the language of section 4 of the act, just quoted. Unless, therefore, petitioner be exempted or excused by such boards, in the manner provided by law, he is subject to draft.

I do not overlook the argument that the words "as in this act provided" refer to the grounds for exemption or excuse provided by the act. It will, however, be noted that, while the act does confer certain rights to exemption or discharge or excuse from the draft, yet such act does not itself actually exempt or excuse any one, within the specified ages, except women and those already serving the United States as members of certain military organizations. All that the statute does in this connection is to provide the grounds for exemption or excuse and a means of putting into execution such grounds. The act confers upon certain classes of persons rights to exemption or excuse. These rights are to be asserted through the machinery created by the act for that purpose. This is the only method whereby such persons may be exempted or excused. It will be noted that the statute does not provide that registrants remain subject to draft unless "*exempt* therefrom as in this act provided," but unless "*exempted* or *excused*" therefrom "as in this act provided." The words "exempted" and "excused," here used, obviously are the past participles of the verbs "exempt" and "excuse," and necessarily imply that the subjects of these verbs have been thus acted upon by some other persons "as in this act provided"; that is, by the draft boards expressly authorized—"to hear and determine * * * all questions of exemption under this act and all questions of or claims for including or discharging individuals or classes of individuals from the selective draft."

In other words, the language of section 5 just quoted first requires "all male persons" between the ages designated (except those already in military service), whether or not having a right to exemption or excuse, to register. The act then follows with the further provision that:

"All persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this act provided."

The plain meaning of this is that these persons, when first registered, were subject to draft; that is, they were not at that time exempted

or excused therefrom as in this act provided, even though having a right to claim such exemption or excuse. This is clearly shown by the language to the effect that they shall "remain subject to draft * * * unless exempted or excused therefrom." The query then naturally arises how they are to be thus exempted or excused therefrom. This question is expressly answered by the next words in the same sentence, "as in this act provided." How is a person having a right to exemption or excuse actually exempted or excused "as in this act provided"? Obviously, through the method created by the act itself, namely, the exemption boards having the exclusive jurisdiction already referred to. This construction, it seems to me, gives effect, not only to the intention of Congress to establish certain grounds for exemption, but also to its plainly expressed intention to confer upon these boards jurisdiction to determine—

"all questions of exemption under this act and all questions of or claims for including or discharging individuals or classes of individuals from the selective draft."

Any other construction would render the provisions respecting these boards unnecessary and meaningless. If the words "as in this act provided" refer, not to the manner of exempting, but to the grounds for exemption themselves, then not only nondeclarant aliens, but all other classes of persons having rights of exemption, discharge, or excuse under the act are also automatically excluded from the operation of the draft and from the jurisdiction of the exemption boards. No method for determining questions of exemption or discharge is provided by the act, or by any other statute, except through these exemption boards, and any construction of the act which would produce such a result, or which would remove any class or classes of such persons from the jurisdiction of such boards, would render it exceedingly difficult to apply such rights of exemption or excuse, and tend to make the act unworkable and to defeat its purpose.

[2] Petitioner's contention that he has been deprived of his liberty without due process of law is manifestly without merit. The following language in the opinion of the Court of Appeals for the Second Circuit in the recent case of *Angelus v. Sullivan*, 246 Fed. 54, — C. C. A. —, where the same contention was made and overruled, is applicable:

"But it is said that the act is unconstitutional, in that it deprives the complainant of his liberty without due process of law, contrary to the Fifth Amendment of the Constitution, which declares that no person shall be deprived of life or property without due process of law. The Supreme Court has, however, held that a judicial trial does not prevail in every case. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 280, 15 L. Ed. 372 (1855). And in *U. S. v. Ju Toy*, 198 U. S. 253, 263, 25 Sup. Ct. 644, 646, 49 L. Ed. 1040 (1905), the court, speaking through Mr. Justice Holmes respecting the Chinese Exclusion Act (Act Sept. 13, 1888, c. 1015, 25 Stat. 476 [Comp. St. 1916, §§ 4306, 4314]), under which the decision of the Department of Labor is final as to the exclusion, said: 'If, for the purpose of argument, we assume that the Fifth Amendment applies to him, and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of the opinion that with regard to him due process of law does not require a judicial trial.' That the decision of the question whether a person of Chinese descent was born

in the United States, and therefore entitled to enter the country, or whether he was born in China and under the Exclusion Act not entitled to enter, may be intrusted to an executive officer whose decision is final, and that it is due process of law is established law. We see no reason why the same doctrine is not equally applicable to the case in hand. And we therefore hold that the complainant is not deprived of due process of law by being compelled to submit to the final decision of the local and district boards the question whether he is a subject of Austria-Hungary and whether he has not declared his intention to become a citizen of the United States.

"The President, in the exercise of the authority conferred on him, has prescribed the rules and regulations for the local and district boards, and they were announced by the Secretary of War on June 30, 1917. And section 41 of the rules and regulations so prescribed is as follows: 'In the case of a claim of appeal filed by or in respect of any person from the final decision of a local board within the jurisdiction of such district board, the district board shall, if the name of such person is on the list certified to such district board by a local board within its jurisdiction as a person called and not exempted or discharged, examine and consider the claim, affidavits, and record in respect of such person filed with such district board by the local board. The district board may receive additional evidence in support of or in opposition to any such claim, provided such additional evidence is filed in the form of affidavits within five days after the receipt by such district board of the notice of filing a claim of appeal by or in respect of such person. Within five days after the closing of proofs in any such case, the district board shall decide in favor of or against any such claim, and shall affirm, modify, or reverse the decision of the local board. The decision of the district board shall be final. The district board shall thereupon notify, on a form provided by the Provost Marshal General for that purpose, the person by whom or in respect of whom such claim of appeal was filed that the district board has affirmed, modified, or reversed, as the case may be, the decision of the local board. If the decision of the local board is affirmed, such person shall stand as called for military service to be finally accepted as hereinafter provided.' It thus appears that the complainant seeks to have the District Court set aside a decision on his exemption claim which the act and the rules and regulations of the President declare to be final.

"The complainant's right of exemption is based on the provisions of section 2 of the Conscription Act, which provides that 'such draft as herein provided shall be based upon liability to military service of all male citizens, or male persons not alien enemies who have declared their intention to become citizens, between the ages of twenty-one and thirty years, both inclusive, and shall take place and be maintained under such regulations as the President may prescribe not inconsistent with the terms of this act,' and on section 18 of the rules and regulations prescribed by the President, which enumerates the persons or classes of persons to be exempted by a local board. Among others it exempts any person who is a subject of Germany, whether such person has or has not declared his intention to become a citizen of the United States. It then exempts 'any person who is a resident alien; that is, a citizen or subject of any foreign state or nation other than Germany who shall not have declared his intention to become a citizen of the United States.' It also provides that 'the claim to be exempted must be made by such person, or by some other person in respect of him, on a form prepared by the Provost Marshal General, and furnished by the local boards for that purpose.' Such claims must be filed with the local board which notified such person that he is called for service on or before the seventh day after the mailing by the local board of the notice required to be given such person of his having been called for service. The statement on the registration card of any such person that exemption is claimed shall not be construed or considered as the presentation of a claim for exemption. If the complainant is, as he alleges, a subject of Austria-Hungary, and has never declared his intention to become a citizen of the United States, as he also alleges, it is perfectly clear that he is not subject to the draft. Whether his allegations in this respect are true must, however, be determined in the manner prescribed by the act."

In the words of Judge Mayer, of the United States District Court for the Southern District of New York, in the case of *United States ex rel. Koopowitz v. Finley* (D. C.) 245 Fed. 871, in considering the same question:

"It would, of course, have been easy for Congress to except nondeclarant aliens from the registration provision of section 5. For instance, it did not include, and therefore excluded, women. It did, however, include all male persons within the draft age. The obvious purpose of this provision of section 5 was to construct a roster throughout the entire nation, which, as it were, would constitute *prima facie* the list from which the draft was to be made up. Section 5 made all registered persons subject to draft, 'unless exempted or excused therefrom as in this act provided.' There seems to be good reason, as matter of language, for using both words—that is, 'exempted' and 'excused.' Certain persons were by the act made exempt. Thus, to illustrate: Under section 4 regularly or duly ordained ministers of religion are exempt. Under the same section, however, the President was authorized to exercise his discretion to exclude or discharge from the draft or to draft for partial military service only, certain other classes, such, for instance, as county and municipal officials. These latter classes were not entitled to exemption as matter of right, for Congress conferred upon the President the discretion of determining whether certain classes should be excluded, which is but another way of conferring upon the President the right to excuse these classes. By virtue of section 2 of the act above quoted, nondeclarant aliens are exempt, because not included. But section 2 provides that the draft 'shall take place and be maintained under such regulations as the President may prescribe not inconsistent with the terms of this act.' This, therefore, is a general declaration in the early part of the act that the draft is to take place under lawful presidential regulations and, later in the act, to wit, in section 4, Congress has provided for the general nature and character of the regulations. Certainly section 5 as to registration, so far as it included nondeclarant aliens, would have been a useless provision, if the act did not after that operate upon nondeclarant aliens, as well as upon all other classes made exempt by the statute. Whether a person is a nondeclarant alien or not is a question of fact, exactly the same as whether a person is a duly ordained minister of religion or a student for the ministry in a recognized theological or divinity school, and the clear purpose of the act was that the fact should be ascertained by the administrative boards which the President was authorized to create. Any other method would have made the act, in part at least, unworkable, and it is a familiar rule of construction of statutes that, whenever possible, effect shall be given to the provisions of a statute, and that that construction shall be placed upon it, if possible, which shall enable its general plan or scheme to be carried out.

"Further, it is quite plain that Congress had in mind that some of those exempted by the act might not claim exemption and might be willing to serve in accordance with the draft. It must be further assumed that it was impossible for the local and district boards, or any other governmental agencies, independently to ascertain whether or not a relator was a nondeclarant alien; for such an inquiry would involve a search of the records of the naturalization courts, federal and state, throughout the entire country, to ascertain a negative, to wit, whether a person had not declared his intention—an obviously impossible and absurd inquiry. The whole plan of the act is undoubtedly to require that those who claim exemption shall affirmatively present their claim to the appropriate body, so that that body can determine as a fact whether the person falls within the exempted classes. When, therefore, no such claim is presented, and the proceedings of the local and the district boards are regular in every respect, the court cannot go outside of the proceedings of the boards to determine independently something which the act required should be determined by these boards. It is, of course, not strange that some who would have been entitled to exemption have failed to claim exemption; but the remedy, if any, in such cases, does not lie with the courts."

I am clearly of the opinion that petitioner was not, by the fact that he was a nondeclarant alien, automatically excused from the operation of the Conscription Act. It follows that these exemption boards have jurisdiction to consider, and, acting within their jurisdiction and in accordance with due process of law, to determine, the claims for exemption by such aliens, which claims must be made in compliance with the rules and regulations referred to, if such aliens desire to avail themselves of the right to exemption conferred upon them by the act.

[3] 2. The mere fact that this alien was exempt from military service by a treaty entered into before the enactment of the present statute does not entitle him to exemption. This treaty stood upon the same basis as any other law, and could be abrogated or suspended by later legislation. The power to abrogate a treaty by statute rests, with the Congress, and the responsibility for the wisdom and justice of such action rests where the power is vested. *Cherokee Tobacco Cases*, 11 Wall. 616, 20 L. Ed. 227; *Head Money Cases*, 112 U. S. 580, 5 Sup. Ct. 247, 28 L. Ed. 798; *Thomas v. Gay*, 169 U. S. 264, 18 Sup. Ct. 340, 42 L. Ed. 740; *Sanchez v. United States*, 216 U. S. 167, 30 Sup. Ct. 361, 54 L. Ed. 432. The rule applicable was thus stated by the Supreme Court in *Head Money Cases*, supra:

"A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties, which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that 'this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land.' A treaty, then, is a law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute. But even in this aspect of the case there is nothing in this law which makes it irrevocable or unchangeable. The Constitution gives it no superiority over an act of Congress in this respect, which may be repealed or modified by an act of a later date. Nor is there anything, in its essential character or in the branches of the government by which the treaty is made, which gives it this superior sanctity. A treaty is made by the President and the Senate. Statutes are made by the President, the Senate, and the House of Representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the other two. If there be any difference in this regard, it would seem to be in favor of an act, in which all three of the bodies participate. And such is, in fact, the case in a declaration of war, which must be made by Congress, and which, when made, usually suspends or destroys existing treaties between the nations thus

at war. In short, we are of opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal."

Paragraph 14 of the conscription statute provides that:

"All laws and parts of laws in conflict with the provisions of this act are hereby suspended during the period of this emergency."

If, therefore, I am correct in my opinion, just expressed, that non-declarant aliens are subject to the jurisdiction of the exemption boards, it follows that any treaty in conflict with this conscription statute, thus construed, was thereby suspended, and cannot now be invoked by petitioner in his behalf. This conclusion makes it unnecessary to determine the effect of the declaration of war against Austria-Hungary upon the treaty mentioned or the question as to whether, if the declaration of war did set at naught this treaty, the petitioner, who was inducted into the army before the declaration of war, could now avail himself of the benefits of the treaty.

[4] Furthermore, it will be noted that the act does not deprive non-declarant aliens of any rights conferred upon them by treaty. As has been already explained, it does not deprive such aliens of the right to claim and receive the exemption provided by the treaty. On the other hand, it expressly gives such alien the right to claim such exemption. It is true that the act provides a method for asserting and enforcing such claim, and it is also true that, unless such method be pursued, the exercise of such right may be lost. This, however, is true of many, if not all, rights conferred by law. In this country of law, rights must be asserted in the manner provided by law, and whenever one having a legal right fails to observe the laws governing the assertion and enforcement thereof he runs the risk of finding himself unable to so assert and enforce such right. This, however, is not a legal deprivation of any right to which he may be entitled, but only a hardship necessarily attending government by law. The establishment, then, by the Conscription Act of the method for obtaining the benefit of this right of exemption or excuse conferred upon non-declarant aliens does not operate to deprive them of any right to which they were entitled under any treaty. Although Congress had the power, as I have already pointed out, to take away such right, it is my opinion that it has not done so. Viewed, therefore, from either angle, this contention is without merit and must be overruled.

[5] 3. Section 10 of the Rules and Regulations governing the draft, in force at the time of the drafting of petitioner, provided that non-declarant aliens—

"shall be exempted by such local board upon a claim for exemption being made and filed by, or in respect of, any such person and substantiated in the opinion of the local board. * * * The claim to be exempted must be made by such person, or by some other person in respect of him, on a form prepared by the Provost Marshal General and furnished by the local boards for that purpose. Such claim must be filed with the local board which notified such person that he is called for service on or before the seventh day after the mailing by the local board of the notice required to be given such person of his having been called for service. The statement on the registration card of

any such person that exemption is claimed shall not be construed or considered as the presentation of a claim for exemption."

Section 18 of the Rules and Regulations provides, among other things, as follows:

"The following persons or classes of persons if called for service by a local board and not discharged as physically deficient, shall be exempted by such local board upon a claim for exemption being made and filed by or in respect of any such person and substantiated in the opinion of the local board: * * * Any person who is a resident alien: that is, a citizen or subject of any foreign state or nation other than Germany, who shall not have declared his intention to become a citizen of the United States. * * * Any person who belongs to any of the classes above enumerated in this section shall be exempted on the following conditions: * * * Any person who is a resident alien—that is, a citizen or subject of any foreign state or nation other than Germany—who shall not have declared his intention to become a citizen of the United States, upon presentation to such local board, at any time within ten days after the filing of the claim of exemption by or in respect of such person, of an affidavit signed by such person setting forth" certain information therein specified.

It is therefore plain that the filing of this affidavit is expressly declared to be one of the "conditions" upon which such alien shall be exempted, and it is clear that petitioner has not complied with the requirements of law governing his right to claim exemption from the draft, the mode of enforcing such right having been thus prescribed by law. As was said in the case of *United States ex rel. Koopowitz v. Finley*, supra:

"If relator as matter of law was called upon to file his claim for exemption, he was obligated to do so in the manner prescribed by the statute and the regulations. * * * Relator not having filed his claim for exemption within the prescribed period, there was nothing before the board to show that he was entitled to exemption, and as a result he was properly certified to the district board, which in turn properly disallowed the relator's appeal."

[6, 7] 4. No statutory provision nor rule of law is referred to in the petition, and I know of none, excusing or releasing petitioner from the draft because he is now a citizen of Austria-Hungary, and therefore an alien enemy. Assuming that, before the enactment of the Conscription Act, an alien enemy could not be enlisted in the military forces of the United States, under the statutes then in force, yet section 14 of said act, as has been already noted, suspends any such statutes inconsistent with its terms, and as all male persons between the ages of 21 and 30 at the time of the registration thereunder are thereby made subject to draft unless properly exempted or excused as in such act provided, and no provision is made therein for the exemption or excusal of any aliens except those who have not declared their intention to become citizens of the United States and subjects of Germany, it seems clear that all other aliens between said ages are subject to said draft. With the expediency or policy of such legislation the courts, of course, have no concern, and any arguments based on such expediency or policy must be addressed to the tribunals responsible therefor. It follows that petitioner is not entitled to the relief prayed on the ground that, as a citizen of Austria-Hungary, he is an alien enemy.

[8, 9] 5. It will be noted that there is a broad allegation that petitioner has been denied a fair opportunity to present his claim for exemption, yet no facts are alleged on which such an allegation can be based, and it does not appear from the petition that as a matter of fact petitioner was deprived of the right or opportunity to file his claim in accordance with the terms of the rules governing the making of such claims. Section 14 of said rules provides, among other things, as follows:

"As soon as practicable after the order in which the persons, whose registration cards are in the possession of the respective local boards, are liable to be called for military service shall have been determined, * * * a list of the names and residences of such persons in the order of their liability to be called for military service * * * shall be posted in the offices of the respective local boards in a place accessible to the public view. As promptly as practicable thereafter a complete copy of such list shall be made accessible in the office of the respective local boards to the press with a request for publication. * * * When any person is called by a local board, notice thereof shall be mailed by the clerk of such local board to each person so called, directed to the address on his registration card. Each such notice shall contain a direction to appear for physical examination as required by section 16 hereof at a time and place fixed and stated in such notice."

Assuming, as I must, and as is not denied by petitioner, that the proper officials performed the duties thus required of them, it does not appear that petitioner has been deprived of any rights to which he was entitled in connection with the making of a claim for exemption, or that he was prevented from discovering that he had been called for examination or from making such claim in the manner prescribed by law. It does not appear that petitioner made or attempted to make any inquiry to ascertain whether his name was posted or published as thus provided, nor is any reason assigned for the failure to make such inquiry. Neither is it alleged that the board did not mail to his correct address the notice in question, and he does not explain or show why he did not receive the notice so mailed. So far as appears from the petition, petitioner may have removed from the address given at the time he registered and failed to notify the board of the change of such address. This may have been the reason for his failure to receive such notice, or the notice may have failed to reach him through any one of numerous other causes not beyond his own control.

Under these circumstances, I do not think that this court can interfere with the decisions of the local and district boards to which are committed the duty of enforcing and applying the provisions of the conscription statutes and the rules and regulations pursuant thereto governing the filing and allowing of claims for exemption and discharge. The Conscription Act makes the decisions of these tribunals final and this portion of such act was considered and declared constitutional by this court in the case of *United States v. Sugar* (D. C.) 243 Fed. 423. It is true that on a proper showing of the denial of a fair hearing, or a clear or gross abuse of the discretion with which these boards are vested, this court has the power, and it would be its duty, to grant relief from the decisions of such boards. As was said by the Court of Appeals for the Second Circuit in the case of *Angelus v. Sullivan*, *supra*:

"The civil courts can afford relief from orders made by such boards in any case where it is shown that their proceedings have been without or in excess of their jurisdiction, or have been so manifestly unfair as to prevent a fair investigation, or that there has been a manifest abuse of the discretion with which they are invested under the act."

In view, however, of the plain provisions of the rules and regulations referred to, and the familiar rule that even ignorance of a law does not excuse the failure to comply therewith, this court cannot interfere with the rulings of the tribunals and officers vested with authority to execute this statute, acting within such authority. *Yamataya v. Fisher*, 189 U. S. 86, 23 Sup. Ct. 611, 47 L. Ed. 721; *United States v. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040; *Zakonaite v. Wolf*, 226 U. S. 272, 33 Sup. Ct. 31, 57 L. Ed. 218; *United States v. Sugar*, supra, and cases therein cited.

[10] 6. Nor does it appear that petitioner has exhausted the remedies afforded him by the Conscription Act. Section 28 of the rules and regulations governing the draft provides that a local board may allow a claim for exemption or discharge to be filed or affidavits in support thereof to be filed after the expiration of the designated time within which such claim or such affidavits may be filed, provided it is shown to the satisfaction of the local board having jurisdiction that the failure to file such claim or such affidavits within the designated time arose because of the necessary absence of the claimant, or because the illness of the claimant prevented the filing of such claim or of such affidavits, or for any other cause or reason which appears to the local board to afford a reasonable ground for allowing the claim or affidavit to be filed. Section 50 confers the same power upon district boards.

It thus appears that, when petitioner was arrested as alleged in his petition, he was not without a remedy under the rules and regulations governing the draft. Although the time prescribed for the filing of his claim for exemption had expired, yet he could have requested from the local and district boards permission to then file such claim. While he alleges that his counsel presented to the local board a petition for the reopening of his case and for this exemption, a copy of said petition is not set out, nor are its allegations recited, and there is nothing to indicate whether it was a formal written petition, or merely a verbal request by said attorney, made to an individual member of the board, and not brought before said board as a tribunal. In the original petition filed herein, no reference was made to any petition presented to the district board. In an amended petition, however, it is alleged that on or about November 22d, one day before the presentation by petitioner of his application to his commanding officer hereinbefore referred to, his counsel presented to said district board a petition for a reopening of his case and his exemption on the ground claimed.

What has just been said with reference to the petition alleged to have been presented to the local board applies equally to the one thus alleged to have been presented to the district board. It does not appear that such petition was a formal written one, presented to said board officially. It does not even appear what, if any, action was

taken on said petition by said district board. Furthermore, there is no allegation that an adequate, or in fact any, affidavit or showing was made in support of any of his said petitions, if said petitions were properly presented, nor does petitioner allege that he was deprived of an opportunity to make such a showing. It does not, then, appear that petitioner has exhausted the remedies afforded him by the Conscription Act and the rules and regulations pursuant thereto before resorting to this court. I cannot assume that, if proper application and showing had been made to the tribunals invested with primary jurisdiction in such a case, petitioner would not have received the full measure of relief to which he was entitled. On the contrary, I do assume that the proper military officers will soon relieve our country of the necessity of clothing and paying this alien enemy who is unwilling to serve us. Our commanding officers will, I am certain, prefer to have those who are in law and in fact alien enemies deprived of loaded guns. My experience with the military authorities at Camp Custer in previous cases assures me of their careful attention and just treatment of all misfortunes of this kind resulting from errors of draft boards. Under such circumstances, the writ of habeas corpus should not be granted. *Ex parte Lancaster*, 137 U. S. 393, 11 Sup. Ct. 117, 34 L. Ed. 713; *Minnesota v. Brundage*, 180 U. S. 499, 21 Sup. Ct. 455, 45 L. Ed. 639; *Yamataya v. Fisher*, 189 U. S. 86, 23 Sup. Ct. 611, 47 L. Ed. 721; *United States v. Sing Tuck*, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917.

[11, 12] 7. One further consideration may be mentioned. It will be noted that on or about November 23, 1917, petitioner appealed for relief to his commanding officer and that such relief was refused. Yet it was not until January 17, 1918, that the original petition herein was signed and verified, and no reason for this delay is shown. During the meantime petitioner was receiving military training, food, lodging, and pay from the government. It would seem not only fair and reasonable, but also necessary for the public welfare, that there should be a limit to the time within which one who has been certified to the army should be allowed to obtain release therefrom on the ground that he was improperly drafted. For example, could it be seriously contended that, after one had been so certified, had been taken to the military training camp, had completed his period of military training, and was on the eve of his departure to the battle ground, or perhaps even about to go into action, he could then for the first time resort to the courts for the purpose of raising objections to the proceedings whereby he was inducted into the army and be granted release therefrom? It is obvious that there should be some limitation upon the right to thus seek such release. Every consideration of public interest demands that in such cases a petitioner should show that he has been diligent in seeking this sort of relief. Petitioner did not comply with the rules and regulations governing the draft, and requiring the filing of written claim for exemption within the prescribed period. His right to relief in this court under the circumstances is not absolute, but depends upon the exercise of a sound discretion. It would seem

that it would not be an abuse of discretion to refuse to grant relief after such an unexplained delay as that disclosed in the present case.

[13, 14] I do not desire to be understood as approving of the drafting of this alien into the military forces of the United States against his will, in the manner alleged in the petition. Conceding that the motives of these draft officials and of other boards, small in number, producing like results by similar methods, are patriotic, it is plain that the means employed and the end achieved do not promote the best interests of this country. If the purpose be to force an alien into the army, in order that an American citizen may be kept at home, it is unpatriotic. It would deprive the country of the services of an American soldier and give in lieu thereof an unwilling alien. If the motive be patriotism, it is of the misguided and short-sighted brand. Assuming that to thus take advantage of the opportunity, afforded by a technical form of law, to trap an unwilling alien into the military service of this country can be justified on moral or equitable grounds, what is thereby gained? The result of each such case is to inject into our brave American army one unfriendly alien, and, in the present case, an alien enemy. Men of the type and spirit of this petitioner would make a poor army to champion the cause of liberty for the nation whose representatives had accorded them such treatment in bringing them to the colors. The plain intent of the Conscription Act was to exempt nondeclarant aliens who were unwilling to perform military service. The rules promulgated by the President were the machinery provided for accomplishing that purpose. The object in view is clearly as much the good of the army as the protection of the alien. The effort and discretion of the draft boards ought to be exercised in such a way as to keep such men out of the army. The crisis which confronts our country and the necessity for a strong American army, which can be quickly trained, I believe, justify these observations. More than 50 similar petitions by aliens have been filed in this court during the past few weeks. I cannot view such a situation with other than grave concern. Because the legal conclusions which I have reached may seem to imply an assent to actions resulting in such a situation, I have deemed it my duty to thus briefly express the views which I hold in this connection.

It will be noted that I have disposed of the questions presented without first granting the writ prayed or issuing an order to show cause why such writ should not be granted. I have pursued this course because I am keenly conscious of the duty of this court to avoid, so far as is possible, interference with the proceedings of the independent executive tribunals and military officers to whom have been intrusted, in the first instance, the decision of questions arising in the execution of the Conscription Act. I appreciate the danger, especially in such an emergency as now confronts us, of an unseemly conflict between the judicial and executive branches of the government, and I am anxious to avoid such conflict, so far as is possible, without neglecting or shirking what may seem to me the discharge of my full duty. I am therefore of the opinion that, before the writ should be issued in such a case, petitioner ought to affirmatively show, on the face

of his petition, that he is clearly entitled to such writ, and that on the hearing thereon he will be able to make at least a prima facie case entitling him to the release sought. He ought, before such writ or order to show cause is issued, by his allegations to resolve in his favor all doubts naturally arising in the mind of the court as to matters which upon the hearing might make it the duty of the court to remand him to the custody of the officers who had been compelled to produce him in court. The petitioner has not affirmatively, on the face of his petition, made out such a case as would warrant the court in subjecting the military authorities to the annoyance and embarrassment of transporting him from the military camp where he is detained and producing him before the court.

For the reasons stated, the petition will be denied.

O'DELL v. SOUTHERN RY. CO.

(District Court, W. D. South Carolina. November 25, 1917.)

1. PLEADING \Leftrightarrow 237(6)—AMENDMENT—CONFORMING TO PROOF.

In a railroad employé's personal injury action, where the proof showed that he was not engaged in interstate commerce as alleged, and that averment had been denied by defendant, the allowance of an amendment to conform the complaint to the proof was proper, though defendant was denied time to answer; it not appearing that on the subsequent hearing defendant could make out a case to the contrary.

2. COMMERCE \Leftrightarrow 27(8)—"INTERSTATE COMMERCE"—RAILROAD EMPLOYÉ.

Whether a railroad employé was, within the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1916, §§ 8657-8665]), engaged in "interstate commerce" at the time he was injured, depends upon the character of the act at that time, and the fact that the appliance he was repairing when injured might in the future be used in interstate commerce does not establish that the cause of action falls within the act.

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

At Law. Action by Clarence O'Dell against the Southern Railway Company. There was a verdict for plaintiff, and defendant moves for new trial. Motion denied.

J. J. McSwain, of Greenville, S. C., for plaintiff.

Cothran, Dean & Cothran, of Greenville, S. C., for defendant.

JOHNSON, District Judge. The complaint alleged that the plaintiff was engaged in interstate commerce work at the time of his injury. There was no testimony to show that he was so engaged. The testimony showed that he was injured while working on an electric motor in the yards at Asheville, N. C. The plaintiff moved to strike out the allegation that he was engaged in interstate commerce, so as to have the complaint conform to the facts proved. The court allowed the amendment. The defendant demanded time to answer. That demand was refused. The cause was argued by counsel, and, after instruc-

tions by the court, submitted to the jury. The verdict was for the plaintiff. Defendant moved for a new trial.

The motion for a new trial is based upon all the grounds upon which the defendant asked for a directed verdict, and upon two additional grounds: First, that the court erred in allowing the plaintiff to amend his complaint and in denying the defendant time to answer; second, that the verdict is excessive. Only the last two grounds need be considered here, as all the others were overruled when the court refused to direct a verdict.

[1, 2] Did the court err in allowing plaintiff to amend his complaint after the evidence was all in? The allowance of amendments to pleadings and the conduct of the trial must rest in the discretion of the court; but such discretion should be so exercised as not to deny any litigant a substantial right. The plaintiff, by the language of the complaint, indicated that his recovery would be on account of the defendant's breach of its duty to him as its servant while engaged in interstate commerce. The defendant denied that the plaintiff was engaged in interstate commerce. There is no dispute about when the plaintiff was injured, or where he was injured, or what he was doing at the time of his injury. The relation of master and servant existed between the plaintiff and the defendant. The plaintiff was working in Asheville, N. C., and at the time of the injury was engaged in repairing a motor which when in use operated a bucket. The bucket lifted cinders from a pit into which they had been dumped by the defendant's engines.

The plaintiff was engaged in interstate or intrastate commerce. The defendant, in full possession of all information touching the time and place of the injury, and what the plaintiff was doing when he was injured, denied that he was engaged in interstate commerce. If he was engaged in interstate commerce, the Employers' Liability Act is applicable. If he was engaged in intrastate commerce, the laws of North Carolina, where the injury occurred, would apply. When the facts are all out, it is the duty of the court to apply the law applicable to the facts. If it is necessary to amend the pleadings to conform to the facts proved, such amendments should be allowed. That is what was done in this case. It would be trifling with justice to dismiss the complaint because the evidence showed that the plaintiff was engaged in intrastate commerce and that the laws of North Carolina and not the Employers' Liability Act applied. To do so would be but to compel the plaintiff to bring another suit, and go to the trouble and expense of proving the same facts, in order to apply the very law which the court has applied.

It is argued that the defendant is not required to admit plaintiff's allegations, or any of them. That is true. But can the defendant say that the court abused its discretion when it refused to allow the defendant time to plead as a defense the very thing that it had denied upon the record, when an opportunity was given to it to admit it, or to suspend the trial of the cause after it was ready to go to the jury, and try it again, in order to allow the defendant to prove a thing that, when it had an opportunity to prove, it had remained silent? It was

not claimed, at the time the defendant demanded time to answer, that it could prove any different state of facts from that which had been brought out; but in the argument for a new trial the defendant says:

"Suppose that testimony could be introduced to show that the motor, after being repaired, would be used in operating a bucket to lift cinders out of a pit and load them on a car to be thence carried and put on the roadbed as ballast."

Take that supposition as a fact. It would not bring the action under the Employers' Liability Act. The character of the act is fixed by what the servant was doing at the time of the injury. Repairing a motor which at some time in the past might have been used in interstate commerce, or which at some time in the future might be engaged in interstate commerce, would not bring the act of repairing within the law. In the case of *Minneapolis & St. Louis Railroad Co. v. Winters*, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358, decided by the Supreme Court of the United States on January 8, 1917, it was held that a machinist helper, engaged in making repairs in the roundhouse upon an engine which had been used in hauling over the railroad company's lines freight trains carrying both intrastate and interstate freight, and which was used in the same way after the accident, was not then employed in interstate commerce, within the meaning of the federal Employers' Liability Act of April 22, 1908. The court said:

"Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events."

All the cases have held that, if the servant was not engaged in interstate commerce at the time of the injury, the Employers' Liability Act did not apply.

Upon this ground, the motion for a new trial is therefore refused.

O'DELL v. SOUTHERN RY. CO.

(District Court, W. D. South Carolina. December 19, 1917.)

1. NEGLIGENCE ⇨136(1)—DIRECTION OF VERDICT—JURY QUESTION.

Where there was evidence of defendant's negligence, the question was for the jury.

2. MASTER AND SERVANT ⇨289(39)—CONTRIBUTORY NEGLIGENCE—JURY QUESTION—PROXIMATE CAUSE.

Where there was evidence of negligence on the part of a railroad company, and under the laws of the state where the accident occurred the servant's contributory negligence would only reduce the recovery, a verdict cannot be directed for the company on the ground that the servant's own contributory negligence caused the accident, for the proximate cause of the accident is a jury question.

3. MASTER AND SERVANT ⇨288(14)—ASSUMPTION OF RISK—JURY QUESTION.

Where, before the accident, the injured servant complained of the defects, and was assured that they would be remedied, his recovery cannot be denied on the ground of assumption of risk; but it is a question for the jury whether a reasonable time to remedy the defects had elapsed before the injury.

4. EVIDENCE ⇨29—JUDICIAL NOTICE—PUBLIC LAWS.

The United States courts take judicial notice of the public laws of all the states of the Union.

5. STATUTES ⇨279—PLEADING—JUDICIAL NOTICE.

In an action in the federal District Court for South Carolina for personal injuries sustained in North Carolina, the court, in view of the South Carolina requirement that the complaint shall concisely state the facts giving rise to the cause of action, should apply to the facts averred the applicable North Carolina statutes, even though not specially pleaded, for it takes judicial notice of them.

6. NEW TRIAL ⇨171—PROCEEDINGS ON RETRIAL—AMENDMENTS OF PLEADING.

Where, on the first trial of a personal injury action by a railroad employé, the proof failed to show that he was engaged in interstate commerce as alleged, so as to come within federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1916, §§ 8657-8665]), and an amendment conforming the complaint to the proof was allowed, the employé, a new trial having been granted, should be allowed, the evidence then showing that he was engaged in interstate commerce, to amend his complaint so as to conform to the proof notwithstanding the railroad company traversed the allegation of the amended complaint that the employé was engaged in interstate commerce.

7. COMMERCE ⇨27(8)—"INTERSTATE COMMERCE"—FEDERAL EMPLOYERS' LIABILITY ACT.

A railroad employé, injured while working on an electric motor, cannot, though the company was engaged in both intrastate and interstate commerce, be deemed engaged in interstate commerce; it not appearing that the particular motor was in any way used in interstate commerce.

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

At Law. Action by Clarence O'Dell against the Southern Railway Company. On motion by defendant to direct a verdict. Denied.

J. J. McSwain, of Greenville, S. C., for plaintiff.

Cothran, Dean & Cothran, of Greenville, S. C., for defendant.

JOHNSON, District Judge. When the evidence was all in, the defendant moved for a directed verdict on various grounds, which will be found in the record. I shall not consider the grounds in the order in which the defendant submitted them, but will endeavor briefly to give my reasons for refusing the motion.

[1] The defendant is not entitled to a directed verdict on the ground that there is no evidence tending to show negligence on the part of the defendant as the proximate cause of the plaintiff's injury, because there is such evidence and it should go to the jury.

[2] The defendant is not entitled to a directed verdict on the ground that the plaintiff by his own contributory negligence produced the injury, because, there being evidence of negligence by the defendant, it is for the jury to say what was the proximate cause of the injury. If the negligence of the defendant was the proximate cause of the injury, even though plaintiff was guilty of contributory negligence, it would not bar a recovery by him, but would only serve to reduce the verdict in the manner and in the measure provided by the North Carolina statute.

[3] The defendant is not entitled to a directed verdict on the ground that the plaintiff assumed the risk, because the plaintiff testified that he had complained of the defects and had assurances that they would be remedied. In such a case it is for the jury to determine whether or not a reasonable time to remedy the defects had elapsed. Besides, the North Carolina statute has modified the common-law doctrine of assumption of risk. But, even if there had been no modification, this is a case that would have to go to the jury.

[4, 5] This disposes of all the grounds of the motion except the first, which is subdivided into three divisions: (1) That the complaint states a cause of action at common law, because the plaintiff has not pleaded the North Carolina statute, and not having pleaded a statute applicable to the facts, and not having alleged facts showing the applicability of the federal Employers' Liability Act, it will be presumed that the complaint is based upon the principles of the common law; (2) that the evidence shows that the plaintiff at the time of his injury was engaged in interstate commerce work, and that the defendant was likewise so engaged; (3) the evidence showing a cause of action under the federal act, and the complaint one at common law, or at best under the North Carolina statute, the case pleaded has not been proved, and the case proved has not been pleaded. For all these reasons the defendant insists that it is entitled to a directed verdict.

Let us consider these grounds in their order. There is absolutely no presumption that the plaintiff has brought an action based upon the common law of North Carolina, because he has not said anything in his complaint about the laws of North Carolina. The South Carolina Code requires that the complaint shall contain a clear and concise statement of the facts constituting the cause of action. The facts constituting this cause of action are these: The plaintiff was the servant of the defendant, and was engaged in working for the defendant at Asheville, N. C.; that the defendant neglected to furnish to the plaintiff a safe place in which to do his work, and reasonably safe tools and appliances with which to do his work; and that defendant's breach of its duty to the plaintiff in that behalf was the proximate cause of the plaintiff's injury. Defendant cites *Roseman v. Railroad*, 66 S. C. 97, 44 S. E. 576. The Supreme Court in that very case, in quoting *Pomeroy on Remedies*, says:

"It [the reformed system of pleading] wholly rejects all the subdivisions, which are merely legal rules or conclusions, and admits only those that consist of the facts to which the legal rules apply, and which are the occasion whence the conclusions arise. It assumes that the courts and the parties are familiar with all the doctrines and requirements of the law applicable to every conceivable condition of facts and circumstances; so that, when a certain condition of facts and circumstances is presented to them, they will at once perceive and know what are the primary and the remedial rights and duties of both the litigants, and, this knowledge being complete and perfect, it is useless incumbrance of the record to spread out upon it legal propositions and inferences with which every one is presumed to be acquainted."

This very forcibly expresses the rule that obtains in the courts of South Carolina. In the very case just quoted from the court said that where the cause of action arose in another jurisdiction, of whose

laws the court does not take cognizance, it was necessary to allege and prove it as a fact in the case, or the court would presume that the law of the foreign jurisdiction was the common law. Wherever a court takes cognizance of the law, it is not necessary to plead the law, or to refer to the law. It is only when a suit is brought in a court upon a cause of action arising in a foreign state that it is necessary to plead the law of the foreign state. The United States courts take judicial cognizance of the public laws of all the states in the Union. There is therefore no more necessity to plead the law of any state in the Union in a United States court than it would be in the state court to plead the law of that state. The plaintiff in this case set forth the time and the place that he was engaged in work for the defendant and how his injury was brought about. It was not necessary for him to say any more, because the court is bound to know the laws of North Carolina, and to apply the laws of North Carolina to the facts. *Railroad v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983, is the other case cited by the defendant in support of his motion. It was an action brought in the state court of Missouri upon a cause of action arising in the state of Kansas, and thence removed to the United States court; but the pleadings were bound to be interpreted according to their meaning in the court in which the action was brought. If this case had been brought in the courts of South Carolina, and thence removed to this court, this court would have to construe the pleadings just as the state court would construe them; but this action was brought in this court, and, as I have hitherto said, this court taking judicial cognizance of the public laws of North Carolina, there was no necessity to refer to it in the complaint.

[6, 7] The next proposition of the defendant is that the defendant was engaged as a common carrier by railroad in interstate commerce, and the plaintiff was likewise so employed at the time of his injury. Even if this were true, the court would not think about directing a verdict. It would be the duty of the court to amend the pleadings, so as to conform to the facts proved. This cause was tried in October. At that time the complaint alleged that the plaintiff was engaged in interstate commerce at the time of his injury, and the defendant denied it. When the evidence was all in, there was nothing to show that the plaintiff was engaged in interstate commerce at the time of his injury, and the court, over the objection of the defendant, allowed the complaint to be amended, so as to conform to the facts proved, and submitted the case to the jury under the North Carolina statute. There was a verdict for the plaintiff. On motion for a new trial, the court granted a new trial nisi. Thereupon the plaintiff amended his complaint by demanding \$30,000, and gave the defendant notice that he would proceed to trial at the Anderson term of this court, with the understanding that the North Carolina statute was the law of the case. The defendant in its amended answer set up specifically that the plaintiff was engaged in interstate commerce at the time of his injury and that the Employers' Liability Act was applicable to the case.

As I have already said, even if the evidence showed that the plaintiff was engaged in interstate commerce, it would be a travesty upon jus-

tice to dismiss the complaint, instead of allowing the case to go to the jury under the law applicable to the facts. I see no connection between the work the plaintiff was engaged in at the time of his injury and interstate commerce. He was working upon an electric motor, which was certainly not peculiarly an instrumentality of interstate commerce in the operation of railroads. There was some evidence about cinders from engines that had come from beyond the state being dropped into the cinder pit, but the evidence all showed that the interstate journey of the engine had ceased long before the cinders were removed to the cinder pit. The crew, bringing the engine in, detach it from the train. It is turned over to a hostler. The hostler carries the engine to some siding or to the roundhouse. Later, as opportunity affords, he places the engine over the cinder pit to be cleaned, and the work of removing the cinders is done by common laborers employed for that purpose. The electric motor is never used in removing the cinders from the engine. Some witness testified that cinders, when removed from the pit, were used for different purposes, amongst others for ballasting the roadbed; but there is no evidence that this particular motor at any particular time, either before or after the injury, was used in lifting cinders from the pit that were used in ballasting a roadbed.

The Supreme Court of the United States in *Winters v. Railroad*, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358, decided January 8, 1917, held that a helper who was engaged in repairing an engine in the roundhouse was not engaged in interstate commerce, although the engine being repaired had brought in a train of cars from beyond the state, and after being repaired carried out another train of cars in interstate commerce. The court said there was nothing about an engine to make it peculiarly an instrumentality of interstate commerce. There is nothing about an electric motor which makes it peculiarly an instrumentality of interstate commerce. To my mind it is clear, therefore, that the plaintiff was not engaged in interstate commerce, within the meaning of the Employers' Liability Act, and it is therefore proper to apply the North Carolina law to the facts of the case.

The third ground is that, the evidence showing a case under the federal act and the complaint one at common law, or at best under the North Carolina statute, the case pleaded has not been proved, and the case proved has not been pleaded; the defendant, therefore, is entitled to a directed verdict. What has been said above sufficiently disposes of this ground. The plaintiff has proved his action under the statutes of North Carolina, and, even if he had proved an action under the federal Employers' Liability Act, I would not direct a verdict. I would require the pleadings amended to conform to the facts proved. The defendant would have no ground to complain of that, because the defendant itself has undertaken to try to show that it was an interstate commerce transaction, and should not object to the application of the very law that it insists is applicable to the case.

All the grounds for a directed verdict are overruled, and exception allowed.

CENTRAL BANK & TRUST CO. et al. v. GREENVILLE & W. R. CO.
(STATE OF SOUTH CAROLINA, Intervener).

(District Court, W. D. South Carolina. November 26, 1917.)

RECEIVERS ⇨118—RAILROAD OPERATION—RECEIVER'S CERTIFICATES.

On bill to foreclose a mortgage on the property of a South Carolina railroad company, a receiver was appointed. After operation of the road for some time had been continued at a loss, train service was discontinued, on the ground that further operation would endanger the lives of crews and passengers. It appeared that the railroad had always been operated at a loss, but that no particular effort had been made to develop traffic in the territory through which it ran. Civ. Code S. C. 1912, § 3117, under which the company was organized, declares that any person, company, or corporation now running or hereafter acquiring any railroad by purchase or otherwise shall organize and put into operation such road within 60 days from purchase or acquisition. *Held*, it appearing that there was much traffic, for movement of which the operation of the railroad was necessary, and which might reasonably be expected to result in a profit, the petition of the state of South Carolina, praying a resumption of the service, should be granted, and the receiver directed to issue certificates to repair the roadbed, for not only is a railroad a public highway, but a resumption of operations would naturally, as the purchaser would be required to resume operation, result in a better price.

In Equity. Bill by the Central Bank & Trust Company, a corporation, and others, against the Greenville & Western Railroad Company, in which the State of South Carolina intervened, praying that operation through a receiver previously appointed should be resumed. Receiver's certificates directed to be issued and operation resumed.

McCullough, Martin & Blythe, of Greenville, S. C., for complainants and defendant.

Haynsworth & Haynsworth, of Greenville, S. C., for intervener.

JOHNSON, District Judge. This is a suit in equity to foreclose a mortgage, executed by the defendant on its franchises, roadbed, rolling stock, and equipment. At the institution of the suit, on motion of the complainants, defendant consenting, a receiver was appointed to take charge of the property and to operate the same. The receiver continued the operation of the road at a loss until November 2, 1917, when this court passed an order discontinuing train service, on the ground that the operation of trains endangered the lives of crews and passengers. Thereupon the state, by consent of the Attorney General, at the relation of numerous citizens interested in the continued operation of the road, filed a petition and prayed to be allowed to intervene. The intervention was allowed. The state then asked that the operation of the road be resumed, whereupon an order was issued and served upon the complainants and defendant to show cause why the operation of the road should not be resumed, and upon the coming in of the return this matter was heard.

The railway company and the bondholders introduced evidence tending to show that the revenues of the road from the formation of the

corporation in June, 1914, had at all times been less than the operating expenses; that the roadbed and trestles are in bad condition, in some places so bad as to endanger the lives of crew and passengers, if trains should run; that it would require \$50,000 to put the road in good condition, and that at least \$3,000 should be spent in repairs at the worst places, before it would be safe to run a train at all; that the road is without equipment, engines, cars, etc., with which to operate. Upon this showing, they ask that they be relieved of spending any more money in the unprofitable enterprise, and pray a speedy foreclosure and sale.

The state introduced testimony tending to show that the road, when inspected by the state Railway Commission in the spring of 1917, was in good condition for a road of that character, and that in August it was found in better condition, with two or three exceptions, than on the previous inspection; that the road, unless it has greatly deteriorated since August, could be operated safely, but that, in order to put it in good condition \$10,000 ought to be spent right away, followed by an expenditure of \$2,000 per month for five successive months, and that this expenditure, totaling \$20,000, would be ample to put the road in good condition; that the present conditions along the line of road render its operation imperative, and that ample business would be furnished to make the road pay; that located on the line of road are freight-furnishing enterprises, including a granite quarry, a sand pit, a brickyard, and also a forest of 100,000 acres, from which could be cut firewood, cross-ties, and lumber in immense quantities; that for all these things the demands are unprecedented, at the highest prices ever known; that the present coal situation in Greenville is acute, and, unless the fuel supply can come from the mountains over the railroad, the people will suffer; that the government has established an artillery range at Cleveland, on the line of the road, where 2,000 men and 500 horses are to be kept, the men and horses to be constantly changed, and that the artillery range will require great quantities of supplies.

Upon this showing, what shall be done? This court has no desire to take over and operate business enterprises, or to substitute its judgment for that of men in charge of business enterprises. This railway has lost money from the beginning. The owners certainly did not invest money for the purpose of losing it, but with their manner of managing it I hardly see how they could hope to make money. If the management had cultivated the virgin fields about them, there might have been a richer harvest; but with no acquaintance with the patrons, and no effort to encourage or stimulate business along the line, the result is not surprising. Railroads in these modern days create business, encourage the building of enterprises along their lines, and foster the improvement of agriculture, in order that their freight traffic may be increased.

The receiver now in charge of the road is a banker. He resides in Atlanta. He is an estimable gentleman, but he is not in touch with the people along the line of road. He is not familiar with local conditions, or in sympathy with them. He cannot leave his bank to give this railroad the attention it needs. For these reasons, without mean-

ing any reflection whatever on him, I have decided to appoint a Greenville man as coreceiver, and I shall appoint a man who not only knows local conditions, but a man who also knows railroading. What shall these receivers be required to do? Shall receivers' certificates be issued, which will be a prior lien to the mortgage debt? Shakespeare puts it in the mouth of one of his characters to say, "When I was a boy and lost an arrow, I sent another in the selfsame way." I believe that the conditions demand that, notwithstanding previous losses, the receivers shall issue a sufficient amount of certificates to put the road in condition to run trains over it, and just as soon as they can get the road in condition to run trains over it, without endangering the lives of the crew and passengers, operation should be resumed. The interests of the public make this service imperative, and I am bound to believe that such service will be equally beneficial to the bondholders. For surely, if the road is in operation or ready to operate, it will sell to better advantage than it would if idle and the property depreciating from nonuse. It should be put in operation, in order that the purchaser may understand that he is buying a railroad, a going railroad, which under the law of South Carolina shall be continued as a railroad until the Legislature shall consent for its abandonment.

Section 3117 of the Code of Laws of South Carolina of 1912, provides:

"Any person, company or corporation now running or hereafter acquiring any railroad within this state by purchase or otherwise shall organize and put into operation said road within sixty days from their purchase or acquisition thereof."

That is the law under which the defendant railroad was purchased and organized by its present owners. That is the law under which it must be sold, and under which the new purchasers must organize and operate. Persons in private business may abandon it at their whim or pleasure. Not so with a railroad. It is a public highway. It is created by the state for the public use. It exercises the state's great power of eminent domain for the public good. The Supreme Court of the United States, in *Barton v. Barbour*, 104 U. S. 135, 26 L. Ed. 677, says:

"A railroad is authorized to be constructed more for the public good to be subserved than for private gain. As a highway for public transportation, it is a matter of public concern, and its construction and management belong primarily to the commonwealth, and are only put into private hands to subserve the public convenience and economy. But the public retain rights of vast consequence in the road and its appendages, which neither the company nor any creditor or mortgagee can interfere with. They take their rights subject to the rights of the public, and must be content to enjoy them in subordination thereto. It is therefore a matter of public right by which the courts, when they take possession of the property, authorize the receiver or other officer in whose charge it is placed to carry on in the usual way those active operations for which it was designed and constructed, so that the public may not receive detriment by the nonuser of the franchises. And in most cases the creditors cannot complain, because their interests, as well as those of the public, are promoted by preventing the property from being sacrificed at an untimely sale, and protecting the franchises from forfeiture for nonuser. As a choice, then, of less evil, if not of the most positive good (but generally of the latter also), it has come to be settled law that a court of equity may, and in

most cases ought to authorize its receiver of railroad property to keep it in repair, and to manage and use it in the ordinary way until it can be sold to the best advantage of all interested. The power of the court to do this was expressly recognized in the case of *Wallace v. Loomis*, 97 U. S. 146 [24 L. Ed. 895]."

Wherefore it is ordered and adjudged and determined that V. E. McBee, Esq., be, and he is hereby, appointed as coreceiver with the present receiver, Carl J. Lewis; further ordered that the receivers immediately issue receivers' certificates, not to exceed the sum of \$3,000, and that they use the proceeds thereof, or so much as may be necessary, in so repairing the roadbed, especially that north of the bleachery, as to make it safe to operate trains over the same. As soon as trains can be safely run over the road, the service shall be resumed.

PUCKETT v. COLUMBUS POWER CO. et al.

(District Court, N. D. Georgia. February 15, 1918.)

1. REMOVAL OF CAUSES ⇐49(3)—SEPARABLE CONTROVERSIES—RIGHT TO REMOVAL.

Where plaintiff's declaration in an action begun in the state court, after setting forth a joint cause of action against his employer, a foreign corporation, and a local corporation, contained further averments disclosing a cause of action against his employer, based on the relation of master and servant, there was a separable controversy, which the employer, being a foreign corporation, could, under the Removal Act (Judicial Code [Act March 3, 1911, c. 231] § 28, 36 Stat. 1094 [Comp. St. 1916, § 1010]), remove to the federal court, for the cause of action for joint negligence was wholly distinct from the cause of action arising out of the relation of master and servant.

2. REMOVAL OF CAUSES ⇐61—SEPARABLE AND DISTINCT CONTROVERSIES—DECLARATION.

Where there is a suit against two or more parties, and one only is a nonresident, and he seeks to remove the cause, the question whether there is such a separable and distinct controversy as to warrant removal is determined by the state of plaintiff's declaration at the time the cause is removed.

At Law. Action by James G. Puckett against the Columbus Power Company and the Postal Telegraph-Cable Company, begun in the state court and removed by the last-named defendant to the District Court on the ground of a separable controversy. On motion to remand. Motion denied.

Atkinson & Born, of Atlanta, Ga., for plaintiff.

T. T. Miller, of Columbus, Ga., and Anderson & Rountree, of Atlanta, Ga., for defendant Postal Telegraph-Cable Co.

F. U. Garrard and A. W. Cozart, both of Columbus, Ga., for defendant Columbus Power Co.

NEWMAN, District Judge. This is a case removed to this court from the superior court of Muscogee county, Ga. The plaintiff is a citizen and resident of the state of Georgia and of the Northern district thereof. The defendant Columbus Power Company is a Georgia

corporation. The defendant Postal Telegraph-Cable Company is a citizen and resident of the state of Delaware. The first will be called hereafter the "Power Company" and the latter the "Telegraph Company."

The petition for removal was filed with the superior court on the ground that there was a separable controversy between one of the defendants, the Telegraph Company, and the plaintiff. The order of the judge of the superior court of Muscogee county recites:

"Read and considered. It appearing to the court that written notice of the foregoing petition and bond for removal has been given to the plaintiff, and the petition and bond being in terms of law:

"It is ordered and adjudged that this cause be and the same is hereby removed to the District Court of the United States for the Northern District of Georgia, Western Division; and the clerk of this court is hereby directed to make up the record in said case for transmission to said court forthwith.

"In open court, this 4th day of August, 1917.

"G. H. Howard, Judge Superior Court, Muscogee County."

The case was thus removed, and a motion is now made to remand the same to the state court, on the ground that no separable controversy exists.

The plaintiff claims to have been severely injured by the defendants' negligence while working as the Telegraph Company's lineman on its lines of wires in Columbus, Ga. The Power Company's wires crossed the Telegraph Company's wires. The declaration undoubtedly states a joint cause of action against the two companies. The question here is: Does it also state a separate cause of action against the Telegraph Company, which is not a joint cause of action, and which makes a separable controversy in this case as against the Telegraph Company?

[1] In the declaration, after stating a joint cause of action against both companies, this occurs:

Paragraph 26: "Defendant Postal Telegraph-Cable Company was negligent, in that it furnished to your petitioner an unsafe place to work at the top of said telegraph pole, where your petitioner's duties required him to go and to be in order to cut down said telegraph wires, as your petitioner was ordered to do."

Paragraph 28: "Defendant Postal Telegraph-Cable Company was negligent in furnishing to your petitioner an unsafe place to work in cutting down the aforesaid telegraph wires at the top of said pole, by reason of allowing the said high-powered wire to be and remain in close proximity as aforesaid to said telegraph wires."

Paragraph 29: "Your petitioner did not know, and had no opportunity of knowing, that he was encountering any danger in going to the top of said telegraph pole to cut down said wires."

Paragraph 30: "Your petitioner did not know, and had no opportunity of knowing, that the master, Postal Telegraph-Cable Company, had furnished to your petitioner an unsafe place to work as aforesaid."

Paragraph 31: "Your petitioner did not have equal means with his master, Postal Telegraph-Cable Company, of knowing that said place was dangerous in which to work."

Paragraph 32: "Your petitioner did not have equal means with the defendant Postal Telegraph-Cable Company of discovering that the aforesaid place was dangerous in which to work."

Paragraph 33: "Your petitioner did not have equal means with the master, Postal Telegraph-Cable Company, of knowing or discovering that the aforesaid place had been rendered dangerous in which he was at work."

Paragraph 34: "Your petitioner mounted and climbed said pole in the line of his duties, to discharge the labors he had been ordered to do, apprehending no danger whatever."

Paragraph 35: "Said defendant Postal Telegraph-Cable Company was negligent in ordering your petitioner to cut down its wires from the top of said telegraph pole, knowing, or in the exercise of ordinary care it should have known, that at the top of said telegraph pole it was furnishing to your petitioner a dangerous place to work, without notifying your petitioner that it was furnishing a dangerous place in which he was required to work."

It will be seen that this states a separate and distinct cause of action against the Telegraph Company, and the law of master and servant is necessarily brought into the case and applied to the rights which are claimed as between the plaintiff and the Telegraph Company. No such law is involved and no such rights can exist between the plaintiff and the Power Company.

The language of the Removal Act (New Judicial Code, section 28 [Act of March 3, 1911, in force January 1, 1912]), is:

"And where a suit is now pending, or may hereafter be brought, in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the District Court of the United States for the proper district," etc.

It will be seen from this that any suit in the state court, in which there is a "controversy" between a citizen of the state and a citizen of another state, is removable. Undoubtedly, where, in addition to a joint cause of action, stated against two defendants, there is a separate and distinct cause of action, stated between the plaintiff and one of the defendants, arising out of the relation of master and servant (such relation not existing as between the plaintiff and the other defendant), a separable cause of action is stated. Here such separable cause of action exists between the plaintiff and the nonresident defendant, the Telegraph Company. Of course, the duty to an employé arising from the relation of master and servant is a duty which cannot be charged to any one except the employer. The right claimed here against the Telegraph Company is that of being entitled to a safe place to work, and a claim for damages because he was injured by reason of the master's failure to provide him a safe place to work is an issue that could only arise between servant and master. The Power Company would not be liable in any way to the plaintiff for the duty which a master owes to his servant.

[2] Under the statute and under the authorities, where there is a suit against two or more parties, and one only is a nonresident, and he seeks to remove the case, there must be, of course, a separate and distinct controversy. Whether there is such a separate and distinct controversy is tested by the state of the plaintiff's declaration at the time the case is removed. Considering it so here, I am constrained to hold that a separable controversy exists in this case. The Supreme Court of Georgia, in *So. Ry. Co. v. Edwards*, 115 Ga. 1022, 42 S. E. 375, states very clearly the law which I think is applicable to this case. I have heretofore in two cases followed and approved that case and the law there stated. The first was the case of *Adderson v. So. Ry. Co.*

(C. C.) 177 Fed. 571, and subsequently in the case of Cayce v. So. Ry. Co. (D. C.) 195 Fed. 786. There is much authority upon the question of the right to remove cases because of a separable controversy, but I think it is unnecessary to refer further to the law. I have gone into this matter fully heretofore, and am satisfied with the decisions I have made on this subject.

These authorities control the case here, and the result is that the motion to remand must be overruled and denied; and it will be so ordered.

In re EAST STROUDSBURG SUPPLY & CONSTRUCTION CO.

(District Court, M. D. Pennsylvania. March 7, 1918.)

No. 3465.

1. BANKRUPTCY ⇨151—TRUSTEE—RIGHTS OF.

The trustee in bankruptcy takes the property in the same condition in which the bankrupt held it.

2. BANKRUPTCY ⇨253—TRUSTEE—REDEMPTION.

The trustee in bankruptcy has the right to redeem property which has been pledged by the bankrupt, and should exercise that right, where for the benefit of creditors.

3. BANKRUPTCY ⇨253—LIENS—RELEASE.

Where a vendor, who took back a mortgage for part of the purchase price, agreed, it being the intention of the purchaser to plat the premises, erect buildings, and dispose of lots to release any lot upon payment of a fixed sum, the vendor may be required, the purchaser having become a bankrupt, to release lots on which houses were erected on payment of the sum fixed, for the vendor had his opportunity of protecting himself when he entered into the contract, and it would be inequitable to allow him to hold such lots after his security had been increased.

4. BANKRUPTCY ⇨293(1)—COURTS OF BANKRUPTCY—JURISDICTION.

Where it was agreed between the bankrupt and its vendor, who took back a purchase-money mortgage, that separate lots should be released from the lien of the mortgage on a fixed payment, and the trustee in bankruptcy desired to exercise that right as to lots on which the bankrupt had erected buildings, a court of bankruptcy has jurisdiction of a proceeding to require the vendor to release such lots from the lien of his mortgage, for the trustee is an officer of the bankruptcy court, and the matter affected the estate of the bankrupt.

In Bankruptcy. In the matter of the bankruptcy of the East Stroudsburg Supply & Construction Company. On rule to show cause why Louis Sulkin, mortgagee, should not release certain lots from the lien of his mortgage, and the same should not be ordered sold, discharged of the mortgage lien. Rule made absolute.

Houck & Benjamin, of Scranton, Pa., for trustee.

E. J. & J. W. Fox, of Easton, Pa., for respondent.

WITMER, District Judge. Louis Sulkin was the owner of a tract of real estate in Stroudsburg, which he sold to the East Stroudsburg Supply & Construction Company, taking from the company, as part consideration of the purchase money, a mortgage, which was recorded

and made a lien covering the entire property conveyed. It was the intent and purpose of the purchaser, the East Stroudsburg Company, to erect buildings upon said real estate and to sell and dispose of the same in lots and parcels, and, in order to transfer the required title, free and discharged of the lien of the mortgage, a release of any or all of said lots or parcels of ground was necessary; hence the parties simultaneously, but separate and apart from the mortgage, entered into the following agreement:

"The said Louis Sulkin covenants, promises, and agrees to and with the East Stroudsburg Supply & Construction Company, Incorporated, and the East Stroudsburg Supply & Construction Company, Incorporated, for the consideration aforesaid, covenants, promises, and agrees to and with the said Louis Sulkin, as follows, to wit:

"I. The said Louis Sulkin will execute a release of the aforesaid mortgage unto the East Stroudsburg Supply & Construction Company, Incorporated, its successors and assigns, for any or all of the lots conveyed by the aforesaid deed and covered by the aforesaid mortgage, upon the payment to him, the said Louis Sulkin, his executors, administrators, or assigns, of the sum of three hundred dollars per lot.

"II. The East Stroudsburg Supply & Construction Company, Incorporated, agrees to pay to the said Louis Sulkin, upon the release, three hundred dollars for each and every lot for which a release is asked, by the said East Stroudsburg Supply & Construction Company, Incorporated, until the whole of the mortgage debt is thereby or otherwise paid."

It appears that afterwards, and before the company was adjudicated a bankrupt, certain lots, designated as lots Nos. 13, 14, and 15 on the bankrupt's plot of this ground, embraced in the conveyance, were improved by the erection thereon of houses. The trustee in bankruptcy, deeming it advisable and to advantage to the bankrupt estate to pay the money for the release of said lots, as provided by the agreement between the parties, obtained authority from the court to advance to the mortgagee the necessary money for the purpose, and having obtained such money, the trustee tendered and offered to the said mortgagee, Louis Sulkin, a legal tender of \$950, being the amount due, including interest, for the release of the lots. The tender was refused and the release declined, whereupon the trustee came into court, asking for a rule to show cause why the said Louis Sulkin should not be compelled to accept said money and execute a release for the three lots mentioned, and on failure thereof he be authorized and empowered to pay the money into court, so as to enable him to make sale of the lots, free and discharged of the lien of the mortgage.

The respondent answers that his contract with the bankrupt was made to aid and assist the bankrupt company in developing the real estate sold to the bankrupt and mortgaged for a portion of the purchase price; that it was the plan of the bankrupt to build houses upon it and to sell lots from time to time, and, in order to assist the enterprise, the respondent entered into the agreement mentioned. The respondent denies that the right which the East Stroudsburg Supply & Construction Company enjoyed before its bankruptcy under its agreement with him to have released from the lien of the mortgage certain of its lots passed to the trustee in bankruptcy and became an asset of the bankrupt company.

[1-3] Now, it must be conceded that the bankrupt was the owner of the lots subject to the equities of the mortgagee, and it is fundamental that "the trustee in bankruptcy takes property in the same condition in which the bankrupt held it." *Humphrey v. Tatman*, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956. Likewise the trustee has the right to redeem property which has been pledged by the bankrupt. *Van Kirk v. Slate Co. et al.* (D. C.) 140 Fed. 38, 15 Am. Bankr. Rep. 239. It is in fact his duty to redeem such property, where the same may be accomplished by the payment of less than its value, so as to realize the equity of redemption for the general creditors. There appears to be no good reason for any contrary conclusion here in the face of the admitted facts of the case under consideration. The bankrupt erected houses on the designated lots, the builders and mechanics contributing their portion, all depending on the title of the bankrupt's right to release on payment of the stipulated amount. That the trustee should be denied the right of release contemplated by the agreement between the parties would indeed work great injustice and hardship to those who, relying on the mortgagee's promise, have extended credit to the bankrupt. The mortgagee, having fixed the amount for the release of the aliquot parts of the mortgaged premises, is bound to look to such parcel for its proportionate part only, and, when tender is made of the consideration, the mortgagor, or his representative, is entitled to have the same discharged from the lien of the mortgage. *Jones et al. v. Vogel*, 185 Pa. 1, 39 Atl. 546; *Levers v. Van Buskirk*, 4 Pa. 309.

[4] That the bankruptcy court has jurisdiction in this proceeding to determine the amount and character of the mortgage lien on the property in question is not doubted. The officer of the court, the trustee, is in the possession of the property, and in order to convert such property into cash, for distribution amongst the creditors in the administration of the estate of the bankrupt, it becomes necessary and important that the court determine the character of the liens and make disposition in regard to the same. To this end the court will exercise its jurisdiction over the estate of the bankrupt. *Whitney v. Wenman*, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157.

The rule is made absolute, and an order will accordingly be entered.

SOCIÉTÉ ANONYME DU FILTRE CHAMBERLAND SYSTÈME PASTEUR
v. CONSOLIDATED FILTERS CO., Inc., et al.

(District Court, S. D. New York. January 9, 1918.)

No. 185.

1. TRADE-MARKS AND TRADE-NAMES ☞95(1)—PRELIMINARY INJUNCTIONS—
CONFLICTING AFFIDAVITS.

A preliminary injunction, restraining defendants from the use of a particular word as a trade-mark and from incorporating it in their corporate title, will not be granted, where the affidavits as to the rights of the parties were in hopeless conflict.

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

2. TRADE-MARKS AND TRADE-NAMES ⇨68—USE—COMPETITION.

Where complainant, a corporation of a foreign country which manufactured "Pasteur" filter tubes, was not doing business in the United States, and defendants were not in competition with it, an injunction restraining them from the use of the trade-mark "Pasteur" will be denied, where the tubes they sold were genuine tubes manufactured by complainant, for the right in such trade-mark cases is based on the deception of the public, as in cases of unfair competition.

3. INJUNCTIONS ⇨137(1)—PRELIMINARY INJUNCTION—RIGHT TO.

Where an injunction had been issued against defendant's principal, and by its terms it restrained, not only the principal, but its agents, an injunction against defendant to protect the same rights which complainant asserted in the suit against the principal will not on that ground be granted, for the first injunction extended to defendant.

4. TRADE-MARKS AND TRADE-NAMES ⇨95(5)—USE OF TRADE-NAMES—RIGHT TO ENJOIN DEFENDANT.

Where defendant, by the long-continued use of a trade-name, established a reputation in business, and this was permitted by complainant, though it was entitled to restrain defendant's use of such name, complainant cannot at a later day prohibit defendant's use of the name, for that would be inequitable.

In Equity. Bill by the Société Anonyme Du Filtre Chamberland Système Pasteur against the Consolidated Filters Company, Incorporated, and others. On application for preliminary injunction. Application denied.

Ashley, Foulds & Galland, of New York City (Justin S. Galland, of New York City, of counsel), for complainant.

Wollman & Wollman, of New York City (Achilles H. Kohn, of New York City, of counsel), for defendants.

MANTON, District Judge. The complainant seeks a preliminary injunction restraining the defendants, dealers in filters and accessories, from the use of the trade-mark "Pasteur." Complainant is a French corporation not engaged in business in America, except through agency. It also seeks to restrain the defendants from using the business name of Pasteur Filter Company and Pasteur Filter Agency, claiming unfair competition in the use of such names in the telephone book, City Directory, and Telephone Red Book. The Pasteur Chamberland Filter Company of America is the licensee of complainant in the United States. Pasteur's system of filtration, and the apparatus employed therein, is what gave rise to the name; it having been invented and patented by a man named Pasteur. The apparatus designed by Louis Pasteur and Charles Chamberland is designed to carry out a filtration system, whereby the passage of microbes and other suspended matter in water and fluids generally might be prevented, and the same rendered bacteriologically sterile. For this system and apparatus, the joint names of "Pasteur Chamberland" are used and form part of the corporate name of the complainant.

A license for the manufacture and sale of this apparatus was granted to the Pasteur Chamberland Company of Dayton, Ohio, which expired on December 31, 1912, after which date the apparatus continued to be sold under said names, first by the Pasteur Filter Sales & Repair-

ing Company, a New York corporation, under a sublicense from complainant, and upon the termination thereof in May, 1916, by complainant's present licensees, the Pasteur Chamberland Filter Company of America.

Prior to the organization of the defendant Consolidated Filters Company, Incorporated, in February, 1916, the defendants Oppenheim and Lordly, in partnership, under claim of contract and authority, were engaged in selling filters and accessories manufactured by the plaintiff, and claimed authority to use these names by licenses and agreement. This, they claim, to have assigned to the Consolidated Filters Company, Incorporated. Lordly, in July, 1915, entered into a contract with the New York company, which was a sublicensee of complainant, whereby he was permitted to sell and deal in Pasteur filters and tubes, in parts of the state of New York, with authority to advertise in the City Directory and telephone book.

It is contended by complainant that whatever right was acquired under this contract, which was assigned to the Consolidated Filters Company, Incorporated, it has terminated by time expiration, and that the continuation of the use of the names is an infringement. The defendant also makes use of the term "agent" or "representative" of the complainant on its letter heads and advertising matter, and also "sole New York representative of the Pasteur Chamberland Filter Company of Dayton, Ohio." It appears that an action was instituted in the United States District Court of Ohio against the Dayton company for infringement of its trade-mark. This action is still pending and undetermined, but a preliminary injunction has been granted, which permits the use of the name, providing the Dayton company ceases the manufacture of the apparatus.

[1, 2] The affidavits submitted on each side are irreconcilable and wholly in conflict. The defendants presented a claim of right to use this name by consent of the complainant, and also make claim of certain contract rights secured by former negotiations resulting in contracts. On a motion for preliminary injunction, I do not think the court should decide this question of fact thus presented on affidavits, but should defer it until the trial is had. The defendants present affidavits which forcibly demonstrate that the filters sold by them contained genuine tubes manufactured by the complainant, and all complainant's tubes, treated by the defendants, have been treated in accordance with the recommendations of the complainant, and no treated tubes have been sold as new, and claim that, the plaintiff not manufacturing in this country, the defendants cannot, therefore, be in competition with it. Thus it is claimed that the public has not been deceived, since the defendants sell only genuine Pasteur filters. Whether or not this claim is well founded depends again upon the determination of a question of fact presented in affidavits, which are hopelessly in conflict. If the defendants sold the genuine article, and were not in competition with the plaintiff, an injunction should not be granted (*F. Gretsck Mfg. Co. v. Schoening*, 238 Fed. 780, 151 C. C. A. 630), for the essence of the wrong consists in the sale of goods of one manufacturer or vendor for those of another, and this applies in trade-

mark cases as in cases of unfair competition (*Hanover Star Milling Co. v. Metcalf*, 240 U. S. 403, 36 Sup. Ct. 357, 60 L. Ed. 713).

The defendants further contend that the complainant has consented to and approved the use of the name Pasteur Filter Company by defendants. The truth about this should not be determined on the affidavits presented, but should be left to the trial court. There is not sufficient presented by the complainant to warrant the granting of a preliminary injunction.

[3, 4] The effect of the decision of Judge Hollister in the Dayton Company Case does not aid the complainant here; for, if the complainant is correct in saying that the defendants here are the agents of the Dayton company, and can establish that position, it has the benefit of the injunction in the Ohio court, which restrains the Dayton company and its agents, and, if wrong has been committed against the complainant by the acts or conduct of the defendants, they are subject to the prohibitions and injunctive restraints placed upon the agents of the Dayton company. It does not, however, offer reason why a preliminary injunction should be granted here. In this action, then, too, it is claimed by the defendants that the complainant, by granting licenses or by contract obligations, has permitted the use of the name Pasteur Chamberland Filter Company in corporate names and otherwise, so as to constitute such conduct as to acquiesce in the use of the word "Pasteur" and relinquish what right it may have in that name. If a reputation in business were established by the use of such trade-name for a long period of time, and this permitted by the complainant, it would be inequitable to forbid its continued use, when it lay within the power of the complainant at any time to have arrested the use of the trade-name by the defendants.

However, these are all questions which I shall leave to the trial court, and deny the application for an injunction at this time.

UNITED STATES v. SCOTT.

(District Court, D. Rhode Island. February 28, 1918.)

No. 302.

1. ARMY AND NAVY ⚡28—STATUTORY PROVISIONS—VALIDITY.

The Selective Service Act May 18, 1917, c. 15, § 13, 40 Stat. 83, authorizing the Secretary of War to suppress and prevent houses of ill fame within such distance as he may deem needful of any military camp, etc., is within the power of Congress under Const. art. 1, § 8, cl. 18, authorizing Congress to make all laws necessary and proper for carrying into execution the powers vested in the government of the United States or any department or officer thereof.

2. CONSTITUTIONAL LAW ⚡62—LEGISLATIVE POWERS—DELEGATION.

Selective Service Act, § 13, as to disorderly houses, does not delegate legislative power to the Secretary of War, but empowers him to ascertain and declare the zone within which the statute shall take effect.

3. CONSTITUTIONAL LAW ⚡48—PRESUMPTIONS AND CONSTRUCTION IN FAVOR OF CONSTITUTIONALITY.

It is only in clear cases that statutes are declared unconstitutional, and a statute is supported by the presumption of constitutionality.

4. INDICTMENT AND INFORMATION Ⓒ111(1)—SUFFICIENCY OF ACCUSATION—NEGATIVES EXCEPTIONS.

Under Selective Service Act, § 13, providing that any one receiving or permitting any person to be received or to remain in any place for an immoral purpose within such distance of any military camp, etc., as may be designated shall be punished as therein specified, unless otherwise punishable under the Articles of War, an indictment need not negative the exception, as it forms no part of the definition of the offense, and does not exempt any general class of persons from criminal liability, but is an "excusatory defense," which defendant has the burden of alleging and establishing.

5. INDICTMENT AND INFORMATION Ⓒ61—MATTERS TO BE PLEADED—JUDICIAL NOTICE.

An indictment under Selective Service Act, § 13, as to disorderly houses, was not defective, because not giving the correct date of the regulations prescribed thereunder, as they have the force of law and are matters of judicial notice, which the pleader was not required to state.

Cynthia Scott was indicted for keeping a house of ill fame within five miles of a naval training station and fort. On demurrer to the indictment. Demurrer overruled.

Harvey A. Baker, U. S. Atty., of Providence, R. I.
William H. Lewis, of Boston, Mass., for defendant.

BROWN, District Judge. By demurrer to this indictment, which charges the keeping of a house of ill fame within five miles of the naval training station and of Ft. Adams, Newport, R. I., the defendant questions the constitutionality of section 13 of "An act to authorize the President to increase temporarily the military establishment of the United States," known as the "Selective Service Act," approved May 18, 1917, and also the constitutionality and legal validity of the orders, rules, and regulations made by the President, the Secretary of the Navy, and the Secretary of War in pursuance thereof.

These questions were fully considered in an opinion of the United States District Court for the Southern District of Ohio, Eastern Division, in *United States v. Thomas Casey et al.*, 247 Fed. 362, printed in Bulletin No. 46, Interpretation of War Statutes.

[1, 2] Constitutional power in Congress to enact this legislation is found in article 1, section 8, clause 18; and it is pointed out that the act does not delegate legislative power to the Secretary of War, but empowers him to make a regulation ascertaining and declaring the zone within which the statute, which expresses the will of Congress, shall take effect.

[3] The suppression in time of war, in districts immediately adjacent to military stations, of sources of contagion likely to affect and impair the efficiency of the officers and enlisted men of the army and navy, violates no constitutional rights of the defendant, and seems properly within the constitutional power of Congress. The demurrer, so far as it asserts grounds of unconstitutionality seems without merit. It is only in clear cases that statutes are declared unconstitutional; and this statute is supported, not only by the presumption of constitutionality, but by good authority and sound reasons.

[4] It is further urged that the indictment is defective, in that it contains no allegation that the offense set out is not punishable under the Articles of War. Section 13 contains the clause "unless otherwise punishable under the Articles of War." Counsel for the defendant points out no Article of War under which, for the acts charged, the defendant, a woman, might be punishable as a legal possibility; but, even if there be any Article of War comprehensive enough to include this defendant, it would seem unnecessary that the indictment should negative this clause. It forms no part of the definition of the offense; neither does it exempt any general classes of persons from criminal liability for the acts charged. It sets forth grounds of defense peculiarly within the knowledge and ability to prove of a defendant, if existing, and its purpose is to avoid a conflict with the jurisdiction of courts-martial rather than to afford immunity to an offender.

In *United States v. Cook*, 17 Wall. 168, 173 (21 L. Ed. 538) it was said:

" * * * If the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference, as the matter contained in the exception is matter of defense and must be shown by the accused."

The character of this exemption shows that it is impractical to cast upon the government the burden of negating it. If the defendant is in fact amenable to and punishable under some Article of War, and thus has what is termed an "excusatory defense" against trial upon the indictment, the burden of alleging and establishing it is upon the defendant, and the indictment need not anticipate nor negative it. 1 *Wharton's Cr. L.* 380; *United States v. Carney* (D. C.) 228 Fed. 163, 169. See, also, *State v. Heffernan*, 28 R. I. 477, 68 Atl. 364; *State v. Flanagan*, 25 R. I. 369, 55 Atl. 876; *State v. Gallagher*, 20 R. I. 266, 38 Atl. 655.

[5] It is further objected to the second and fourth counts that they refer to regulations of July 24, 1917, when in fact the regulations are of the date of July 25, 1917. As the regulations, when promulgated, have the force of law, and in conjunction with the statute are matters of judicial notice, which the pleader is not required to state, there is no merit in this ground of demurrer.

Demurrer overruled.

In re BOARDWAY.

(District Court, N. D. New York. March 17, 1918.)

BANKRUPTCY ⇨391(3), 435—**DISCHARGE—WAIVER.**

Where a bankrupt, though duly served in an action on a claim barred by his discharge, defaulted, and did not interpose as a defense the discharge, the court of bankruptcy cannot enjoin enforcement of the judgment of the New York state court, for, unless pleaded, the defense of discharge is waived; hence the bankrupt, if entitled to any relief, must resort to the method prescribed by Code Civ. Proc. N. Y. § 1268, now Debtor and Creditor Law (Consol. Laws, c. 12), § 150.

In Bankruptcy. In the matter of the bankruptcy of George Boardway. On motion to vacate an ex parte order restraining the collection and enforcement of a judgment against the bankrupt recovered by default, after his discharge, on a claim which existed prior to his bankruptcy and which had been discharged by the general order. Motion granted.

Motion to vacate an ex parte order restraining the collection and enforcement of a judgment against the said George Boardway, recovered by default after his discharge in bankruptcy on a claim against him which existed prior to his bankruptcy and was provable and dischargeable in bankruptcy, and which claim was discharged by the general order, etc., discharging him from all his provable debts, notice of all proceedings having been given to the claimant, and the claim having been duly scheduled.

Thos. R. Tillott, Jr., of Schenectady, N. Y., for judgment debtor.
Del B. Salmon, of Schenectady, N. Y., for judgment creditor and bankrupt.

RAY, District Judge. The judgment debtor, George Boardway, was duly adjudicated a bankrupt in this court and duly filed his schedules, which included the claim of the judgment creditor, David H. O'Brien, whose address was properly and correctly given, and who was duly notified of all proceedings in the bankruptcy matter. O'Brien's claim was one provable in bankruptcy. In due time Boardway filed his application for a discharge, and the usual proceedings were had and notice duly given to all creditors, including O'Brien. There being no appearances or objection, Boardway was discharged, and the usual order made and entered, and a discharge issued.

Thereafter O'Brien sued Boardway on such claim, one provable in bankruptcy, in the City Court of the city of Schenectady, N. Y., and process was duly served. Boardway did not appear, and O'Brien took judgment on such claim by default, and issued execution, and has garnisheed Boardway's wages. The said judgment has not been opened or vacated. Application was made, ex parte, to this court for an order enjoining further proceedings on the judgment and on the garnishee proceedings, and all the facts not appearing, and this court assuming the bankruptcy proceedings to be pending, and that the judg-

ment was obtained prior to adjudication, granted the stay. The judgment creditor, O'Brien, moves to vacate such injunction order.

The motion to vacate must be granted. The bankruptcy proceeding was commenced in June, 1916, and the discharge was granted November 6, 1917. The estate was closed, and the bankruptcy proceedings ended, prior to suit brought on such claim and prior to the obtaining of such judgment. The jurisdiction of this court ended with the closing of the estate. Whether or not said O'Brien, when he brought suit, had a claim on which he could sue and obtain judgment in the City Court, is not for this court to decide. He sued and obtained a judgment after the bankruptcy proceedings were closed, which is in full force, and no bankruptcy proceedings are now pending. Boardway, when sued, might have appeared in the City Court and there pleaded his discharge in bankruptcy and defeated the suit, assuming the facts to have been as stated; but this he did not do. This court has no power to interfere with the enforcement of that judgment. If, after bankruptcy proceedings are ended, a creditor sues the bankrupt on a claim which has been discharged, he may appear and plead and prove his discharge, and it will be a complete defense. If he does not appear, but allows judgment by default, the court in bankruptcy is powerless to grant any relief. The remedy of Boardway, if any, is under section 1268 of the New York Code of Civil Procedure. That section provides:

"At any time after one year has elapsed, since a bankrupt was discharged from his debts, pursuant to the acts of Congress relating to bankruptcy, he may apply, upon proof of his discharge, * * * for an order, directing the judgment to be canceled and discharged of record. If it appears upon the hearing that he has been discharged from the payment of that judgment or the debt upon which such judgment was recovered, an order must be made directing said judgment be canceled and discharged of record."

In *Walker v. Muir*, 194 N. Y. 420, 87 N. E. 680, the Court of Appeals of New York has decided that this section of the Code applies to a case where the judgment is upon a debt which has been discharged in bankruptcy. In that case the suit was commenced before the bankruptcy proceedings were instituted, but judgment was not entered until after discharge. It may be the state courts will hold that section 1268 of the Code of Civil Procedure has no application to a case where suit on the claim discharged in bankruptcy is commenced after the discharge was granted and default is taken; defendant not appearing or pleading his discharge. But that is for the state court, and not this court, to decide.

In *West Phil. Bank v. Gerry*, 106 N. Y. 467, 472, 13 N. E. 453, it was decided that a judgment is but a new form of the old debt. See, also, remarks of the court in *Walker v. Muir*, 127 App. Div. 164, 111 N. Y. Supp. 465. In any event this court has no jurisdiction to grant the order after the bankruptcy proceedings were terminated. It would seem that, to make the discharge in bankruptcy available, it must be pleaded, and that the right may be waived. *Schreiber v. Garden*, 152 App. Div. 817, 137 N. Y. Supp. 747; *Herschman v. Justices*, etc., 220 Mass. 137, 107 N. E. 543; *In re Nuttall* (D. C.) 201 Fed. 557, and 7 C. J. 414, and cases cited.

Motion granted.

THE REBECCA R. DOUGLASS.

(District Court, S. D. New York. February 1, 1918.)

1. CUSTOMS AND USAGES ⚡17—AGREEMENTS—VARIATION.

A custom or usage as to the payment of port charges by a chartered vessel cannot be permitted to vary a plain and unambiguous agreement making no such provision.

2. SHIPPING ⚡37—CHARTER PARTIES—MERGER.

While the negotiations between the parties amounted to an oral charter party, yet where libelant, when he reduced it to writing, as was contemplated should be done, introduced an unauthorized provision, constituting a material variation, the original agreement became invalid, and libelant could not hold respondents to the oral charter party.

In Admiralty. Libel by Edward Lutz against Edwin Allen Douglass, part owner of the schooner Rebecca R. Douglass, and others. Libel dismissed.

MacFarland, Taylor & Costello, of New York City (Willard U. Taylor and Alfred H. Strickland, both of New York City, of counsel), for libelant.

Burlingham, Montgomery & Beecher, of New York City (Roscoe H. Hupper, of New York City, and Frederick Pennell, of Brooklyn, N. Y., of counsel), for respondents.

HAZEL, District Judge. The libelant herein seeks to recover damages for breach of an oral charter party. The respondent, however, contends that there never was a meeting of the minds of the parties, and that the negotiations at Mobile, Ala., in the early part of December, 1915, did not eventuate in a charter party, but merely in an incompleated agreement that the schooner Rebecca R. Douglass should thereafter be chartered in writing for three trips from gulf ports to Cuba or San Domingo, at option.

The evidence shows that the parties met and discussed the conditions of a charter party, specifying the trips, the parties, rate of loading and discharge, and agreed that its terms should be reduced to writing on a specified form, with which the respondent was familiar, and then sent to him for his signature. I am convinced that, when the parties separated, all the provisions of the charter party had been agreed upon, but that, when the writing was received by respondent, who meanwhile had sailed for St. Andrews, Fla., to complete a previous charter, it contained in typewriting a provision that, if vessel discharged at Cuba, the charges were to be account of vessel as customary, while in the printed form there was a provision that the vessel was to be free of all foreign port charges, including pilotage, counsel fees, custom fees, tonnage, towage, etc. The respondent at once objected to paying port charges, claiming that he had not agreed to do so, and declined to sign the charter party.

[1, 2] Libelant's contention is that the verbal charter party was binding, regardless of any arrangement to reduce the same to writing, and that the inclusion without respondent's consent of the provision

for the payment of port charges by the vessel at Cuba does not invalidate the agreement, as such payment was customary. Respondent's refusal to sign the written document may have arisen, as asserted, from the sudden increase in freight rates, of which he had been informed in the interim between the negotiations and the presentation of the written charter party; but such argument becomes immaterial, in view of the evidential fact that there existed an intention to defer completion of the charter party until it was reduced to writing on a specified form. I think it is clear enough that respondent intended the charter party to include only such ordinary provisions as appeared in the specified form—a printed form with which he was familiar—and accordingly that the inclusion of an agreement for the vessel to pay port charges was a material variation of the previous understanding. Even though such custom or usage existed, it cannot be permitted to vary a plain and unambiguous agreement. *Great Lakes Coal & Dock Co. v. Seither Transit Co.*, 220 Fed. 28, 136 C. C. A. 110.

In the case of *La Compania Bilbaina v. Spanish American Light & Power Co.*, 146 U. S. 483, 13 Sup. Ct. 143, 36 L. Ed. 1054, a clause was inserted in the charter party upon which the minds of the parties had not met, and it was contended, as here, that respondent's dissent to its inclusion did not invalidate the binding effect of the original agreement; but the Supreme Court did not accept that view, and decided that, if there was any part of the charter party in regard to which the minds of the parties did not meet, the whole instrument became a nullity as to its provisions. In *Starr & Co. v. Galgate Ship Co.*, 68 Fed. 234, 15 C. C. A. 366, a somewhat similar situation arose. The parties understood that the charter party was to contain a provision for "charterer's" surveyor; but this was afterwards altered, without the consent of the charterer, to read "competent" surveyor. See, also, *Pew v. Laughlin* (D. C.) 3 Fed. 39. Furthermore, there are adjudications holding that, where a written contract is contemplated, no contract comes into existence until the writing is signed. See *Steamship Co. v. Swift*, 86 Me. 248, 29 Atl. 1063, 41 Am. St. Rep. 545.

It appears to me satisfactorily shown in this case that the negotiations between the parties amounted to an oral charter party, but that, when it was reduced to writing, it contained a material variation; therefore the original agreement became and was invalid.

The libel is dismissed, with costs.

CARDINAL FILM CORP. v. BECK et al.

(District Court, S. D. New York. March 1, 1918.)

COPYRIGHTS ⇨31—INFRINGEMENT—“PUBLICATION.”

Copyright Law March 4, 1909, c. 320, § 62, 35 Stat. 1087 (Comp. St. 1916, § 9583), declaring that the date of publication in the case of a work of which copies are produced for sale or distribution shall be held to be the earliest date when copies of the first authorized edition were placed on sale, was intended merely to fix the date from which the copyright term should begin to run, and not a general definition of what constitutes publication; hence a copyright of a motion picture play is not invalid, because there was no publication before deposit of copies of the play in the office of the librarian of Congress. That deposit constituted sufficient publication to sustain the copyright.

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

In Equity. Bill by the Cardinal Film Corporation against Fred Beck and others. Decree for complainant.

Nathan Burkan, of New York City, for complainant.
Louis Ogust, of New York City, for defendants.

AUGUSTUS N. HAND, District Judge. If the complainant has a valid copyright of the motion picture play, “Joan the Woman,” it has been infringed by the defendants. The defendants, however, argue that the copyright was invalid because there was no publication before the deposit of copies of the motion picture photoplay in the office of the librarian of Congress. This defense has been considered before by Judge Learned Hand in the case of *Stern v. Jerome H. Remick* (C. C.) 175 Fed. 282, where the court said that no publication was necessary other than the deposit in the Library of Congress. The same view of the law was taken by several of the judges in the case of *Jewelers’ Mercantile Agency v. Jewelers’ Pub. Co.*, 155 N. Y. 241, 49 N. E. 872, 41 L. R. A. 846, 63 Am. St. Rep. 666, and by the New York Appellate Division for the Second Department in the case of *Wright v. Eisle*, 86 App. Div. 356, 83 N. Y. Supp. 887. See, also, the opinion of Judge Putnam in the case of *Ladd v. Oxnard* (C. C.) 75 Fed. at page 730.

Section 62 of the Copyright Law, which provides that the date of publication in the case of a work, of which copies are reproduced for sale or distribution, shall be held to be the earliest date when copies of the first authorized edition were placed on sale, sold or publicly distributed by the proprietor of the copyright, or under his authority, was an enactment to fix the date from which the copyright term should begin to run, and not a general definition of what constituted publication.

The usual decree should be granted for the complainant, upon the settlement of which I will hear counsel as to the amount to be awarded for infringement and counsel fees.

NORRIS et al. v. MONTEZUMA VALLEY IRR. DIST. et al.*
 (Circuit Court of Appeals, Eighth Circuit. February 13, 1918.)

No. 4901.

1. WATERS AND WATER COURSES ⇔231—IRRIGATION DISTRICT—BONDS—OBLIGATION TO LEVY TAX.

Statutory power given an irrigation district to issue its bonds, when exercised, imposed an obligation on the district to levy a sufficient tax to pay such bonds as they become due, unless the Constitution or statutes of the state forbade.

2. WATERS AND WATER COURSES ⇔231—IRRIGATION DISTRICT—APPORTIONMENT OF COST OF IMPROVEMENTS.

The cost of the improvements in a local assessment irrigation district must be apportioned in some just mode according to the benefits received by the several portions of the district.

3. MUNICIPAL CORPORATIONS ⇔964—OBLIGATION TO PAY DEBT—ASSESSMENT AND RATE OF LEVY—COLLECTION OF TAXES.

A statutory obligation of a municipal or quasi municipal corporation to pay its debt, or to fix a rate of levy necessary to provide the amount of money required to pay its debt, is not satisfied by an assessment and rate of levy sufficient to pay the debt if the taxes are collected, but requires that there be a sufficient assessment and levy and collection of the taxes as levied actually to pay the debt.

4. TAXATION ⇔42(1)—UNIFORMITY—ADDITIONAL LEVY ON PROPERTY IN IMPROVEMENT DISTRICT.

Provisions in state Constitution and statutes that assessments or levies for taxation shall be uniform upon the same class of subjects, or by value, are not violated when, after lapse of a reasonable time, and after reasonable efforts have been made to collect the first levy, as for the cost of an irrigation improvement, an additional levy is made on all the property in the district, because of the failure of some of the taxpayers to pay their portions of the first levy.

5. MANDAMUS ⇔116—To COMPEL LEVY OF ASSESSMENT—PAYMENT OF JUDGMENT ON BONDS.

Where the debt of an irrigation district to its bondholders had not been paid, when they sued for mandamus to compel a levy of assessment against lands of the district to pay a judgment on interest coupons, about 18 months after the coupons became due, and the lands delinquent under a prior assessment had been offered for sale for taxes, but had only been struck off to the county for lack of other buyers, and only a small number of such sales had been redeemed, the number of taxpayers who refused to pay increasing year by year, so that no further collection of any substantial sums from prior levies was to be expected, the bondholders were entitled to mandamus to compel levy of assessment against the lands of the district to pay the judgment on the interest coupons.

6. WATERS AND WATER COURSES ⇔230(6)—IRRIGATION DISTRICT—BONDS—INTEREST COUPONS—APPORTIONMENT OF FUND.

Under Colorado irrigation statutes, the county treasurer was not required to pay coupons from bonds of an irrigation district in the order of presentation, but the fund available, insufficient to pay all coupons, was to be allotted to all holders of coupons who presented them within a reasonable time after they were due.

Amidon, District Judge, dissenting.

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

Petition for mandamus by Mark Norris and others against the Montezuma Valley Irrigation District and others. To review a judgment

⇔For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
 248 F.—24 *Rehearing denied May 30, 1918.

(240 Fed. 825) granting the prayer for relief in part and denying it in part, plaintiffs bring error. Reversed, and cause remanded for further proceedings in accordance with the opinion.

Fred R. Wright, of Denver, Colo. (Charles D. Hayt and Clyde C. Dawson, both of Denver, Colo., and Mark Norris, of Grand Rapids, Mich., on the brief), for plaintiffs in error.

B. W. Ritter, of Durango, Colo. (Edgar Buchanan, of Durango, Colo., and W. F. Mowry, of Cortez, Colo., on the brief), for defendants in error.

Pershing, Titsworth & Fry, of Denver, Colo., amici curiæ.

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

MUNGER, District Judge. The plaintiffs below sought a writ of mandamus to compel the county treasurer to apply a certain fund in his hands on the payment of a judgment held by them and to compel a levy of a tax to pay the unpaid balance of the judgment. The trial court granted a writ requiring the county treasurer to pay over a portion of the fund in his hands to apply on the judgment and denied the prayer for other relief, and the plaintiffs have prosecuted this writ of error.

The Montezuma Valley irrigation district was organized under the statutes of Colorado, and in 1907 and 1910 it issued two series of its coupon bonds to the amount of \$805,000 to raise the funds for the construction of an irrigation system. For some years it paid these interest coupons as they fell due from a fund derived from taxes levied against each acre in the district which was benefited by reason of irrigation. Some of the owners of the lands did not pay the taxes levied against their lands, and nearly \$50,000 of such taxes were in arrears in 1914. To meet the interest coupons falling due on December 1, 1914, the board of county commissioners made a levy in December, 1913, of an amount against the lands of the district which would have been sufficient to have paid the coupons, if all the taxes had been collected; but a large number of the taxpayers again defaulted in payment. The Colorado statutes required that the lands on which the taxes were delinquent should be offered for sale for the taxes, but, in case no purchaser was willing to pay the amount of the taxes due upon the lands, the certificates were to be struck off to the county. The county was not obliged to pay any money for the certificates thus acquired, nor did it thereby obtain title to the lands; but it held the tax sale certificates for subsequent redemption or purchase by those who should be interested. A purchaser of the certificates was required to pay all of the taxes levied against the land, and if he thereafter paid all taxes subsequently levied thereon he might obtain a tax deed after the lapse of three years; but this deed might be set aside within five years if the proceedings had not been regularly conducted. A later statute, in force since 1915 (Laws 1915, p. 315), provides that the lands are to be sold to the irrigation district, if no one offers to purchase them, and the district, or its assignee, is entitled to a tax deed in the same manner as a private purchaser at the tax sale

would have been entitled, upon payment to the county treasurer of such a sum as the county board of commissioners might determine.

The plaintiffs were the owners of some of the bonds of both series issued by the district, and soon after they were due presented for payment some of the coupons that were due on December 1, 1914, but payment was refused. They then brought suit upon the coupons, and obtained judgment in January, 1916. In May, 1916, they brought this action in mandamus, seeking to compel the board of county commissioners to levy an additional tax against the lands of the district sufficient to pay the judgment. The defendants' answer alleged that a levy of a sufficient tax had been made to pay the district's debts, and that a further levy could not be required, even if portions of the former levy were unpaid, because such a levy would impose an unequal burden on the lands, and in effect require the whole debt to be discharged by that portion of the taxpayers who had paid their shares of the prior levy. This contention was upheld by the trial court.

The statutes of Colorado (sections 3440-3494, chapter 72, Rev. Stat. 1908) provide for the organization and operation of irrigation districts, and these districts have power to own property, to sue and be sued, to acquire and conduct an irrigation system and to issue and sell its bonds for that purpose. Among the provisions of these statutes are the following:

"3456. *Bonds—Payment—Lien.*—Said bonds, and the interest thereon, shall be paid by revenue derived from an annual assessment upon the real property of the district, and the real property of the district shall be and remain liable to be assessed for such payments as herein provided.

"3457. *Board of Directors—Levy.*—It shall be the duty of the board of directors, on or before September first of each year, to determine the amount of money required to meet the maintenance, operating and current expenses for the ensuing year, and to certify to the county commissioners of the county in which the office of said district is located, said amount, together with such additional amount as may be necessary to meet any deficiency in the payment of said expenses theretofore incurred.

"3458. *Assessor—Assessment.*—It shall be the duty of the county assessor of any county embracing the whole or a part of any irrigation district, to assess and enter upon his records as assessor in its appropriate column, the assessment of all real estate, exclusive of improvements, situate, lying and being within any irrigation district in whole or in part of such county. Immediately after said assessment shall have been extended as provided by law, the assessor shall make returns of the total amount of such assessment to the county commissioners of the county in which the office of said district is located. All lands within the district for the purpose of taxation under this act shall be valued by the assessor at the same rate per acre: Provided, that in no case shall any land be taxed for irrigation purposes under this act, which from any natural cause cannot be irrigated, or is incapable of cultivation.

"3459. *County Commissioners.*—It shall be the duty of the county commissioners of the county in which is located the office of any irrigation district, immediately upon receipt of the returns of the total assessment of said district, and upon the receipt of the certificate of the board of directors certifying the total amount of money required to be raised as herein provided, to fix the rate of levy necessary to provide said amount of money, and to fix the rate necessary to provide the amount of money required to pay the interest and principal of the bonds of said district as the same shall become due; also, to fix the rate necessary to provide the amount of money required for any other purposes as in this act provided, and which are to be raised by the levy of assessments upon the real property of said district; and to certify said respective rates to the county commissioners of each county embracing any por-

tion of said district. The rate of levy necessary to raise the required amount of money on the assessed valuation of the property of said district shall be increased fifteen per cent. to cover delinquencies. For the purposes of said district it shall be the duty of the county commissioners of each county in which any irrigation district is located in whole or in part, at the time of making levy for county purposes, to make a levy, at the rates above specified, upon all real estate in said district within their respective counties. All taxes levied under this act are special taxes.

"3460. * * * The bond fund account shall consist of all moneys received on account of interest and principal of bonds issued by said district, said accounts for interest and principal shall be kept separate. The general fund shall consist of all other moneys or general fund warrants received by the collection of taxes or otherwise. The district treasurer aforesaid shall pay out of said bond fund, when due, the interest and principal of the bonds of said district, at the time and place specified in said bonds, and shall pay out of said general fund only upon the order of the district, signed by the president and countersigned by the secretary of said district as herein provided. * * *

"3461. *Assessment—Collection.*—The revenue laws of this state for the assessment, levying and collection of taxes on real estate for county purposes, except as herein modified, shall be applicable for the purposes of this act, including the enforcement of penalties and forfeiture for delinquent taxes."

[1] The power given to the irrigation district to issue its bonds, when exercised, imposed an obligation upon the district to levy a sufficient tax to pay such bonds as they became due, unless the constitution or statutes of the state forbade. *City of Galena v. Amy*, 5 Wall. 705, 18 L. Ed. 560; *Loan Association v. Topeka*, 20 Wall. 655, 22 L. Ed. 455; *United States v. County of Clark*, 96 U. S. 211, 24 L. Ed. 628; *United States v. New Orleans*, 98 U. S. 381, 25 L. Ed. 225; *United States v. County of Macon*, 99 U. S. 582, 25 L. Ed. 331; *Ralls County Court v. United States*, 105 U. S. 733, 26 L. Ed. 1220; *Scotland County Court v. Hill*, 140 U. S. 41, 11 Sup. Ct. 697, 35 L. Ed. 351; *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 21 Sup. Ct. 174, 45 L. Ed. 280; *United States v. Saunders*, 124 Fed. 124, 59 C. C. A. 394. See, also, *Bates County, Mo., v. Wills*, 239 Fed. 785, 152 C. C. A. 571, same case on rehearing, 245 Fed. 556, — C. C. A. —; *Coy v. City Council*, 17 Iowa, 1, 85 Am. Dec. 539.

[2] The trial court was of the opinion that the Colorado statutes relating to irrigation districts impliedly prevented an additional levy as demanded by plaintiffs because the statute provided for taxation by special assessments to pay these bonds, that each acre was subject to only the same burden as every other acre for this purpose, and that a requirement of a new levy as prayed would impose an unequal burden on the lands on which the prior levy had been paid, as compared to those lands on which the levies remained unpaid. Undoubtedly the cost of the improvements in a local assessment district must be apportioned in some just mode according to the benefits received by the several portions of the district. *Gast Realty Co. v. Schneider Granite Co.*, 240 U. S. 55, 36 Sup. Ct. 254, 60 L. Ed. 523; *Hagar v. Reclamation District No. 108*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; *Ill. Cent. R. R. Co. v. Decatur*, 147 U. S. 190, 13 Sup. Ct. 293, 37 L. Ed. 132.

[3] The scheme disclosed by these statutes relating to irrigation districts looks to uniformity of assessment per acre for the payment of the district's indebtedness, but they also provide that the "bonds,

and the interest thereon, shall be paid by revenue derived from an annual assessment upon the real property of the district, and the real property of the district shall be and remain liable to be assessed for such payments as herein provided"; also, the county board are "to fix the rate necessary to provide the amount of money required to pay the interest and principal of the bonds of said district as the same shall become due." Sections 3456, 3459. In order to give to these statutes the construction contended for by defendants in error, it is necessary to read into them a provision that there shall be paid on the bonds only so much as the annual levy shall produce in money collected, whereas the statute is peremptory that the bonds and interest shall be paid, and the remaining provisions only indicate the source and mode of obtaining the fund. In order to give full force and effect to every portion of the statute there must not only be an assessment and levy, but the debt must be paid. A statutory obligation of a municipal corporation or quasi municipal corporation to pay its debt, or to fix a rate of levy necessary to provide the amount of money required to pay its debt is not satisfied by an assessment and rate of levy sufficient to pay the debt if the taxes are collected, but requires that there be a sufficient assessment and levy and collection of the taxes as levied to actually pay the debt. *East St. Louis v. Amy*, 120 U. S. 600, 7 Sup. Ct. 739, 30 L. Ed. 798; *Rialto Irr. Dist. v. Stowell*, 246 Fed. 294; *Boynnton v. The District Township of Newton*, 34 Iowa, 510.

There is neither express nor implied prohibition of the making of a levy large enough to accomplish this purpose. The provision granting power to the county board to estimate and fix the amount of the levy in no way undertakes to limit the amount of the levy they may make. *Bates County v. Wills*, supra; *City of Galena v. Amy*, supra.

[4] The defendants in error press the claim that a reassessment violates the statutory scheme of uniformity of taxation on each acre of these lands. The objection is not made by any taxpayer claiming to have paid his full share of the prior levy, but is made by the defendants in error, the irrigation district, the board of county commissioners and the county treasurer. Considering the defense as one that may be made by the defendants in the action below, it will be observed that the statutes do not provide that a uniform amount shall be collected per acre, but that the lands shall be valued by the assessor at the same rate per acre. The Legislature is presumed to have knowledge of the fact, that under any system of taxation by assessment hitherto devised, a portion of the taxpayers neglect to pay the taxes levied against their property for a long period after they become due. In partial recognition of this fact these statutes provide that the county board shall increase the rate of levy on an irrigation district fifteen per cent. to cover delinquencies. If the objection that is made to a reassessment be carried to its logical conclusion, the regular annual assessment would be excessive in part, because of the practical certainty that some taxpayers would not pay their taxes before the obligations of the district became due. Such a stout requirement of equality of collection would make a system of taxation that would be unworkable in practice. The ordinary ma-

chinery for the collection of taxes is not so perfect that it induces payment at the same time from all alike and usually large portions of taxes upon real property, and larger portions of poll and personal property taxes are never collected. It is supposed that the interest and penalties exacted from those who delay prompt payment and the summary means of enforcement of collection will somewhat equalize the burden that falls on those who pay promptly, but any final unpaid balance is a loss that falls uniformly upon the entire body of taxpayers. It is a common provision in the state constitutions and statutes that assessments or levies for taxation shall be uniform upon the same class of subjects, or by value. Such provisions are not violated, when, after the lapse of a reasonable time, and after reasonable efforts have been made to collect the first levy, an additional levy is made upon all the property in the district because of the failure of some of the taxpayers to pay their portions of the first levy. *State v. Common Council*, 15 Wis. 30; *Sheridan v. Fleming*, 93 Mo. 321, 5 S. W. 813; *State v. Holt County Court*, 135 Mo. 533, 37 S. W. 521; *Wayne County Sav. Bank v. Supervisor of Township of Roscommon*, 97 Mich. 630, 56 N. W. 944; *Huey v. Police Jury*, 33 La. Ann. 1091. See *Bates County v. Wills*, *supra*; *Francis v. A. T. & S. F. Railroad Co.*, 19 Kan. 303. In the case of *State v. Common Council* it was said:

"Nor is it of any importance, in a legal point of view, that many of the citizens have contributed their full proportions of the money which should have been applied in payment of these debts, whilst others have refused, it matters not whether rightfully or wrongfully. It seems oppressive, and is, in some respects, no doubt, a great hardship, that those who are diligent and prompt in the discharge of their obligations to the public should be compelled to suffer on account of the delinquencies of others, occasioned sometimes by the mistakes of the officers of the law, or, it may be, of the Legislature, but more frequently the fault of the delinquents themselves. It is an evil inseparable from every system of taxation, a subject always difficult and never free from vices and imperfections—a misfortune which must ever attend those who dwell in communities where any are unwilling to bear their just share of the public burdens. In such affairs, the taxpayers are, as it were, sureties for one another. What one gains by accident or fraud, the other must lose. No deductions are ever made from the public revenues for such causes. The deficiencies of one year must be made up the next, and diverted funds restored. If these inequalities, often inevitable, were to constitute an excuse for the nonpayment of taxes, public faith would be at an end, and government must cease. Who doubts, for instance, that under our present law, rigid and impartial as the Legislature have endeavored to make it, great injustice is frequently done? That some are charged beyond their due proportion, whilst very many fall far short of it? So long as men suppress truth, and make false and corrupt statements of the amount and value of their property, and so long as mistakes occur, so long these things will continue. But the remedy does not consist in a refusal to pay all taxes. The evils, so far as possible, are to be obviated by the rigid enforcement of the law, the punishment of those who transgress its provisions, and the election of faithful and competent officers. Clearly such grievances, however perplexing and burdensome, are nothing to the public creditor, who has the right to look to the whole people for the payment of his demand. The duty of the common council is continuing, and does not cease with the levying of one tax which is in part unsuccessful. It ends only when the whole money is collected and the debt actually paid. They cannot, therefore, say that their powers are exhausted and no new tax can be levied."

[5] In the case now under consideration, it appears that the plaintiffs' debt had not been paid at the time of bringing this suit, about 18 months after the coupons became due, and that the lands had been offered for sale for taxes, but had been struck off to the county for lack of other bidders. Only a small amount of these sales had been redeemed, the number of taxpayers who refused to pay taxes assessed against these lands increased year by year and no further collection of any substantial sums from the prior levies was to be expected. Under these circumstances the plaintiffs were entitled to a writ of mandamus to compel a levy of assessments against the lands of the district for the purpose of the payment of this judgment.

[6] 2. When this suit was brought there was a small amount of money in the bond fund derived from prior levies. The plaintiffs had presented their coupons to the treasurer with a demand for payment. but other holders of coupons from these bonds had presented their coupons with demand of payment at about the same time. The plaintiffs prayed that the writ should command the treasurer to apply all of the money in this fund to the payment of plaintiffs' coupons, but the trial court directed that the treasurer should pay to plaintiffs only such proportion of the fund on hand as the amount of plaintiffs' coupons bore to the total amount of unpaid coupons due at the same date. This order is in accordance with the rule laid down by the Supreme Court of Colorado in the case of *Thomas v. Patterson*, 61 Colo. 547, 159 Pac. 34, in which it was held that under these irrigation statutes the treasurer was not required to pay the coupons in the order of presentation, but that the fund was to be allotted to all holders of coupons who should present them within a reasonable time after they were due. The rule seems reasonable and just, and no error was committed by the court in making the order accordingly. There are some other questions discussed in the briefs but they are not deemed essential to the disposition of the case.

The judgment of the trial court will be reversed, and the cause remanded for further proceedings in accordance with the views expressed herein.

AMIDON, District Judge (dissenting). I am unable to concur in the foregoing opinion, and will briefly state my reasons.

1. The defendant was organized for the purpose of carrying out a special improvement. The cost of that improvement was to be paid by a special assessment upon the property benefited. The power to levy annual taxes is confined to the upkeep of the project after the irrigation ditches are constructed. The defendant is not authorized to levy general taxes for any other purpose. It may not levy such taxes under the law of its creation to pay the cost of constructing the irrigation system. The scheme of the statute does not contemplate that one piece of land shall be responsible for the default of another in the payment of special assessments which the law authorizes. Land may be included in a project by majority vote against the will of its owner. It is manifest that if each parcel of land is liable for the entire cost of the project its assessment may greatly exceed any benefit conferred. The assessment provided by the law is not based upon the

value of the property, but is apportioned ratably as special assessments usually are. A special assessment which substantially exceeds the benefits amounts to a taking of property without due process of law. *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443. It is manifest that under the majority opinion a faithful remnant of the property embraced in the project may be charged with substantially the entire cost of the irrigation project. That, in my judgment, is a clear departure from the scheme of the statute, and even if such were the scheme when properly construed, the result would be a violation both of the state and the federal Constitution. It is not claimed that defendants have failed to levy the assessment or to take any step required by law for its collection. The only claim is that owing to delays in the procedure for the collection of the assessment, it has not yet resulted in a sufficient fund to pay the bonds. It results that defendants have not failed to perform any duty which may properly be enforced by mandamus, and that what they are commanded to do is something which they have no legal right to do.

2. The bonds are what is known in the commercial world as improvement bonds. They bear an exceptionally high rate of interest. They are, like ordinary municipal warrants, issued solely for the purpose of anticipating the collection of the special assessment. Under the statute they are payable out of a fund to arise from the collection of the special assessment, and do not create a general liability upon the lands embraced in the project to be paid by ordinary tax levies. Such improvement bonds have been issued by municipalities in the coast and mountain states for hundreds of millions of dollars. Their character is well understood in the commercial world. It is well known that such bonds are payable solely out of a fund arising from the special assessment. They bear a high rate of interest, and are frequently sold at a discount because they are not what is known in the business world as municipal bonds. Parties purchasing such securities investigate the project lying behind them as carefully as a good loan agent investigates properties upon which he is taking a mortgage. The price paid, as well as the rate of interest, expresses the hazard which the purchaser of these improvement bonds takes. To treat them as municipal obligations, as the majority opinion does, is, in my judgment, a complete departure from the view of the business world which deals in such securities.

For these reasons I think the judgment should be affirmed.

BUSH v. BRANSON, Sheriff and Collector, et al.

(Circuit Court of Appeals, Eighth Circuit. February 16, 1918.)

No. 4958.

1. COURTS ⇨366(1)—FEDERAL COURTS—PRECEDENTS.
Decisions of a state Supreme Court, construing provisions of the state Constitution, are conclusive on the national courts.
2. CONSTITUTIONAL LAW ⇨70(1)—ENACTMENT—NOTICE—REVIEW BY COURTS.
The Legislature of Arkansas is the sole judge whether the requirements as to notice of local and special bills have been complied with, and if the Legislature chooses to disregard such requirements no issue on the subject can be raised in the courts.
3. HIGHWAYS ⇨136—ESTABLISHMENT—PROPERTY SUBJECT TO TAX.
Under the Arkansas Constitution, the property of a railroad can be assessed for benefits derived from a highway improvement district.
4. HIGHWAYS ⇨122—ASSESSMENTS—RAILROAD PROPERTY.
As the state tax commission, after assessing railroad property, certifies the assessment to each county, and it thereafter becomes the assessment of the county in the same manner as if made by the county assessor, Sp. & Priv. Acts Ark. 1911, p. 642, providing for the establishment of a highway district, which in section 5 declares that it is ascertained and declared that all real property within the district, including railroads, will be benefited by the building of the highway more than the cost thereof as appropriated in the county assessment of each piece of property within the district, is not invalid, as providing for assessment of railroad property by county officials.
5. HIGHWAYS ⇨122—ASSESSMENTS—RAILROAD PROPERTY.
As the state tax commission, in assessing railroad property, includes not only the tangible property, but also the franchise, which is intangible property, Sp. & Priv. Acts Ark. 1911, p. 642, declaring in section 5 that it was ascertained that all the real property within the district, including railroads, would be benefited by the building of the highway provided for, more than the cost thereof as appropriated in county assessment, is invalid, under Const. Ark. art. 16, § 5, providing for uniformity of taxes, because, as the franchise tax was included in the railroad company's assessment, its property was taxed at a higher rate than other real property in the district.
6. HIGHWAYS ⇨140—IMPROVEMENT DISTRICT—ASSESSMENT.
The Legislature of a state may charge on the property benefited the cost of a local improvement, such as a highway, either according to valuation, or superficial area, or frontage.
7. CONSTITUTIONAL LAW ⇨290(1)—DUE PROCESS OF LAW—WHAT CONSTITUTES.
The state may by statute directly, or by appropriate legal proceedings, fix the basis of taxation or assessment for a local improvement, without violating the due process clause of Const. U. S. Amend. 14; but an arbitrary exercise of such power is confiscation, in violation of such provision.
8. HIGHWAYS ⇨136—IMPROVEMENT DISTRICT—PROPERTY SUBJECT TO TAX.
Under Sp. & Priv. Acts Ark. 1911, p. 642, providing for the establishment of a highway, and declaring in section 5 that the real property in the district, including railroads, shall be subject to assessment, rolling stock and materials belonging to the railroad company, being declared personally by Const. Ark. art. 17, § 11, are not subject to assessment.
9. CONSTITUTIONAL LAW ⇨290(1)—DUE PROCESS OF LAW—CONFISCATION.
While a railroad company's property may be assessed for road, bridge, and other improvements, when benefited, an assessment, when no advantage or benefit from the improvement results to its property, is confiscation.

10. APPEAL AND ERROR ⇨854(2)—REVIEW.—REVERSAL.

A decree which is correct will not be reversed because the trial court gave an erroneous reason.

11. APPEAL AND ERROR ⇨1009(4)—REVIEW—FINDINGS—EQUITY CASES.

On appeal in an equity case, the facts as well as the law are open for consideration, and a finding of the trial judge, while entitled to high consideration, will be reversed, if clearly against the weight of the evidence.

12. HIGHWAYS ⇨148—SPECIAL ASSESSMENTS—EVIDENCE.

In a proceeding to enjoin the collection of special assessments for construction of a highway, imposed by Sp. & Priv. Acts Ark. 1911, p. 642, on the property of a railroad company, evidence *held* to show that the railroad was not benefited by the improvement, and hence collection of the assessment would be enjoined.

13. HIGHWAYS ⇨137—ASSESSMENTS—EQUITABLE ESTOPPEL—NATURE OF.

For more than three years after the enactment of a special act creating a highway district and imposing assessments, no steps for the construction of the highway were taken. In the meantime a representative of the railroad company, whose property was illegally assessed by the act, was advised by the attorney for the contractors that he would advise against his clients' accepting for the work bonds provided for in the act. Some five years after passage of the act, the highway having been constructed, the railroad company sued to enjoin collection of the assessments, imposed under the act, which would be due that year. *Held* that, as neither the contractors nor the purchasers of the bonds issued by the district were parties, the railroad company could not be deemed estopped to question the validity of the assessments against its property, for no estoppel in pais can be created, except by the conduct which the party setting up the estoppel has the right to rely upon, and does in fact rely upon.

Appeal from the District Court of the United States for the Western District of Arkansas; F. A. Youmans, Judge.

Bill by B. F. Bush, receiver of the St. Louis, Iron Mountain & Southern Railway Company, against J. H. Branson, Sheriff and ex officio Tax Collector, and others. From a decree for defendants, complainant appeals. Reversed, with directions.

W. L. Curtis, of Sallisaw, Okl., and Thomas B. Pryor, of Ft. Smith, Ark., for appellant.

C. A. Starbird, of Alma, Ark., and George 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 appellees.

Before SANBORN, Circuit Judge, and TRIEBER, District Judge.

TRIEBER, District Judge. The issue involved is the liability of the appellant, the receiver of the St. Louis, Iron Mountain & Southern Railway Company, duly appointed in a proceeding to foreclose a mortgage executed by the railway company, for assessments on the railroad property for the construction of a road by a road district, created by a special act of the General Assembly of the state of Arkansas, approved April 28, 1911. Act 228, Session Acts of Arkansas, page 642.

The legality of the assessment is attacked upon several grounds. (1) That under the provisions of the act (section 5) the railroad's property was assessed on its 3.6 miles within the district for a sum

equal to 28 per cent. of the entire cost of the road. (2) That the assessment not only included the realty of the railroad, but also its rolling stock and materials, which under the Constitution and laws of the state of Arkansas are personalty, amounting to \$6,770, the tax thereon being \$44.59 annually for the term of 20 years; that the latter is in violation of section 11, art. 17, of the Constitution of the state and section 5 of this act, and also in violation of the equal protection clause of the Fourteenth Amendment, no other person's or corporation's personal property being so assessed. (3) That section 5 of the act provides that the county assessment is adopted, as conclusively determining the benefits from the construction of the road, and that under the laws of the state the property of the railroads is not assessed by county assessors, but by the state tax commission. (4) That the state tax commission is required by the laws of the state to include in the assessment of the railroad property the value of its franchise, in addition to its tangible property, and therefore places a greater burden on the railroad than on other property, in violation of the Constitution of the state and the Fourteenth Amendment. (5) That the act was enacted without notice or investigation, and arbitrarily fixed the charge, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States. (6) That the assessment is void, because based on the mileage basis of defendant's property, whereas all other property is on the acreage basis. (7) It is also claimed that the tax is void, so far as it taxes the property of the railroad, because it is in no wise benefited by the building of the road. (8) That the act creating the district is in violation of the constitutional provision of the state of Arkansas (section 26, art. 5), this being a special act, and no notice thereof was published, as required by that constitutional provision.

[1-3] So far as provisions of the state Constitution are affected, their construction by the Supreme Court of the state is conclusive on the national courts. This disposes of the assignment of error about local and special bills, notice of which had not been published, as it is the settled law of the state that the Legislature is the sole judge whether this provision has been complied with, and if it chose to disregard it, and passed a bill without notice having been published, no issue upon the subject can be raised in the courts. *Davis v. Gaines*, 48 Ark. 370, 385, 3 S. W. 184; *Waterman v. Hawkins*, 75 Ark. 120, 86 S. W. 844; *Caton v. Drainage Dist.*, 87 Ark. 8, 112 S. W. 145. This also applies to the contention that the property of the railroad cannot be assessed for benefits derived from an improvement district under the Constitution of the state. That it may be was decided in *St. Louis & San Francisco R. R. Co. v. Bridge District*, 113 Ark. 493, 168 S. W. 1066.

[4] Does the assessment of the property of the railroad tax it equally with other property in the district, as required by section 5, art. 16, of the Constitution of the state and the Fourteenth Amendment?

That this provision of the Constitution applies to improvement districts was determined in *Davis v. Gaines*, *supra*. The claim that

section 5 of the act, which makes the county assessment of the property within the district, including railroads, the benefit to the property, is void, because the property of the railroad is assessed by the state taxing board, and not by the county assessor, is untenable, for the state tax commission, after making the assessment, certifies it to each county, and thereupon it is put upon the assessment books, and thereafter becomes the assessment of the county in the same manner as if made by the county assessor. The act does not say "the assessment made by the county assessor," but uses the words "county assessment."

[5] But the assessment of the railroad property by the state tax commission differs materially from that made by the county assessors, as it includes, not only the value of all the tangible property of the railroad company, but also the intangible property, called the franchise, thereby imposing on it a higher rate of taxation than on all other property of the district, which is clearly in violation of section 5, art. 16, of the Constitution of the state (Ft. Smith, etc., Bridge Co., *Ex parte*, 62 Ark. 461, 36 S. W. 1060; *Bank of Jonesboro v. Hampton*, 92 Ark. 492, 123 S. W. 753; *State ex rel. v. Meek*, 127 Ark. 349, 192 S. W. 202), and the equal protection clause of the Fourteenth Amendment.

[6] The power of the Legislature of a state to charge the cost of local improvements, either according to valuation, or superficial area, or frontage, cannot be questioned. *Webster v. Fargo*, 181 U. S. 394, 21 Sup. Ct. 623, 45 L. Ed. 912; *St. Louis Southwestern R. R. v. Board of Directors*, 81 Ark. 562, 99 S. W. 843; *Board of Directors v. Crawford County Bank*, 108 Ark. 421, 158 S. W. 149; *Board of Improvement v. S. W. Gas & Electric Co.*, 121 Ark. 105, 180 S. W. 764.

[7, 8] The act of the General Assembly, which declared the benefits to the property by the building of the road to be more than the cost thereof, as shown by the county assessment of each piece of property within the district, it is claimed is not due process of law, and therefore void. It is charged in the complaint that the act was passed without any hearing or notice being given, giving the property owners an opportunity to be heard before the enactment of the law. This is not denied, nor is there any provision in the act giving the taxpayer an opportunity to be heard on the assessment of the benefits, or appeal to any court or other tribunal. That a state may by statute directly, or by appropriate legal proceeding, fix the basis of taxation or assessment, without violating the due process provision of the national Constitution, unless it is palpably arbitrary, and a plain abuse, is beyond question. The latest cases on this subject are *Wagner v. Baltimore*, 239 U. S. 215, 36 Sup. Ct. 66, 60 L. Ed. 230; *Houck v. Little River Drainage Dist.*, 239 U. S. 254, 262, 36 Sup. Ct. 58, 60 L. Ed. 266; *Myles Salt Co. v. Board of Commissioners*, 239 U. S. 478, 36 Sup. Ct. 204, 60 L. Ed. 392. But, such power, arbitrarily exercised, imposing a burden without a compensating advantage of any kind, amounts to confiscation, and violates the due process provision of the Fourteenth Amendment. *Myles Salt Co. v. Board of Commissioners*, *supra*. In *Gast v. Schneider Granite Co.*, 240 U. S. 55, 36 Sup. Ct.

254, 60 L. Ed. 523, a law establishing a paving district, levying the cost of paving on property fronting on the street, based on area without providing for equal depth of the assessment district, was held to be void, reversing the decision of the Supreme Court of the state of Missouri. In *Myles Salt Co. Case*, the court, in reversing the decision of the Supreme Court of Louisiana, said:

"It is to be remembered that a drainage district has the special purpose of the improvement of particular property, and when it is so formed to include property which is not and cannot be benefited directly or indirectly, including it only that it may pay for the benefit to other property, there is an abuse of power and an act of confiscation. *Wagner v. Baltimore*, ante [239 U. S. 207, 36 Sup. Ct. 66, 60 L. Ed. 230]. We are not dealing with motives alone, but as well with their resultant action; we are not dealing with disputable grounds of discretion or disputable degrees of benefit, but with an exercise of power determined by considerations, not of the improvement of plaintiff's property, but solely of the improvement of the property of others—power, therefore, arbitrarily exerted, imposing a burden without a compensating advantage of any kind."

And when assessments are thus imposed without the opportunity of having them reviewed by some authority, a court of equity may unquestionably interpose its protective arm to prevent wrong and injustice.

The pleadings and evidence establish the following undisputed facts: That in the assessment of benefits of the complainant there was included rolling stock and material of the value of \$6,370. As this is clearly personalty under the laws of the state (section 11, art. 17, of the Constitution of Arkansas), it was not subject to assessment under the act, which expressly limits the assessments to real property.

The contemplated road begins at the opposite end of the town of Alma from where the railroad tracks and station are, one-quarter of a mile from them, and no portion of the road connects with the railroad's right of way. In addition to this, between one-eighth and one-quarter of a mile of the road is outside of the limits of the district.

[9-12] The undisputed facts also show that all the realty in the district, except that of the plaintiff, is assessed on the acreage basis. If the property of the railroad company had been assessed on the acreage basis, as the other realty was (there are 7,700 acres in the district), its assessment would have been on 53 acres, and the taxes to be paid by the railroad would have been .0071 per cent. of the entire assessment, instead of being 28 per cent. Whether this is fatal need not, in view of the conclusions reached on other issues, be determined herein. As to the benefits to be derived by the plaintiff railroad, the testimony of Mr. White, the engineer of maintenance of way of the railroad company, of Mr. Brown, who is in charge of the engineering department of that division of the plaintiff, of Mr. Morse, the superintendent of the plaintiff's road, and of Mr. Warden, the assistant engineer of the road, is to the effect that after a careful examination of this road, and being familiar with that section of the state and the conditions, the construction of this road will in no wise benefit the railroad, enhance its value in any way, or any portion thereof, or facilitate its

operation, or add to its traffic, and that the distance from the place of connection with the other road is $4\frac{1}{2}$ miles further to Van Buren than to Alma.

On the part of the defendants, Dr. Crigler testified that he has for years resided at Alma, and is acquainted with this road; that in wet times it was, before the improvement was made, practically impassable; that the greater per cent. of the people adjacent to the town of Alma used the road in coming to and going from Alma; that before the construction of this road many of them went to the town of Van Buren, during the wet season, to do their trading, while in good weather they would come to Alma; that in 1914 a large gas belt was discovered near there, and perhaps some of the gas pipes used in the gas field were shipped over the plaintiff's road, and unloaded at Alma, and carried over this new road. He also states that all the produce brought over this road to Alma is shipped out over plaintiff's railroad, and for this reason it is his opinion that the railroad is benefited by the road. On cross-examination he testified that the construction of the road was begun in 1915.

Mr. Cravens testified that he is a merchant residing at Alma, buys and sells farm produce, and is one of the commissioners of the road district; that he is familiar with the roads in and out of town, and, while there are fair roads in and out of the town, this improvement district road carries 50 to 60 per cent. of the traffic; that the old road, before the improvement was made, was a fairly good road, except in wet weather, and sometimes it was impossible to get through. It intersects with the road from Van Buren to Yoestown, $3\frac{1}{2}$ miles south of Alma. He believes that 50 per cent. of the produce coming in to merchants and going out of the town of Alma comes over this road, and the building of the road increased the tonnage of the railroad. He does not know the amount of the tonnage, or the amount of stuff that goes out of Alma, but that practically all farm produce brought into Alma over this new road is shipped out over the Iron Mountain Railroad. On cross-examination he says that he is unable to say whether or not the revenues of the railroad will be increased by the improvement of the road. His impression is that they would be, but he does not know. If the country served by this road had no way of getting to Alma, they would take their produce to Van Buren; but he could not say whether that would affect the revenues of the road, but thought that it would make a difference, as Van Buren has a competing railroad, the St. Louis & San Francisco Railroad.

Mr. Hamer, who is a farmer, and knows this road, testified that it is now a good road; that he lives right out of town, and is in a position to observe the traffic that comes into town over this road, and that twice as much comes over it now as did before it was improved; prior to the improvement and during the winter season that road was very bad. On cross-examination he says he thinks it helped the traffic of the railroad, but "I don't know anything about the running of a railroad; don't know what effect it would have on the railroad; it helps the people who live down there along the road, but so far as the railroad is concerned, and so far as its reve-

nues are concerned, I do not know as to whether it would affect or help it or not."

That was all the evidence that was introduced on this subject. The maps of the road, showing the territory embraced in the district and location of the road, and the plaintiff's property in relation to the road, were also introduced by plaintiff. Does the evidence show any benefit to the railroad, which justifies the assessment on its property? That the railroad may be assessed for road, bridge, and other improvements, when benefited thereby, may be conceded, and it has been so held by the Supreme Court of Arkansas in several cases. But, if there is no advantage or benefit to its property, it clearly amounts to confiscation.

The only benefit to appellant claimed by appellees is that, if this road had not been built, a great deal of the business, now coming to Alma by reason of the construction of the road, would go to Van Buren, and, there being a competitive road at Van Buren, the St. Louis & San Francisco Railroad, the plaintiff's road would only get a share of the business, while at Alma it gets it all, there being no competitive road there.

Although counsel in their briefs and argument indicate that the court rested its finding on the fact that the finding of benefits by the General Assembly is conclusive, even if the court erred in this declaration of law, if the assessment is warranted by reason of benefits to be derived by the railroad from it, this court would not reverse the cause upon the ground that the court gave a wrong reason for a correct conclusion. *Latting v. Owasso Mfg. Co.*, 148 Fed. 369, 78 C. C. A. 183; *Bunday v. Huntington*, 224 Fed. 847, 140 C. C. A. 415. To declare the law, that the finding of benefits by the Legislature, without any opportunity to the parties in interest to be heard, is conclusive, would enable a state, under the guise of the taxing power, to confiscate property. It has been well said that the power to tax is the power to destroy. *McCulloch v. Maryland*, 4 Wheat. 431, 4 L. Ed. 579; *Loan Association v. Topeka*, 20 Wall. 655, 663, 22 L. Ed. 455. But, assuming that the trial court found that the proof established a benefit to the railroad, is the finding warranted by the evidence?

The finding of a trial judge is entitled to high consideration, and unless clearly against the weight of the evidence, or caused by a misapplication of the law, will not be disturbed on appeal. On the other hand, if the finding is clearly against the weight of the evidence, the appellate court, in a proceeding in equity, will reverse it, as on appeal the facts as well as the law are open for consideration. *Alexander v. Redmond*, 180 Fed. 92, 103 C. C. A. 446. The evidence hereinbefore set out convinces that the finding that the railroad would be benefited by this road is clearly against the weight of the evidence, if not entirely without any evidence to support it.

On the one hand, witnesses of experience in railroad traffic testified that this new road is of no benefit to the railroad, or any part of it. On the other hand, none of the witnesses introduced by the defendant had any experience whatever in the management of railroads or

their traffic, and they merely expressed the opinion that, if the town of Alma increased its trade, this railroad, being the only one in that town, would be the beneficiary, and its traffic would be correspondingly increased, while without the improved road considerable traffic would be diverted to Van Buren, where there was a competitive railroad. This cannot be said to be convincing testimony in view of the lack of experience of the witnesses introduced by the plaintiff. Judging from Mr. Hamer's testimony, the effect of the construction of the road is to "help the people who live down there along the road."

Counsel rely on what was decided in *St. Louis & San Francisco R. R. v. Bridge District*, 113 Ark. 493, 495, 168 S. W. 1066. The report of that case fails to show what the evidence was, but the court expressly held that the act of the Legislature did not undertake to determine the amount of the benefits by the act creating that bridge district. Nor did the court pass on the sufficiency of the evidence on the question of benefits. The court held on that point:

"We are of the opinion that the evidence is sufficient to sustain the finding of the Circuit Court as to the extent and value of the benefits. The testimony is conflicting, and consists mainly of the opinions of witnesses who qualified themselves by showing that they had knowledge of the values of property in the district and the estimated benefits to accrue from the construction of the improvement. Anything like an extensive analysis of the testimony would serve no useful purpose."

And it concludes by saying:

"We are not prepared to say that the evidence in this case, as it appears in the record, preponderates in favor of the amount of benefits found by the assessors and by the circuit court; but we are not called upon to pass upon the weight of the evidence. The question of its legal sufficiency is all that we need pass upon, and we are of the opinion that there is competent testimony of a substantial nature sufficient to base the finding upon as to the amount of benefits fixed."

It is to be noted that that case was an action at law, and the findings of facts by the trial judge, sitting as a jury, have much greater weight in the appellate court than in a cause in equity.

It is also claimed by appellees that the plaintiff is estopped by his conduct to question the validity of the act. They say in their brief:

"The railroad stood by, permitted the district to issue its negotiable bonds and to borrow the money with which to do the work, and permitted the work to be done; and then, when the highway was completed, and it was assured of an increased traffic that would result therefrom, it brought this suit to restrain the collection of taxes. * * * Without the tax upon the railroad, a large part of the bonds must go unpaid."

[13] It may be conceded that the principle of estoppel can apply to cases of this nature, but in order to create an estoppel it is necessary that the party sought to be estopped by his conduct induced the other party to act on it to his detriment, or, as said in *Bloomfield v. Charter Oak Bank*, 121 U. S. 121, 135, 7 Sup. Ct. 865, 872 (30 L. Ed. 923):

"No estoppel in pais can be created, except by conduct, which the person setting up the estoppel has the right to rely upon, and does in fact rely and act upon."

The only testimony on that point is that of Mr. Pryor, who testified:

"I made an investigation of this (that is, prior to the latter part of 1914 or the early part of 1915), I cannot remember how long before this. I remember that Judge Hill represented the contractors, and we discussed the feasibility of building the road under the act creating Crawford County road improvement district. No. 2 of the Acts of 1911. Judge Hill stated to me that he did not believe that the commissioners would be able to get the contractors, whom he represented, to take the contract and look to the bonds to be issued for payment of the cost of the construction of the road; that the commissioners were making an effort to do so, but that he had advised his clients, the contractors, against the proposition. We discussed the matter several times, and he suggested that he would keep me advised as the matter progressed. I had no further information from him, and knew nothing at the time of the contract being let, or of any effort on the part of the commissioners to obtain a contract on any other terms for the building of the road. The next information I had in regard to it was that the bonds had been sold, and that considerable work had been done on the road."

This clearly does not establish an estoppel, especially as to the contractors and purchasers of the bonds, who were not parties to the formation of the district, or the assessment of benefits, nor parties to this action. *Deery v. Cray*, 5 Wall. 795, 18 L. Ed. 653; *Thompson v. Sioux Falls Natl. Bank*, 150 U. S. 231, 244, 14 Sup. Ct. 94, 37 L. Ed. 1063. Nor was the plaintiff, or the railroad company, a party to any of the board's proceedings. For more than three years after the enactment of the act nothing was done towards the construction of the road. This action was instituted on March 17, 1916, and while the record fails to show when the assessments were certified by the board to the collector of taxes, it must have been done on January 1, 1916, as the bill only seeks to enjoin that year's taxes, and under the provision of the act the taxes were to be certified by the board on or before January 1st of each year, and become payable between the first Monday in January and the 10th day of April of that year.

It therefore cannot be said that plaintiff did not act promptly. The decree is reversed upon two grounds: (1) That the act imposes a higher rate of taxation on the railroad property of the plaintiff than it does on the other property in the district, by reason of the fact that its franchise and other intangible property are included in its assessment. (2) That the evidence fails to show that the railroad company derives any benefit from the road.

The decree of the lower court is reversed, with directions to make the temporary injunction perpetual.

HIGGINS et al. v. ANGLO-ALGERIAN S. S. CO., Limited.

(Circuit Court of Appeals, Second Circuit. February 13, 1918.)

No. 139.

1. SHIPPING Ⓒ106—BILLS OF LADING—CONTRACTUAL RELATION.

Libelants, who became the owners and holders in course of trade of bills of lading representing a shipment transported by sea, are in contractual relations with the carrier, and entitled to enforce the contract contained in the bills of lading.

2. SHIPPING Ⓒ106—BILLS OF LADING—ESTOPPEL.

Where respondent, a carrier by water, though knowing that shipments of dates appeared to have been damaged when received, executed bills of lading reciting that the shipments had been received in good condition, the shippers having agreed to indemnify it against loss by reason of the false recitals, respondent is, as against holders of the bills of lading who acquired them in course of trade, estopped to deny that it received the shipments in good order.

3. SHIPPING Ⓒ106—ACTIONS—FRAUD.

Where, on a libel based on bills of lading reciting receipt of shipments of dates in good condition, the carrier set up that the shipments had not been so received, and that it inserted such recitals in the bills of lading on agreement by the shippers to protect it, recovery by the libelant cannot be denied, on the theory that the libel was based on contract, and that it could not take advantage of the fraud, for the fraud was set up by respondent solely as a matter of defense.

4. ADMIRALTY Ⓒ1—COURTS OF ADMIRALTY—NATURE OF RELIEF.

Though courts of admiralty are not courts of equity, and may not be able to give affirmative relief in case of contracts induced by preliminary fraudulent representations, still they proceed on equitable principles, and may prevent a party from taking advantage of his own fraud in the contract itself.

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

Libel by William A. Higgins and another against the Anglo-Algerian Steamship Company, Limited. From a decree dismissing the libel (242 Fed. 568), libelants appeal. Reversed.

Foley & Martin, of New York City, for appellants.

Kirlin, Woolsey & Hickox, of New York City (John M. Woolsey, and Harry D. Thirkield, both of New York City, of counsel), for appellee.

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

WARD, Circuit Judge. The libel alleged that Williams Hills, Jr., & Co. shipped November 8, 1911, on the steamer Armistan, then lying at Busreh, bound to New York, 3,000 cases of dates, receiving therefor a clean bill of lading reciting that they were apparently in good order and condition, of which William A. Higgins & Co., the libelants, became owners and holders in due course of trade, and that on arrival at New York 2,085 of the cases were found to be damaged by contact with water.

The answer denied that the cases were shipped in good order and condition, relied on exceptions in the bill of lading (a) that the quality,

contents, and value of the cases were unknown; (b) rain, spring, sweat, or land damage; (c) that the mate's receipts were to be conclusive evidence of the condition in which the goods were received by the company; (d) that no claims against the company should be enforceable, unless notice be given in writing before removal of the goods, and claim be received in London within 60 days after discharge. Further, the respondent had the courage to set up as a defense its own complicity in a fraud, viz., that a large number of the cases which had been wet and were stained and discolored by rain were received from lighters; that their stained, damaged, and discolored condition had been noted on the mate's receipts, but that a clean bill of lading was delivered to the shippers at their request, against their agreement to indemnify the respondent against loss for so doing. This was pleaded as an admission binding on the holder of the bill of lading that the cases were not shipped in apparent good order and condition, and a bar to the maintenance of the libel.

The mate's receipts were taken up at Busreh upon delivery of the bill of lading, of which the libelants became owners for value without notice of the circumstances under which it was delivered. 1,665 of the cases were by order of the libelants delivered January 8, 1912, to a warehouse, and, their condition being discovered, the libelants on the next day served notice of the damage, and the balance were removed from the ship thereafter and survey held.

The District Judge found that the cases were injured by rain water or sea water while on lighters before delivery to the ship; but he further held, while recognizing the fraud, that the untruthful statement of receipt in apparent good order and condition only estopped the carrier from asserting that the cases were in good order and condition, but not from showing that they were damaged by rain water, liability for which was excepted in the bill of lading.

[1] The libelants, as holders of the bill of lading, are in contractual relation with the carrier and entitled to enforce the contract. The carrier agreed to deliver the shipment in like good order and condition as when received, to the order of the shipper. That it has broken the contract to deliver in apparent good order and condition is quite clear. If the statement in the bill of lading were true, the carrier could show that the goods really were not in good order and condition, and could protect itself by any applicable exception in the bill of lading.

[2] The effect of acknowledging in a bill of lading the receipt of goods as in apparent good order and condition when they are not so has been considered in several cases. Channell, J., in *Campania Naviera v. Churchill*, [1906] 1 K. B. 237, in considering the effect of such a statement as against the indorsee of the bill of lading, expressed surprise that the question had not been decided. He did not regard the statement as part of the contract, but as an affirmation which the carrier must be taken to have known would be acted on by purchasers of the bill of lading, and which it was therefore estopped from denying. Accordingly he held the carrier liable to the indorsee for the difference between the value of the goods as delivered and the value they would have had if actually in good order and condition. This deci-

sion was followed by Scrutton, J., in *Martineau, Ltd., v. Royal Mail Co.*, [1912] 17 Com. Cas. 176, and Judge Nelson came to a similar conclusion in *Bradstreet v. Heran*, 2 Blatchf. 116, Fed. Cas. No. 1,792a. He said:

"The consignees made large advances upon the cotton, on the faith of the representation in the bill of lading that it was shipped in good order. They were justified in doing so, and their security should not be lessened or impaired by permitting the master to contradict his own representation in that instrument. It might be otherwise if the question arose between the master and the owner of the cotton. The question of damage might, in that case, be well limited to that occurring in the course of the voyage, notwithstanding the bill of lading. But the respondents stand in the light of bona fide purchasers, who become such on the faith of the representations of the master."

Crawford v. Allan Line, [1912] App. Cas. 130, arose in 1904 out of a shipment of 41,000 bags of flour from Minneapolis to Glasgow on a through bill of lading. This was treated throughout as a novel instrument, needing construction because of the difficulty holders of the bill of lading in England had in recovering damage claims. The through bill of lading was signed on behalf of the successive inland carriers, as well as of the ocean carrier, by an agent for all the carriers at Minneapolis. It recited that the goods were received in apparent good order and condition. Its conditions were divided into two classes; the first applying to the inland carriers, and the second to the ocean carrier. It was an express condition that each carrier should be responsible only for damage occurring on its own line. To enable the owner to know to whom to look for compensation, each carrier was obliged to notify the preceding carrier of the condition of the goods when received by it. The ocean carrier at New York receipted to the last inland carrier for the bags as in apparent good order, except in the case as noted of 110 bags. On delivery at Glasgow it was found that 4,132 bags were caked by fresh water. The proof showed that the shipment had been hurriedly loaded, without adequate examination, and in rainy weather. The Lord Ordinary decided in favor of the consignees, but his judgment was reversed by the Court of Session, and thereupon an appeal was taken to the House of Lords, which was decided in December, 1911. The material difference between the Scotch courts was that the Lord Ordinary held the recital as to the apparent condition of the goods at Minneapolis applied to all the carriers, except as each notified the preceding carrier of some defect. On the other hand, the Court of Session held that the recital applied only to the first carrier from Minneapolis. The House of Lords unanimously reversed the decision, holding the ocean carrier liable because of its failure to notify the last carrier of any apparent defect in the shipment, except in the case of 110 bags.

It is to be noted that in all the foregoing cases the statement, though untrue, was the result of negligence, or misunderstanding, or mistake; whereas, there can be no other explanation of the carrier's conduct in this case than that it was willing to assist the shipper in misleading subsequent holders of the bill of lading, provided he agreed to hold it harmless for so doing. Although a bill of lading is only a quasi negotiable instrument, we are not impressed by the argument that, be-

cause the carrier could have set up this defense against a shipper, it can set it up against the subsequent holder of the bill of lading, who was intended to be misled, because he is the assignee of the shipper.

[3] The respondent insists that, as the libel is founded on contract on the bill of lading, nothing being said about fraud, it would be allowing the libelants to recover on a new and different cause of action if the case were disposed of on that ground. The answer is the respondent itself introduced all the evidence showing the fraud.

[4] The case of *The Persiana*, 185 Fed. 396, 107 C. C. A. 416, is relied on as authority for holding that there can be no recovery, at least in connection with the 1,665 cases which were removed from the carrier's possession before notice of claim was given. Though courts of admiralty are not courts of equity, and may not be able to give affirmative relief in the case of contracts induced by preliminary fraudulent representations (*Williams v. Insurance Co.* [D. C.] 56 Fed. 159), still they do proceed upon equitable principles and may prevent a party from taking advantage of his own fraud in the contract itself. *Pew v. Laughlin* (D. C.) 3 Fed. 39, *The Hero* (D. C.) 6 Fed. 526, and *The Electron* (D. C.) 48 Fed. 689, are examples. To give the carrier the benefit of this exception would be to enable it to protect itself against the consequences of its own fraud.

The decree is reversed.

ERIE R. CO. v. LINNEKOGEL

(Circuit Court of Appeals, Second Circuit. January 16, 1917.)

No. 137.

1. MASTER AND SERVANT ⇨226(1)—INJURIES TO SERVANT—ASSUMPTION OF RISK—FEDERAL EMPLOYERS' LIABILITY ACT.

Under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1916, §§ 8657-8665]), one acting as brakeman, while assuming the risk of falling from the car on which he was riding, does not assume the risk of being thrown from the car by the negligent act of the railroad company, its agents, or officers, for such risks are not risks incidental to the employment assumed under the act.

2. EVIDENCE ⇨498½—RECEPTION OF OPINION EVIDENCE—DISCRETION OF COURT.

Much discretionary power rests in the trial judge in determining whether a statement is objectionable as opinion testimony, or receivable as a statement of ultimate fact.

3. EVIDENCE ⇨471(17)—OPINION TESTIMONY—STATEMENT OF ULTIMATE FACT.

Testimony by a brakeman, who asserted he was injured when cars were shunted against the car on which he was riding, that the cars struck his car with a crash, being subject to cross-examination, was properly received over objection that it was opinion evidence.

4. EVIDENCE ⇨553(3)—OPINION EVIDENCE—HYPOTHETICAL QUESTION.

A hypothetical question must rest upon facts in evidence at the time the question is put, including inferences properly drawn from the evidence.

5. APPEAL AND ERROR ⇨1048(3)—REVIEW—HARMLESS ERROR.

The admission of a hypothetical question, not justified by the evidence, was harmless, where the evidence at a later stage warranted the question.

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

6. COMMERCE ⇨8(6)—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT —"DAMAGES."

Recovery in an action falling within the federal Employers' Liability Act, declaring that common carriers shall be liable in damages for injuries due to their negligence, can in no way be modified by the Workmen's Compensation Act of the state in which the accident happened (Act April 1, 1913 [P. L. N. J. p. 302]), for the word "damages," as used in the Liability Act, means what juries assess according to their own views of value, and has no reference to compensation in the nature of insurance provided by Workmen's Compensation Acts.

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

7. COMMERCE ⇨8(1)—STATE STATUTES—EFFECT.

Where a congressional act supersedes state statutes, a statute of the state, enacted after the passage of the congressional act, is of no effect in so far as it is within the scope of the congressional act.

8. TRIAL ⇨419—MOTION TO DISMISS—WAIVER.

A defendant's motion to dismiss the complaint at the close of plaintiff's case is waived, where after denial it proceeds with the trial and introduces evidence.

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

Action by George W. Linnekogel against the Erie Railroad Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Linnekogel, hereinafter called "plaintiff," was a brakeman in the Erie employ, and brought this action for personal injuries, alleging that he had been hurt while on one freight car and by the impact of other cars upon the one on which he was standing; such other cars having been "negligently caused and permitted to be sent down hill or grade upon the same track upon which plaintiff's car then was at a fast rate of speed, and without having any person upon said other cars to hold or control the speed" of the same.

The federal Employers' Liability Act admittedly applies to this litigation. The circumstances of injury were such that no one but plaintiff himself did or could speak as to many details. He was a member of a "yard crew" whose business it was to sort out or assemble, as might be required, freight cars either for despatch or unloading. This operation was being conducted at night on tracks having a sufficient slope or grade to permit cars, once given an impetus, to roll with accelerating speed down hill unless or until checked by brake or otherwise. Linnekogel mounted a car, which was then detached from the line in which it was, permitted to roll down hill about 380 feet, when it was stopped by plaintiff's application of brakes. He knew that other cars would come down the same incline and against the car on which he stood, and in expectation of this event he stood on top of his car and in the middle of it, with nothing to hold onto. It was too dark to see the other and approaching cars until they were within a few feet of him. Over objection and exception he testified that the other and expected cars came down the track and hit this car "with a crash" so violent that he "went up in the air," and came down with his own car "going out from underneath my feet." He testified that the result was that his car, with brakes set, was swept out from under him, so that he fell between the car he had been on and the cars that struck his "with a crash," receiving painful and permanently disabling injuries.

The "cut" which thus came down the track "with a crash" consisted of two cars, on which there was no brakeman. At a time in the trial (during the plaintiff's case) when there was no evidence from what distance the "cut" had been dropped down upon plaintiff's car, expert witnesses for plaintiff were asked a hypothetical question which assumed that said "cut" had been "sent down onto a side track or siding for a distance of about 380 feet," or the same distance that plaintiff's car had been permitted to run before plain-

tiff stopped it; the object of the questioner being to elicit the answer (which was given) that cars traveling by gravity such a distance should have been attended by a brakeman. Plaintiff having rested, and while a motion to dismiss was pending, this expert was recalled and was asked the following: "What is the greatest distance you ever saw a loaded freight car allowed to go down that grade [i. e., somewhat similar grades in other yards where the witness had worked] without a man on top to man the brakes? A. None; ride them all." This closed plaintiff's case, and the motion to dismiss was denied.

Defendant's evidence from the other members of the yard crew was to the effect that two cars had been cut off and permitted to roll down upon plaintiff's car from a distance of not over 200 feet, which was common, ordinary, and safe practice. The majority of this court consider that there was some testimony elicited from defendant's witnesses tending to show that the "cut" had been permitted to roll down grade a greater distance than 200 feet, and perhaps as much as 380 feet. With this the writer does not agree. At the close of all the evidence defendant again made a motion to dismiss or to direct a verdict; this having been denied, and plaintiff having a verdict, this writ was taken.

The injury occurred in New Jersey, and at the time thereof the Workmen's Compensation Act of that state was in force. The assignments of error assert in substance: (1) Plaintiff was injured by an assumed risk of his employment; (2) it was error to permit plaintiff to characterize the impact of the "cut" upon his car as a crash; (3) the hypothetical question put to plaintiff's experts was not warranted by the evidence, and therefore its allowance was error; (4) the Workmen's Compensation Act of New Jersey applied, at least in so far as to regulate the amount of recoverable damage; (5) the complaint should have been dismissed at the close of plaintiff's case.

Stetson, Jennings & Russell, of New York City (William C. Cannon and Coulter D. Young, both of New York City, of counsel), for plaintiff in error.

Sydney A. Syme, of Mt. Vernon, N. Y., for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1]

1. It is true that one suing under the federal Employers' Liability Act is held to assume the risk of his employment, but that does not include risks incident to the negligence of defendant's agents, employes, or officers. *Boldt v. Pennsylvania R. R. Co.*, 218 Fed. 367, 134 C. C. A. 175; *New York, etc., Co. v. Vizvari*, 210 Fed. 122, 126 C. C. A. 632, L. R. A. 1915C, 9. As applied to this case, the risk of falling off a car properly managed or handled was a risk of plaintiff's employment; but the risk of being thrown off his car by the negligent act of his employer or any one for whom that employer was responsible was not such risk.

[2, 3] 2. To describe the meeting of two cars as a crash, or a violent crash (as was also done by the plaintiff while testifying), is to state an opinion or a result. Where to draw the line between permissible statements of this nature and those which cannot be approved is not always easy, and is a matter concerning which much discretionary power exists in the trial judge. Standing alone, the words complained of are of little or no probative force, yet they represent an endeavor to convey the idea of swift and ungoverned approach, and if the witness had stated what turned out to be the poorest of guesses as to the speed of the advancing cars, no one would have challenged his right so to testify. Subject to cross-examination, we think the words were rightly permitted to stand as well within the reasonable rule of the cases

collated in Wigmore on Evidence, § 1977. See, also, *Beers v. West Side, etc., Co.*, 101 App. Div. 308, 91 N. Y. Supp. 957.

[4] 3. A hypothetical question must rest upon facts in evidence at the time the question is put. Nothing beyond the reasonable effect of such evidence can be embodied in the question, though the effect of the evidence includes inferences properly drawn therefrom. The question complained of was confessedly put because it was thought a "fair inference" that the "cut" of cars that was said to have crashed into plaintiff's car came from the same point as had the plaintiff's; i. e., had rolled down the same distance. Considering the nature of the freight yard in which work was going on, with its multitude of switches, the absence of testimony as to what cars, or how many, were to be switched, or from or to what points, we do not think the inference legitimate, and consider the allowance of the question, at the time it was asked, error.

[5] But a majority of the court are of opinion that no harm was done by the question, because there subsequently appeared testimony that would have justified the question at a later stage of the case; and the writer of this opinion thinks that plaintiff's experts by finally testifying that permitting any car to run down hill at night unmanned, for any distance, was (in effect) bad railroading, put plaintiff's case on a different ground, but still consistent with the pleading. This last testimony was not objected to, and when it had been given the answer to the hypothetical question became (in my judgment) both immaterial and harmless.

[6, 7] 4. The assertion that a recovery under the federal act here invoked can be in any way modified by the Workmen's Compensation Act of the state in which the accident happened certainly lacks authority. It seems to us unsustainable upon the reason of the matter. It is the essential nature of any compensation act that it does not depend upon or is not invoked as the result of an act of negligence. What is assured to the workman thereby is not compensatory damages for a tort, but a species of insurance against hurts received in the line of occupation without (perhaps) anybody's fault. But section 1 of the Liability Act (35 Stat. 65) declares that common carriers shall be liable "in damages" for injuries due to their "negligence." These words refer to a course and habit of litigation only too well known for some generations and must be interpreted accordingly. Damages mean what juries assess according to their own views of value, and the act authorizing such damages supersedes all state laws relating to the same subject. *Mondou v. New York, etc., Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; *Seaboard Air Line v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475. It must be equally true that such legislation is unaffected by any subsequent state act, for what cannot survive congressional action certainly cannot control it.

[8] 5. When defendant's motion to dismiss the complaint at the close of the plaintiff's case was denied, the defendant was bound to elect whether to go on and introduce evidence or rest upon the infirmity of the case as made by plaintiff. It went on, and thereby waived the right to complain in this court of the denial of the motion.

Union Pacific, etc., Co. v. Daniels, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 597. Nor is the rule different in this state. *Porges v. United States, etc., Co.*, 203 N. Y. 185, 96 N. E. 424.

It follows from the foregoing that the judgment must be affirmed, with costs.

LEVI STRAUSS & CO., Inc., v. SILVERSTEIN.

SILVERSTEIN v. LEVI STRAUSS & CO., Inc.

(Circuit Court of Appeals, Second Circuit. January 16, 1918.)

No. 126.

1. SALES ⇄88—CONTRACT BY CORRESPONDENCE—SALE BY SAMPLE.

Where, by correspondence unambiguous in its terms, the buyer ordered thread according to sample previously furnished by the seller, the contract was one by sample, and it is the duty of the court to so declare it.

2. SALES ⇄420—REFUSAL TO ACCEPT—ACTION—PROVINCE OF COURT AND JURY.

Where a sale was by sample, the only question for the jury, in an action wherein the seller claimed damages for the buyer's refusal to accept deliveries, and the buyer damages for the seller's failure to deliver the goods bought, is whether those tendered conformed to the sample.

3. SALES ⇄166(5)—SALE BY SAMPLE—EFFECT.

Where thread was sold by sample, and the sample on which the price was based was manufactured of Egyptian yarn, the buyer is entitled to demand that the thread delivered be manufactured of that same yarn.

4. SALES ⇄166(5)—SAMPLES.

Where thread is sold by sample, the seller is bound to furnish thread according to the sample, even though, having no 3/24 in stock, it substituted a better and stronger thread, which by mistake it labeled 3/24.

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

Action by Isaac J. Silverstein, doing business as the Globe Thread Company, against Levi Strauss & Co., Incorporated, begun in the state court and removed to the federal court, where it was consolidated with an action by Levi Strauss & Co. against Silverstein, plaintiff in the other action. There was a judgment for Silverstein and Strauss & Co. brings error. Reversed.

Leventritt, Cook, Nathan & Lehman, of New York City (Emil Goldmark and Mortimer Brenner, both of New York City, of counsel), for Levi Strauss & Co., Inc.

Blandy, Mooney & Shipman, of New York City (Edmund L. Mooney and Eli S. Wolbarst, both of New York City, of counsel), for Silverstein:

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. Levi Strauss & Co., Inc., are manufacturers of overalls at San Francisco, having an office in New York City, and Silverstein is a manufacturer of thread in New York City, trading under the name of the Globe Thread Company. Isaac J. Silverstein sued Strauss & Co. in the state court to recover the price of thread

delivered by him to Strauss & Co. under a contract for 10,000 tubes, together with damages for their refusal to accept full deliveries. Strauss & Co. sued Silverstein in the District Court of the United States for the Southern District of New York to recover damages for his failure to deliver 10,000 tubes of thread conforming to sample, and removed his suit from the state court to the United States court. These two causes were consolidated, tried together, and this is a writ of error to a judgment entered on the verdict of the jury in favor of Silverstein.

The whole question in the case is whether the sale of 10,000 tubes of orange-colored thread was by sample or by description, and the contract, whichever it was, is contained in the correspondence of the parties. A contract prior to the one sued upon was entered into by the following order:

"January 3, 1916.

"Messrs. Globe Thread Co., 147 Spring Street—Gentlemen: We herewith order from you one (1) case each 50 tubes per case dark red, orange thread silk finish as follows:

| | | Silk. | Soft. |
|------|---------------------|--------|--------|
| 3/24 | 9600 yards at | \$1.25 | \$1.18 |
| 3/30 | 9600 " " | 1.15 | 1.10 |
| 3/36 | 12000 " " | 1.10 | 1.05 |
| 3/40 | 12000 " " | .95 | .90 |
| 3/50 | 12000 " " | .90 | .84 |

"The above are all to be left twist and to be wound on tubes universal wind and to be delivered f. o. b. our New York office 377 Broadway. You are to take out two (2) tubes from each case and pack separately and mark Levi Strauss & Co., San Francisco, California, and deliver with the rest of the goods. We remain,

"Respectfully yours,

Levi Strauss & Co.,
"Per Simon E. Davis."

One copy of this order was kept by the Thread Company and the other by Strauss & Co. The order was subsequently filled, paid for, and is admitted to have been satisfactory. The next day negotiations began for the contract in suit, the Thread Company putting in the following offer:

"New York, Jan. 4, 1916.

"Messrs. Levi Strauss & Co., 377 Broadway, New York City—Gentlemen: As we are anxious to be favored with your contract order on the dark red orange thread, we have refigured once again very carefully the cost, and are herewith giving you the very lowest prices which we can accept an order:

| No. | | Silk. | Soft. |
|------|--------------------|--------|--------|
| 24/3 | 9600 yards @ | \$1.25 | \$1.18 |
| 30/3 | 9600 " " | 1.15 | 1.10 |
| 36/3 | 12000 " " | 1.10 | 1.05 |
| 40/3 | 12000 " " | .95 | .90 |
| 50/3 | 12000 " " | .90 | .84 |

"All the above quotations are figured on the very best quality cotton, all left twist, to be put up on tubes, universal wind, f. o. b. New York. Thanking you for your sample order, and hoping to receive your further order for this goods, we are,

"Yours very truly,

The Globe Thread Co."

Strauss & Co. say they answered this letter by one dated January 5th, which the Thread Company says was unequivocally turned down

by it in a letter dated January 6th, which Strauss & Co. say they never received, though the verdict of the jury shows they must have found to the contrary; therefore we will omit both in considering this record.

The next letter is as follows:

"February 10, 1916.

"Messrs. Globe Thread Co., 147 Spring Street, New York, New York—
Gentlemen: We just now received the following telegram from our San Francisco house which is no doubt prompted by their receipt of two (2) tubes each of thread that you expressed February 2: 'Confirm order Globe Thread Co. 2000 tubes three cord fifty 500 tubes three cord forty 7500 tubes three cord twenty four half silk finish and half soft finish. Ship 1000 tubes per month rush first shipment.' We therefore direct you to book the following order to apply against the contract made between your Mr. Silverstein and our Mr. Davis on January 3:

| | |
|-----------------|----------------|
| 2000 Tubes 3/50 | 500 Tubes 3/40 |
| 7500 " 3/24 | |

half silk finish, half soft finish. Ship the above via Morgan & Sunset line to Levi Strauss & Co., San Francisco, California, as per the attached form, at the rate of 1000 tubes per month and rush the first shipment. As soon as shipment is made, send us three bills here and original bill of lading.

"Respectfully yours,

Levi Strauss & Co.

"P. S.—This thread must be the same color, qual. and finish as those expressed."

The reference to the contract of January 3d is evidently a typographical error for the contract proposed by the letter of January 5th, which was rejected by the Thread Company, because admittedly the first contract of January 3d was wholly independent, was for different quantities and varieties of thread, and had been filled and shipped. When the New York agent of Strauss & Co. presented this letter to the Thread Company, its bookkeeper pointed out that there was no unfilled contract of January 3d and that the company had no thread in stock corresponding in color to that order. She asked the agent to say which shade of five samples of different shades of orange they had received from Strauss & Co. he wished the color of the thread to be, whereupon he selected one to be used, which was used. Then came the following letter, confirming the letter of February 10th, and inclosing Order No. 646 for 10,000 tubes:

"February 14, 1916.

"Messrs. Globe Thread Co., 147 Spring Street, New York, New York—
Gentlemen: Herewith please find the official confirmation No. 646 for the thread purchased from you by our Mr. Davis. We hereby confirm the phone conversation had with you this morning regarding the color of the thread. We just received a telegram from our San Francisco house reading: 'Globe thread is right shade.' So kindly go ahead and make the shade of the thread like the samples you have expressed February 2d, and kindly acknowledge this by return mail to this office.

"Respectfully yours,

Levi Strauss & Co."

"No. 646 Dep't P 2/9/1916. If this order is not exactly as trade was made, return to our New York office. Address all correspondence concerning this order to New York Office.

"New York, 196 West Broadway.

"Levi Strauss & Co., San Francisco, Cal.

"To be delivered below

"Morgan Sunset

"Bought of Messrs. Globe Thread Co. Address: New York City. Sample to New York office. Terms 2/10—60x not later than % per annum allowed for unexpired time.

"We reserve the right to cancel any number of which samples and goods are not delivered promptly on time.

"Packed

| Original No. | Call No. | Bought. | Description of Goods. | Price. |
|--------------|----------|---------|-------------------------------------|--------|
| | | | 1,000 tubes 3/50 soft finish thread | .84 |
| | | | 250 tubes 3/40 soft finish thread | .90 |
| | | | 3,750 tubes 3/24 soft finish thread | 1.18 |
| | | | 1,000 tubes 3/50 silk finish thread | .90 |
| | | | 250 tubes 3/40 silk finish thread | .95 |
| | | | 3,750 tubes 3/24 silk finish thread | 1.25 |

"Delivery: 1000 tubes per month. Rush first shipment all possible.

"Freight allowance cwt. Est. Am't \$11,315.00.

"When goods are ready, send three bills to our New York office and get S/D."

This order was accepted by the following letter of the Globe Thread Company:

"New York, Feb. 15, 1916.

"Levi Strauss & Company, 377 Broadway, City—Gentlemen: We have entered your order #646, dated February 9th for the following:

"Terms: 2% 10/60x, f. o. b. New York.

| | |
|-------------------------------|------|
| 1,000 tubes #50/3 soft finish | .84 |
| 250 tubes #40/3 soft finish | .90 |
| 3,750 tubes #24/3 soft finish | 1.18 |
| 1,000 tubes #50/3 silk finish | .90 |
| 250 tubes #40/3 silk finish | .95 |
| 3,750 tubes #24/3 silk finish | 1.25 |

"All above is to be orange shade, put up on tubes, to be delivered about 1,000 tubes per month, and we expect to begin shipment about March 10th. Thanking you for same, we are,

"Very truly yours,

The Globe Thread Co."

The Thread Company made a number of deliveries, which were rejected by Strauss & Co. as not up to the sample, and they ultimately refused to receive any more.

[1, 2] The contract in our opinion results from the foregoing correspondence. We cannot accept the contention of the Thread Company that the letter of February 10th is to be disregarded. The effect of doing so would be to make the sale one by description, whereas it expressly required the thread to be of the same color, quality, and finish as the samples expressed February 2d. The Thread Company never rejected the proposition contained in this letter; on the contrary, it accepted the offer, asking only for specific directions as to the shade of the orange-colored thread to be manufactured, about which particular there never has been any dispute. This correspondence being plain and unambiguous, it was the duty of the court to construe it and to construe it as a sale by sample as Strauss & Co. requested. The shade of the goods delivered was acceptable to Strauss & Co. and the question for the jury was whether they conformed to the samples expressed February 2d of the original order of January 3d in other respects, as required by the letter of February 10th.

[3] Strauss & Co. likewise assign error to the refusal of the court to charge that the thread was to be manufactured of combed Egyptian yarn. As it is admitted by the Globe Thread Company that the sample thread of January 3d was combed Egyptian yarn, and that the price fixed in order 646 plainly indicated that yarn, the refusal of the request was error.

[4] In filing the original order of January 3d the Thread Company, having no 3/24 in stock, substituted a stronger and better thread, 4/30, which it is said was labeled 3/24 by mistake. Assuming that this was an honest mistake, nevertheless the samples of the thread furnished on that original contract were expressly made the samples to which the goods ordered under the contract in suit must conform, and Strauss & Co. could not be required to take anything else.

The judgment is reversed.

F. M. DAVIES & CO. v. PORTER. *

(Circuit Court of Appeals, Eighth Circuit. February 19, 1918.)

No. 4954.

1. JURY ⇨28(17)—JURY TRIAL—WAIVER—STIPULATION.

A stipulation on the first trial, waiving jury trial, does not affect the right of either party to demand trial by jury after judgment on the first trial has been reversed and the cause remanded.

2. JUDGMENT ⇨715(2)—CONCLUSIVENESS—MATTERS CONCLUDED.

While a judgment is conclusive, not only as to what was decided, but as to what might have been decided, a judgment in an action in the state court against a Chamber of Commerce and defendant, whom it was claimed asserted a lien on a certificate of membership of which plaintiff, as receiver, claimed to be the equitable owner, is not, defendant's lien claim having been denied, conclusive against plaintiff's right to recover against defendant on account of alleged speculative transactions between defendant and the corporation of which plaintiff was receiver.

3. GAMING ⇨26(1)—RECOVERY—STATUTE.

In the absence of statute, authorizing recovery, money lost in a gaming transaction cannot be recovered, as no court will lend its aid to one who founds his cause of action upon an immoral or illegal act.

4. CORPORATIONS ⇨432(12)—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action by the receiver of a corporation to recover against defendant on account of alleged speculative transactions claimed to have been carried on through defendant by the secretary-manager of the corporation, evidence held to show that such officer was acting for the corporation.

5. CORPORATIONS ⇨428(5)—DIRECTORS—NEGLECT OF DUTY.

Where corporate directors, who were the sole stockholders, other than an officer of the corporation and his wife, neglected to examine the corporate books, and an examination would have disclosed the transactions complained of, the directors must, by reason of their dereliction of duty, be deemed to have knowledge of such transactions, so that it was imputable to the corporation.

6. APPEAL AND ERROR ⇨1194(1)—REVIEW—PRESUMPTIONS.

Where the Appellate Court, on reversing judgment for defendant, expressly declared it was not its intention to in any wise pass upon the merits of the controversy, the presumption that there was evidence sufficient to warrant a finding for either party, for as otherwise the court would have affirmed the judgment in favor of defendant, is conclusively negated.

In Error to the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Action by Clement F. Porter, Jr., receiver of the Independent Elevator Company, against F. M. Davies & Co., a corporation. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions.

See, also, 224 Fed. 451, 140 C. C. A. 288.

H. V. Mercer, of Minneapolis, Minn. (Krause & Krause, of Dell Rapids, S. D., on the brief), for plaintiff in error.

Frank McNulty, of Aberdeen, S. D. (Howard Babcock, of Sisseton, S. D., on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and TRIEBER and YOUNG, District Judges.

TRIEBER, District Judge. This case is here a second time, and the writ of error is prosecuted from a judgment entered upon the verdict of a jury in favor of the plaintiff, the defendant in error in this court. For convenience the parties will be referred to herein as they appeared in the court below; the defendant in error as plaintiff, and the plaintiff in error as defendant. In the opinion of the Circuit Court of Appeals (223 Fed. 465, 140 C. C. A. 11), the issues made by the pleadings are set out sufficiently to make it unnecessary to restate them in this opinion.

[1] It is claimed that, as the first trial was had to the court, a jury having been waived by stipulation in writing, it was error to grant plaintiff's motion to try the cause to a jury. The contention is without merit, as such a stipulation does not affect the right of either party to demand a trial by jury, on a second trial, after the judgment in the first trial has been reversed and remanded for a new trial. *Burnham v. North Chicago Street Ry. Co.*, 88 Fed. 627, 32 C. C. A. 64; 24 Cyc. p. 173; 11 A. & E. Encyc. of Law, p. 1108.

[2] It is next claimed that the court erred in excluding the record of a cause determined in the district court for the Fourth judicial circuit, of the county of Hennepin, state of Minnesota, offered for the purpose of sustaining defendant's plea of *res adjudicata*. That was an action by the present plaintiff against the Chamber of Commerce of Minneapolis and the defendant, claiming that the Independent Elevator Company, of which he was receiver, was the equitable owner of the membership in the Chamber of Commerce, the legal title of which was in the name of A. J. Norby, and on which the defendant claimed a lien under the rules of said Chamber of Commerce, and which membership was about to be sold by directors of the Chamber of Commerce to satisfy defendant's claim of lien. The prayer for relief in the complaint in that cause was to decree the membership certificate, standing in the name of Norby to belong to the plaintiff as receiver of the Independent Elevator Company and entitled to the possession thereof, and that Davies & Co. have no right, title, or interest in or to the same, or any lien upon the same. The only issue in that case, so far as the defendant herein was concerned, was whether it was entitled to a lien on the certificate of membership, and the court held that it was not. In *Bates v. Bodie*, 245 U. S. 520, 38 Sup. Ct. 182, 62 L. Ed. —, opinion filed January 21, 1918, the court, after referring to its former decisions, epitomized the law established as a test of the thing adjudged and the extent of its estoppel as follows:

"If the second action is upon the same claim or demand as that in which the judgment pleaded was rendered, the judgment is an absolute bar not only of what was decided but of what might have been decided. If the second

action was upon a different claim or demand, then the judgment is an estoppel 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.'"

As there was no such issue involved in that cause as is presented in the instant case, the court committed no error in sustaining plaintiff's objection to the introduction of the record of that cause.

At the close of the evidence, the defendant asked for a peremptory instruction, which was denied by the court, and proper exceptions saved.

[3-5] The object of the action is to recover money by the plaintiff as receiver of the Independent Elevator Company, alleged to have been paid to the defendant by one A. J. Norby, which money belonged to the Elevator Company, as was well known to the defendant, and was used for alleged wagering transactions. The pleadings raised two issues:

(1) Were Norby's transactions with the defendant for himself, or, as general manager of the Elevator Company, for the Elevator Company and its sole benefit?

(2) Were the transactions between Norby and the defendant mere wagering transactions, and, if they were, can the plaintiff recover the moneys, belonging to it, and alleged to have been paid to the defendant?

If Norby acted for himself and unlawfully used the funds of the Elevator Company, which fact was known to the defendant, it is no doubt liable for the money thus unlawfully received and appropriated by it. On the other hand, if he acted as the agent of the Elevator Company, for its sole benefit, with the knowledge and consent, either express or implied of the officers and stockholders of the corporation, defendant was entitled to a directed verdict in its favor.

Whether the transactions between Norby and the defendant were mere wagering or gambling transactions is immaterial, if he acted solely for the Elevator Company, as the law is well settled that in the absence of a statute, authorizing a recovery of money lost in a gaming transaction, the money cannot be recovered, as no court will lend its aid to one, who founds his cause of action upon an immoral or illegal act. *Higgins v. McCrea*, 116 U. S. 671, 686, 6 Sup. Ct. 557, 29 L. Ed. 764; *White v. Barber*, 123 U. S. 392, 425, 8 Sup. Ct. 221, 31 L. Ed. 243; *Carpenter v. Beal-McDonnell* (D. C.) 222 Fed. 453, affirmed 235 Fed. 273, 148 C. C. A. 633. And this is the rule prevailing in the state of Minnesota, where these transactions took place. *Franklin v. Stoddart*, 34 Minn. 247, 25 N. W. 400; *Nagel v. Randall*, 115 Minn. 235, 238, 132 N. W. 266.

Did the evidence justify the submission to the jury of the question whether the transactions between Norby and the defendant, were for himself, or for the Elevator Company, whose secretary and manager he was? The evidence is very voluminous, but a careful reading convinces that he acted solely for the Elevator Company, and with the knowledge, if not express, clearly implied, of the directors and stockholders.

The undisputed evidence shows that the Elevator Company was a corporation existing under the laws of South Dakota. Its stockholders were A. J. Norby and his wife, Clement F. Porter, Sr., and Frank McNulty. The directors were Mr. Porter, who was president, Mr. McNulty, who was vice president, and Mr. Norby, who was secretary and general manager. The business of the corporation was at first transacted at Sisseton, S. D., and later removed to Minneapolis, Minn. The Elevator Company being unwilling to comply with the requirements of the laws of the state of Minnesota, regulating the transaction of business in that state by foreign corporations, and being desirous of obtaining the benefits of a membership in the Chamber of Commerce of Minneapolis, transacted its business through Norby, who had sole charge of it in Minneapolis; the other directors residing in South Dakota. The evidence establishes beyond question that the management of the corporation's business in Minneapolis was left entirely in charge of Norby; the other directors but rarely visiting that office, and never examining its books. The membership in the Chamber of Commerce was taken in his name, but paid for by the Elevator Company, and held by him in trust for the company. Norby during the time employed the defendant as broker in many transactions for the purchase and sale of grain for future delivery, but these transactions were all for the Elevator Company, whose checks were given in all the transactions, most of them drawn by Norby as secretary, and some by Miss Baker, the bookkeeper of the company, at the request of Norby. All moneys, when there were profits, were paid by the defendant by its checks, payable to Norby, and by him deposited to the credit of the Elevator Company, and on the books credited to the profit and loss account, while, when there were losses, they were charged to that account. In a number of instances the Elevator Company made such purchases or sales through defendant for its customers, also in the name of Norby, and the commissions received were credited on the books of the Elevator Company to it. Under the rules of the Chamber of Commerce, its members only were entitled to receive one-half of the commissions charged by brokers, and these were also credited on the books of the company for its benefit. This privilege was no doubt one, if not the main, reason which induced the Elevator Company to purchase a membership in the Chamber of Commerce.

During the time these transactions took place, the defendant paid to Norby at different times, as profits, sums amounting to \$19,444.94, all of which was paid by checks payable to Norby, and by him deposited to the credit of the Elevator Company and credited on its books. Had the directors, or either of them, examined the books of the company, they would have learned of these transactions and that they were for the sole benefit of the company. From a careful reading of the testimony, it is impossible to escape the conclusion that it establishes conclusively that Norby's transactions were for the sole use and benefit of the company, and that they were carried on in his name, for the only reason that the membership in the Chamber of Commerce was in his name. The neglect of the other directors, who were the

sole stockholders, besides Norby and his wife, to examine the books of the corporation for years, which would have shown these transactions, and failing to make any effort whatever to ascertain how the business of the company was being conducted by Norby, was not only a breach of their duties as directors, but also, as by the exercise of any diligence whatever, they could have ascertained the facts, they must be held to have knowledge of them. *Gold Mining Co. v. National Bank*, 96 U. S. 640, 24 L. Ed. 648; *Rolling Mill v. St. Louis, etc., Co.*, 120 U. S. 256, 7 Sup. Ct. 542, 30 L. Ed. 639; *Pittsburg, etc., Co. v. Keokuk*, 131 U. S. 371, 9 Sup. Ct. 770, 33 L. Ed. 157. In *Brown's Valley State Bank v. Porter*, 232 Fed. 434, 146 C. C. A. 428, an action arising out of similar transactions of Norby as general manager of the Elevator Company, in which the evidence was very much like that in this case, we held that his acts were those of the corporation.

[6] The learned trial judge, in his memorandum opinion was under the impression that, when the Court of Appeals reversed the case before, it must have held that there was sufficient evidence to warrant a finding for either party, as otherwise it would have affirmed the judgment in favor of the defendant, although error in the admission of evidence had been committed. But this presumption is conclusively negated, when the court on a motion for a rehearing said:

"It was not our intention to in any wise pass upon the merits of the controversy. * * * and in view of the possible embarrassment that it may cause the defendant on a new trial the same (referring to the expression, which it was thought might affect the merits) may be omitted from the opinion." 224 Fed. 451, 140 C. C. A. 288.

The court erred in refusing to direct a verdict in favor of the defendant, and the cause is reversed and remanded, with directions to grant a new trial.

DEXTER HORTON TRUST & SAVINGS BANK v. CLEARWATER COUNTY,
IDAHO, et al.

(Circuit Court of Appeals, Ninth Circuit. February 18, 1918.)

No. 2968.

1. COUNTIES ⇐113(6)—CONTRACTS FOR CRUISING ASSESSABLE TIMBER LAND—
POWERS OF COUNTY BOARD.

Const. Idaho, art. 18, § 6, provides for the election biennially of a county assessor, who shall be ex officio tax collector. Rev. Codes Idaho, § 2119, as amended by Laws Idaho 1913, c. 127, authorizes the board of county commissioners, on application by the assessor and after a hearing on 30 days' notice, to empower the assessor to appoint such deputies and clerks as the business of his office may require and to fix their compensation. Laws Idaho 1913, c. 58, declares that it shall be the duty of the assessor to assess all real property in his county, and in making assessments to actually determine as near as practicable the full cash value of each parcel assessed, and further provides for the classification of lands as agricultural, timber, or mineral lands, etc., and requires the taxpayer to make a statement as to the nature and value of his lands. *Held*,

⇐ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
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that the county board is not authorized to contract with a third person to cruise the taxable timber lands of the county at a large expense.

2. COUNTIES \Leftarrow 152—LIMITATION OF INDEBTEDNESS—"ORDINARY AND NECESSARY EXPENSE."

A contract for cruising taxable timber lands of a county at an expense considerably exceeding its yearly revenue is invalid; such expense not being an "ordinary and necessary expense," within Const. Idaho, art. 8, § 3, prohibiting counties from incurring indebtedness or liability in any year exceeding the income and revenue for such year, unless certain designated conditions are complied with relative to the authorization of the debt and provision made for its payment, but providing that the restriction shall not apply to the ordinary and necessary expenses authorized by general laws of the state.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Necessary Expenses; Ordinary Expenses.]

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

Suit by the Dexter Horton Trust & Savings Bank against the County of Clearwater, of the State of Idaho, and Oren D. Crockett, as Treasurer thereof. From a decree dismissing the bill (235 Fed. 743), complainant appeals. Affirmed.

During 1914, the county of Clearwater, in Idaho, issued to M. G. Nease, of Oregon, as payment under a contract, warrants aggregating more than \$44,000. In July, 1915, the Dexter Horton Trust & Savings Bank, appellant herein, acting in good faith, bought the warrants for value from Nease. In January, 1916, newly elected county officials of Clearwater county refused to recognize the warrants as valid obligations of the county, and the bank brought this suit to restrain the county and the treasurer of the county from dissipating to other purposes the funds of the county, which, it contends, were by law applicable to the payment of the warrants it held.

On April 15, 1914, a contract was made by the county of Clearwater, through the county commissioners, with Nease, whereby Nease agreed to make and complete by June 15, 1915, a careful, complete, and thorough cruise and estimate of all of the timber of the patented lands in Clearwater county, Idaho, with certain exceptions not here necessary to be stated. Nease was to be paid 12½ cents per acre for his cruise. The contract required reports from Nease showing topographic sketches and features, elevations, description of lands, varieties of timber, and much other detailed information. Nease was to give a bond for the faithful performance of his contract. The commissioners were to examine and accept or reject all reports filed by Nease at each regular session of the board, and to give to Nease or his assigns written acceptance or rejection of the reports, and were to issue warrants on the current expense fund for an amount equal to 80 per cent. of the amount due Nease as shown by the accepted reports; the balance to be held until 60 days after the completion of the contract and acceptance of the work. Clauses providing for arbitration in case of disagreement as to the cruises were inserted, and Nease agreed that he would not subcontract any part of the work. As the work progressed, Nease filed reports, which were accepted, and claims were allowed for 80 per cent. as provided for, and after the completion of the work the board allowed the balance of 20 per cent. called for under the contract. Nease sold warrants amounting to more than \$18,000 to a purchaser, and these warrants were paid by the county. Two days before the officials who had made the contract with Nease retired from office, and before the appellant bought the warrants, the warrants were presented to the county treasurer, but were stamped by the treasurer "Not paid for want of funds," and thereafter were registered. When the appellant bank bought the warrants, it had no notice of any claim of the county against their validity, and did not learn of the objections of the defendant county to them until September or October, 1915, or shortly before this suit was brought.

The defendants, appellees, denied that the county commissioners had authority to issue the warrants referred to, and deny their validity, and pleaded that the warrants were issued to Nease under the contract, when no provision had been made in the tax levy of the year 1914 for the payment of the indebtedness incurred, and therefore that such indebtedness was not a necessary or ordinary expense, and was void under section 3 of article 8 of the Constitution of Idaho. Defendants also asserted that the cruise contracted for was not made by the assessor or his deputy as required by law, that the contract was fraudulently entered into, that the work was improperly done, and that the treasurer was not obligated by law to pay the warrants. On the trial the bank admitted that no provision had been made to meet the debt incurred under the Nease contract in the tax levy of the year 1914, and that the debt was not authorized by the vote of the electors of the county. After trial before the court, decree was made dismissing the plaintiff's bill. The bank appeals.

Peters & Powell, of Seattle, Wash., George W. Tannahill, of Lewiston, Idaho, and H. B. Beckett, of Portland, Or., for appellant.

Fred E. Butler, of Lewiston, Idaho, and John R. Becker, of Orofino, Idaho, for appellees.

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

HUNT, Circuit Judge (after stating the facts as above). [1] The statutes of Idaho (section 2119 of the Revised Codes of Idaho, as amended by chapter 127 of the Laws of 1913) provide in substance:

That the assessor of a county shall be empowered by the board of county commissioners to appoint such clerical assistance as the business of his office may require, deputies to be remunerated as may be fixed by the county commissioners: "Provided, that any of the officers mentioned in this section requiring the services of one or more deputies or requiring clerical assistance shall, for a period of at least thirty days before any regular meeting of the board of county commissioners," publish a notice in a newspaper, or if there is no newspaper in the county, then by putting a notice in his office for thirty days before such regular meeting, "of his intention to apply to the board of county commissioners for a deputy or deputies or for clerical assistance, and no deputy shall be appointed or clerical assistance allowed by said board until due proof of the publication of said notice shall have been furnished said board and the necessity for said assistance is satisfactorily shown. * * *"

The Constitution of Idaho (section 6, art. 18) provides that the Legislature, by general and uniform laws, shall provide for the election biennially in each county of a county assessor, who shall be ex officio tax collector. Certain sections of the laws (article 3, chapter 58, Laws of 1913) make it the duty of the assessor to assess all real property in his county, and in making such assessments he shall—

"actually determine, as near as practicable, the full cash value of each tract * * * of real property assessed, and shall enter the value thereof, and the value of all improvements thereon * * * in appropriate columns against the description of such real property in the real property assessment roll." Section 39.

By chapter 58 of the Laws of Idaho of 1913 (section 48), for the purpose of assessment, lands must be classified as agricultural, or timber, or cut-over and burnt timber land, mineral land, and by other classifications not material at this time. The assessor (section 49) shall exercise his best judgment in classifying land, but the classifica-

tion made may be amended or revised, and a new classification made, or the classification of any particular tract changed by the board of county commissioners, if in the judgment of such board the classification has not been correctly made under the provisions of the law. There are further statutory guides for the assistance and instructions of assessors; for instance, by section 15, the assessor in valuing property shall not adopt a lower or different standard of value because the same is to serve as a basis of taxation, but shall value each piece of property by itself and at such sum or price as he believes the same to be fairly worth in money at the time such assessment is made. The assessor is required to obtain correct statements from owners, and it is his duty to determine the value of such property, and return and enter the same on the assessment roll.

The statutes above referred to are but part of the scheme for gathering the lists of property subject to taxation and providing for the valuation thereof for taxation purposes. It is urged that the acquisition of the information which the assessor must have in order to make a classification and valuation is merely to qualify the assessor to perform properly the official function, and that the valuation only is the official act. The weakness of this argument is apparent, we think, when we consider the scope of the duties of the assessor as defined by the statutes. They make it obligatory upon such official to classify, and then to determine, as near as practicable, the full cash value of the property subject to assessment in his county. This obligation to make classification cannot be lost sight of, and carries with it the inseparable duty to acquire enough information to be able to arrange the property lists intelligently and as prescribed by law. He can always refer to the taxpayer's statement made under section 16 of the statutory provisions. Primarily, no one except the assessor is responsible for the classification; and when classification is had, all of course for purposes of assessment, the assessor alone is responsible for determining, as near as practicable, what the full cash value of the property may be. Thus in assessing of property there are two steps—one the listing, the other the estimating or valuing—and while one is the complement of the other, both are essential in making an assessment. Cooley on Taxation, p. 596. In *Bloomquist v. Board of County Commissioners*, 25 Idaho, 284, 137 Pac. 174, the Supreme Court of Idaho said that property must be assessed; "that is, the property must be listed for taxation." Furthermore, the court held that, under the Constitution of Idaho, the duty of assessment was upon the assessor, and that, the Constitution having provided a scheme for the "mechanical administration of the laws of the state," the Legislature could not substitute another method therefor. It might well be that, in order to enable the assessor to reach the full cash value of timber lands, it would be of great aid to him to be furnished with a cruise by experts of the timber upon timber lands; it might also well be that it would be of great assistance to him to have expert mining engineers furnish reports concerning the ore bodies in the mines situate in his county, or that he would be given great assistance by having expert reports upon the value of agricultural lands.

But the law assumes that the assessor is competent to arrive at reasonably fair valuations, and that, if need be, he will inform himself sufficiently well to make values; hence it does not expressly authorize the expenditure of public funds for the employment of experts to gather such information for the aid of the official, and we are cited to no statute which fairly implies authority for incurring expenses of such a character. The limitations upon the employment of assistants are very positive. If the regular force of his office is inadequate, the assessor may have some assistance, but only as limited by section 2119; that is, he may employ such deputies or clerks as the board of county commissioners may empower him to employ, and even then, before the board can act, it must appear that the official has given notice of intention to apply for assistants, and it must be satisfactorily shown to the board that there is need for such assistance. *State v. Goldthait*, 172 Ind. 210, 87 N. E. 133, 19 Ann. Cas. 737. The case of *Pacific Timber Co. v. Clarke County* (D. C.) 233 Fed. 540, called for an interpretation of the powers of county commissioners under the laws of Washington, which, in respect to assessments and equalization, are at least in some respects different from those of Idaho. Section 3890, R. & B. Code; *Gen. Custer Mining Co. v. Van Camp*, 2 Idaho (Hasb.) 40, 3 Pac. 22. What the powers of the board of equalization might be to make the Nease contract we need not stop to analyze, for plainly the agreement was made by the board of commissioners with a view to furnishing information for the assessor in making his assessment, and should be judged accordingly.

[2] Appellants urge that neither the contract nor the performance thereof by Nease was in violation of section 3 of article 8 of the Constitution of Idaho, which is as follows:

"Sec. 3. No county * * * shall incur any indebtedness, or liability in any manner or for any purpose, exceeding in that year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose. * * * Any indebtedness or liability incurred contrary to this provision shall be void: Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state."

It is important to keep in mind the concession that the indebtedness now questioned was incurred without the assent of the electors at an election held to submit the question, and also that no provision was made for the collection of an annual tax sufficient to pay the interest on the indebtedness, and to constitute a sinking fund for the payment of the principal, and also that such indebtedness exceeded the income and revenue for the year in which it was incurred. The inquiry is therefore at once narrowed to this: Was the purpose for which the indebtedness was incurred one of the "ordinary and necessary expenses authorized by the general laws of the state"? We are greatly assisted in reaching decision upon the true meaning of the constitutional section and the proviso by the views of the Supreme Court of the state, expressed in *Bannock County v. Bunting & Co.*, 4 Idaho, 156, 37 Pac. 277, where it was held that a comparatively

small expense paid for a temporary jail was an ordinary and necessary one authorized by the Constitution, and in *Ada County v. Bullen Bridge Co.*, 5 Idaho, 79, 47 Pac. 818, 36 L. R. A. 367, 95 Am. St. Rep. 180, where it was held:

"That an improvement involving an expenditure of nearly \$40,000, where the revenue of the county for the year was only about \$70,000, would not readily be classed as an 'ordinary and necessary expense.'"

The court said:

"It would be difficult, we apprehend, to name an expense under such a construction that would not be 'ordinary and necessary.' If a necessity existed for the bridge, there was no conceivable excuse for not complying with the plainly expressed provisions of the Constitution and the statutes. If these provisions of law are to be ignored or defeated upon flimsy technicalities, it is difficult to see what protection the people will have."

The expenditure involved in the contract with Nease amounted to approximately \$63,000; whereas, the available revenue was approximately little more than \$53,000, out of which would have to come the usual ordinary and necessary expenses for 1914, which amounted to about \$59,000.

In *Dunbar v. Board of County Commissioners*, 5 Idaho, 415, 49 Pac. 409, the court, after pointing out that the terms "ordinary and necessary" are used conjunctively in the constitutional provision, said that expenditures made in excess of the revenues of any current year must not only be for ordinary expenses, "such as are usual to the maintenance of the county government, the conduct of its necessary business, and the protection of its property, but there must exist a necessity for making the expenditure at or during such year," and concluded that the building of a bridge and the payment of scalping bounties were not ordinary, but extraordinary, expenses, and, being such, could not be created in excess of the revenue for the fiscal year in which such expenses were incurred without the assent of the necessary two-thirds of the electors of the county voting at an election duly called and held. The court also held that it was intended by the makers of the Constitution that the several counties of the state should be placed upon a cash basis, and that the incurring of heavy debts by the counties should not be had, except where the people of the counties should so authorize.

In *Hickey v. City of Nampa*, 22 Idaho, 41, 124 Pac. 280, the Supreme Court, in discussing the meaning of the proviso under consideration, held that the Legislature could say that an expenditure, though out of the ordinary, which is incurred for the purpose of repairing some damage done to property, or improving it so as to render it serviceable to a city, falls within the proviso. The expenditure in that case was made necessary by a casualty, where a large amount of property was destroyed by reason of a fire, which destroyed the water supply, and the municipal authorities proceeded under section 2270 of the Revised Codes of Idaho, calling for and requiring the restoration and improvement of the water system and fire-extinguishing apparatus. The point emphasized was that the making of repairs, although it

might only occur at infrequent intervals, would still be an "ordinary and necessary expense."

These decisions are in accordance with what we believe is the true construction of the constitutional provision, and they lead to the conclusion that the commissioners had no right to enter into the contract, although it may be assumed they honestly believed it would be advantageous to the county, until they had complied with the legal requirements.

Wingate v. Clatsop County, 71 Or. 94, 142 Pac. 561, upholds the position of appellant. The case involved the construction of article 11 of section 10 of the Constitution of Oregon, as amended by the Laws of 1911 (see Laws 1911, p. 11), providing that:

"No county shall create any debts or liabilities which shall singly or in the aggregate exceed the sum of five thousand dollars, except * * * to build permanent roads within the county, but debts for permanent roads shall be incurred only on approval of a majority of those voting on the question."

The court drew a distinction between a voluntary indebtedness, or one which a county is at liberty to evade or postpone until means are provided for the payment of the expenses incident thereto, and an involuntary indebtedness, or liability imposed upon a county by law and which it is not privileged to evade or postpone, and held that, in order to carry out the constitutional mandate and fairly to distribute the burdens of government, the expenditures there examined into—a debt on a contract for cruising timber—necessarily became of such a character as to create an involuntary indebtedness, "stationed without the pale of constitutional inhibition." With great respect for the learned court which pronounced the opinion, we are not persuaded that under the laws of Idaho there was a duty, the performance of which involved the power to contract the debt in question, without a vote of the electors.

It being clear to us that the expense under investigation was not an ordinary and necessary one, the result must be that appellant cannot prevail, and that the District Court was right in dismissing the complaint.

Affirmed.

JOHNSTON v. KENNECOTT COPPER CORP.

(Circuit Court of Appeals, Ninth Circuit. February 18, 1918.)

No. 3031.

1. STATUTES 56—GRANTING SPECIAL PRIVILEGE OR FRANCHISE—WORKMEN'S COMPENSATION ACT OF ALASKA.

The Workmen's Compensation Act of Alaska (Laws 1915, c. 71), rendering any person or corporation, employing five or more persons in connection with mining operations carried on in the territory, who shall not have given notice in manner specified to reject the provisions of the act, liable to pay compensation in accordance with a schedule to employes receiving personal injury, or to their beneficiaries in case of death, is not violative of the Organic Act of Alaska (Act Aug. 24, 1912, c. 387)

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

§ 9, 37 Stat. 514 (Comp. St. 1916, § 3536), inhibiting the Legislature from granting to any corporation, association, or individual any special or exclusive privilege or franchise, without the affirmative approval of congress, in that it grants any privilege or franchise to the mining companies of the territory.

2. MASTER AND SERVANT ⇨347—WORKMEN'S COMPENSATION ACT OF ALASKA—VALIDITY—ABSENCE OF INSURANCE FEATURE.

The Workmen's Compensation Act of Alaska is not invalid, in that it fails to provide for payment of compensation to an injured servant, for, though the act contains no insurance feature, it substitutes another scheme to accomplish the same purpose, while the particular method is mainly one of legislative choice, and so long as the method adopted is reasonably adapted to the purpose, not arbitrary, and without proper regard to cause and effect, it is beyond the scope of judicial function to disturb the choice.

3. CONSTITUTIONAL LAW ⇨211—"CLASS LEGISLATION."

Generally speaking, class legislation is prohibited by the equal protection of the laws clause of the Fourteenth Amendment of the federal Constitution, but legislation limited in its application is not within the prohibition, if within the sphere of its operation it affects alike all persons similarly situated.

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

4. CONSTITUTIONAL LAW ⇨48, 211—CLASS LEGISLATION—DISCRETION OF LEGISLATURE.

Legislation can be condemned as class legislation only when it is without any reasonable basis and purely arbitrary. The Legislature possesses a wide scope of discretion in the exercise of its function of classification, and when a legislative classification is questioned, if any state of facts reasonably can be conceived that would sustain the law, the existence of that state of facts when it was enacted must be assumed.

5. CONSTITUTIONAL LAW ⇨245—MASTER AND SERVANT ⇨347—WORKMEN'S COMPENSATION ACT OF ALASKA—"CLASS LEGISLATION."

The Workmen's Compensation Act of Alaska, applying only to mining concerns employing five or more persons in the work, is not violative of the equal protection of the laws clause of the Fourteenth Amendment of the federal Constitution, as class legislation; mining being the one great industry of the territory, attended by many hazards and complexities.

6. MASTER AND SERVANT ⇨347—WORKMEN'S COMPENSATION ACT OF ALASKA—VALIDITY.

The Workmen's Compensation Act of Alaska, applying to mining concerns employing five or more persons, is not invalid, as making it more difficult for workmen to elect to accept its provisions, and to waive them, once election is made, than it is for the employer, or on account of its being burdensome for workmen to pay the expenses pertaining to verification and recording.

7. MASTER AND SERVANT ⇨347—WORKMEN'S COMPENSATION ACT OF ALASKA—VALIDITY.

The Workmen's Compensation Act of Alaska is not invalid, as making no provision respecting workmen under the age of majority for accepting or rejecting the provisions of the act; minors not being denied the interposition of a guardian or next friend to do so for them.

In Error to the District Court of the United States for the Third Division of the Territory of Alaska; Fred M. Brown, Judge.

Action by J. W. Johnston, by his next friend, Otto F. Johnston, against the Kennecott Copper Corporation, a corporation. Judgment for plaintiff in accordance with Workmen's Compensation Act of Alaska, and he brings error. Affirmed.

The plaintiff below prosecutes error. While working for defendant in its mill, he suffered the loss of his right foot, and he alleges that the injury was the result of defendant's negligence. Plaintiff was at the time 20 years of age. The defendant by its answer pleaded the Workmen's Compensation Act of Alaska, asserting its liability to be \$1,440 only, for which amount judgment was rendered against it and in favor of plaintiff. The plaintiff complains here of the action of the court in recognizing the validity of the act, and in rendering judgment in pursuance of its provisions, and not according to his alleged common-law remedy.

The act in question renders any person or corporation employing five or more persons "in connection with mining operations carried on" in the territory, who shall not have given notice in manner specified to reject the provisions of the act, liable to pay compensation, in accordance with a schedule adopted, to employes receiving personal injury, or to their beneficiaries in case death results from accident in the course of the employment, provided the employe so injured has not, prior to injury, given notice of his or her election to reject the provisions of the act in manner as prescribed.

The prescribed compensation for loss of a foot is \$1,440. No compensation is allowed in any case where the injury is occasioned by willful intention to bring about the casualty, or where intoxication is the proximate cause. Provision is made for beneficiaries of a deceased person, whose death occurred through injury as an employe, to file their claim for compensation in writing, verified by the oath of the claimants, and for a hearing before the district court, or before a jury if one is demanded. Provision is further made whereby the employer may, in anticipation of conflicting claims of such beneficiaries, file a bond in the sum of \$6,000, or make deposit of that amount to abide the result of the controversy. Actions for recovery of compensation as per the schedule may be maintained in the courts of the territory, and attachment may issue on compliance with prescribed conditions. The employe is inhibited from waiving by agreement any of his or her rights to compensation under the act.

The employer is conclusively presumed to have elected to pay compensation in accordance with the provisions of the act, unless notice in writing to the contrary shall have been given to the employe by recording said notice with the United States commissioner in whose precinct the employer's operations are carried on; the commissioner to be paid a fee of \$1.50 for the recording. In case the employer shall exercise the right to reject the terms and provisions of the act, it is declared that he shall not escape liability, and that he shall not be entitled to the defenses of assumption of risk, negligence of co-employe, or contributory negligence, unless such negligence was the result of willful intent to cause the injury, or the result of intoxication; and in actions against the employer, where he has rejected the provisions of the act, it is presumed that the injury was the first result and growing out of the negligence of the employer, and that such negligence was the proximate cause of the injury, the burden of proof resting upon the employer to rebut the presumption.

Employes are conclusively presumed to have elected to accept compensation in accordance with the provisions of the act until notice in writing is served upon the employer or his agent in person, which notice is required to be recorded, as in the case of an employer giving notice of rejection. Such notice must be accompanied by an affidavit thereon showing the date upon which the same was served upon the employer. In cases where the employe, having rejected the provisions of the act, brings action to recover, the employer is accorded the right to plead and rely upon any and all defenses, including those at common law, including assumption of risk, negligence by coservant, and contributory negligence: Provided, however, that if the employe sustains injuries as a result of the employer's failure to exercise reasonable care to maintain safety devices required by statute, or of the violation of any statutory regulations relating to the safety of employes, the doctrine of assumed risk shall not apply. It is also provided that, where both the employer and the employe have rejected the terms of the act, the employe shall have the same right of action as though the employer had not rejected the provisions of the act.

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By section 35 either employer or employé may waive rejection of the terms of the act in the same manner as they may signify their election to reject. The thirty-ninth section provides that "the phrase 'mining operations,' whenever used in this act, shall be held to include all work in connection with underground workings, underground mines, open cut working, surface working, stamp mills, roller mills, chlorination processes, cyanide processes, coke ovens, all reduction work of any kind or character, and all work performed on or for the benefit of any mine, mining claim, or claims, whether quartz or placer, and the phrase shall be held to include development and construction work, as well as work carried on in connection with actual mining or milling."

John Lyons, of Seattle, Wash., and E. E. Ritchie and J. L. Reed, both of Valdez, Alaska, for plaintiff in error.

R. E. Capers, of North Yakima, Wash., and E. Lyders, of San Francisco, Cal., for defendant in error.

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

WOLVERTON, District Judge (after stating the facts as above). The plaintiff challenges the validity of the Alaska act, on the ground that it denies the employé the equal protection of the law, and is in violation of section 9 of the Organic Act of the territory of Alaska, inhibiting the Legislature to "grant to any corporation, association or individual any special or exclusive privilege, * * * or franchise without the affirmative approval of Congress." Comp. St. 1916, § 3536.

The particular features of the act which it is insisted render it nugatory are: First, that it is class legislation; second, that it is discriminatory in its provisions; third, that it possesses no characteristic of industrial insurance and no provision for payment of compensation; that it creates no official authority for adjustment of claims, but merely compounds a schedule of payments to which the injured is entitled, and is a limitation of liability on the part of the employer.

[1] The suggestion that the act is in violation of section 9 of the Organic Act of the territory is not seriously pressed in the argument and briefs of counsel. Nor can it avail plaintiff, for it is manifest that the act grants neither privilege nor franchise to the mining companies of Alaska.

Counsel for defendant urges that the Fourteenth Amendment to the federal Constitution can have no application in the present controversy, because the amendment inhibits state action as it regards the denial of the equal protection of the laws, and does not, it is insisted, restrict the legislative action of a territory. This question may be waived, without deciding it, as we have concluded that plaintiff cannot prevail upon either of the questions presented in his behalf.

[2] For convenience, the third objection will first receive our attention. The gist of this objection to the validity of the act is that it contains no feature of industrial insurance and no provision for the payment of compensation. While the act does not contain any provision for industrial insurance, it does contain regulations for securing payment of the compensation for injuries. A bond or cash deposit by the mining company is provided for, where beneficiaries

of deceased persons are concerned, out of which to meet the compensation to which they are entitled; and in an action for the scheduled compensation, the employé has his attachment for securing the demand. So it cannot be said that the employé is without provision looking to the eventual payment of his claim. As to the absence of any insurance feature, the late cases of the Supreme Court proceed upon a reasoning, in support of Employers' Liability Acts, which appears to us to be ample to support the present statute.

The New York act (Consol. Laws, c. 67), which is styled the "Workmen's Compensation Law," requires every employer subject to the provisions of the act to pay or provide compensation, according to a schedule, for the disability or death of his employé resulting from an accidental personal injury arising out of and in course of the employment, without regard to fault as a cause, except where the injury is occasioned by the willful intention of the injured employé, or where it results solely from his intoxication while on duty. A commission is created, with judicial functions, for passing upon claims, and a state insurance fund is provided for, to be made up primarily of premiums to be paid by the employers. By the present act the district court is constituted a tribunal for ascertaining the legitimacy of the claims and the amount, but the so-called insurance feature, as we have previously indicated, is wanting. In practically all other respects, this act conforms in principle with the New York legislation. The New York act was brought to test in the Supreme Court in the case of *New York Central R. R. Co. v. White*, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629. Responding to three considerations urged adverse to the act—namely, (a) that the employer is subject to a liability for compensation without regard to any neglect or default on his part, and this though the injury may be solely attributable to the neglect or fault of the employé; (b) that the employé is prevented from obtaining compensation commensurate with the damages actually sustained; and (c) that both the employer and the employé are deprived of the liberty of agreement respecting the terms of employment—the court first disposed of the questions pertaining to the right of litigants to invoke the common-law remedies and the defenses of assumption of risk, negligence of a coemployé, and contributory negligence adversely to the continued maintenance of the right in the face of legislation taking it away and substituting other adequate remedies and defenses, and then proceeded to a discussion of the reasons which are thought to support the act, saying:

"The statute under consideration sets aside one body of rules only to establish another system in its place. If the employé is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy, without the difficulty and expense of establishing negligence or proving the amount of the damages. Instead of assuming the entire consequences of all ordinary risks of the occupation, he assumes the consequences, in excess of the scheduled compensation, of risks ordinary and extraordinary. On the other hand, if the employer is left without defense respecting the question of fault, he at the same time is assured that the recovery is limited, and that it goes directly to the relief of the

designated beneficiary. And just as the employé's assumption of ordinary risks at common law presumably was taken into account in fixing the rate of wages, so the fixed responsibility of the employer, and the modified assumption of risk by the employé under the new system, presumably will be reflected in the wage scale. The act evidently is intended as a just settlement of a difficult problem, affecting one of the most important of social relations, and it is to be judged in its entirety."

After referring to the scheme of compensation, the court continues:

"Of course, we cannot ignore the question whether the new arrangement is arbitrary and unreasonable, from the standpoint of natural justice. Respecting this, it is important to be observed that the act applies only to disabling or fatal personal injuries received in the course of hazardous employment in gainful occupation. Reduced to its elements, the situation to be dealt with is this: Employer and employé, by mutual consent, engage in a common operation intended to be advantageous to both; the employé is to contribute his personal services, and for these is to receive wages, and ordinarily nothing more; the employer is to furnish plant, facilities, organization, capital, credit, is to control and manage the operation, paying the wages and other expenses, disposing of the product at such prices as he can obtain, taking all the profits, if any there be, and of necessity bearing the entire losses. In the nature of things, there is more or less of a probability that the employé may lose his life through some accidental injury arising out of the employment, leaving his widow or children deprived of their natural support; or that he may sustain an injury not mortal, but resulting in his total or partial disablement, temporary or permanent, with corresponding impairment of earning capacity. The physical suffering must be borne by the employé alone; the laws of nature prevent this from being evaded or shifted to another, and the statute makes no attempt to afford an equivalent in compensation. But, besides, there is the loss of earning power; a loss of that which stands to the employé as his capital in trade. This is a loss arising out of the business, and, however it may be charged up, is an expense of the operation, as truly as the cost of repairing broken machinery or any other expense that ordinarily is paid by the employer. Who is to bear the charge? It is plain that, on grounds of natural justice, it is not unreasonable for the state, while relieving the employer from responsibility for damages measured by common-law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall—that is, upon the injured employé or his dependents. Nor can it be deemed arbitrary and unreasonable, from the standpoint of the employé's interest, to supplant a system under which he assumed the entire risk of injury in ordinary cases, and in others had a right to recover an amount more or less speculative upon proving facts of negligence that often were difficult to prove, and substitute a system under which in all ordinary cases of accidental injury he is sure of a definite and easily ascertained compensation, not being obliged to assume the entire loss in any case, but in all cases assuming any loss beyond the prescribed scale."

As it relates to the freedom of agreement respecting employment, the court is of the view that the act is fairly supportable on the ground that it is a reasonable exercise of the police power of the state. The court further says concerning the act, answering the objection advanced that it is inimical to the equal protection clause of the Fourteenth Amendment:

"The only apparent basis for it is in exclusion of farm laborers and domestic servants from the scheme. But, manifestly, this cannot be judicially

declared to be an arbitrary classification, since it reasonably may be considered that the risks inherent in these occupations are exceptionally patent, simple, and familiar."

Now, all this discussion has proceeded independently of the industrial insurance feature of the act, and is as applicable and cogent here as to the New York act. The insurance feature, among other things, is designed to afford the employé adequate security for his compensation. In the present act, another scheme is evolved, intended to accomplish the same purpose. The particular method for accomplishing the purpose is mainly one of legislative choice, and so long as such method is reasonably adapted to the purpose, and is not arbitrary and without proper regard to cause and effect, it is beyond the scope of judicial function to disturb the choice. We think that the present legislation is reasonably adapted to secure to the employé the compensation provided for in the act. At least, it is such that the court will not say that the legislation is arbitrary and not based upon sufficient reason for its adoption.

In *Hawkins v. Bleakly*, 243 U. S. 211, 37 Sup. Ct. 255, 61 L. Ed. 678, Ann. Cas. 1917D, 637, another case decided at the same time, involving the Iowa act (Acts 35th Gen. Assem. c. 147) relating to employers' liability and workmen's compensation, the same general reasoning is adopted for upholding the statute, and this again quite aside from the insurance provision. The Iowa act, in its general features, is practically the same as the New York act, and it was held that it is not inimical to that cause of the Fourteenth Amendment guaranteeing the equal protection of the laws. See, also, *Mountain Timber Co., v. Washington*, 243 U. S. 219, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642, and *Cunningham v. Northwestern Improvement Co.*, 44 Mont. 180, 119 Pac. 554.

This disposes of the third objection favorably to the validity of the act in question.

[3-5] The law is assailed by the first objection on the ground that it is thought to be class legislation, and this because, out of all the industries, the Legislature has selected but one class, namely, mining concerns employing five or more persons in the work. This pertains, again, to the equal protection of the laws clause of the Fourteenth Amendment. Classification of subjects for regulation by law is a function belonging to the legislative department of government. Generally speaking, class legislation is prohibited, but legislation which is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the prohibition. *Barbier v. Connolly*, 113 U. S. 27, 31, 5 Sup. Ct. 357, 28 L. Ed. 923.

The Legislature possesses a wide scope of discretion in the exercise of its function of classification, and such legislation can be condemned as vicious only when it is without any reasonable basis, and therefore purely arbitrary; and when legislative classification is called in question, if any state of facts can be reasonably conceived that would sustain the law, the existence of that state of facts at the time it was enacted must be assumed. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160. To

the same purpose, with elaborate discussion of the subject, see *Miller v. Wilson*, 236 U. S. 373, 382, 35 Sup. Ct. 342, 59 L. Ed. 628, L. R. A. 1915F, 829; *Louisville & Nashville R. R. v. Melton*, 218 U. S. 36, 30 Sup. Ct. 676, 54 L. Ed. 921, 47 L. R. A. (N. S.) 84; *Mondou v. New York, New Haven & Hartford R. R. Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; *Cunningham v. Northwestern Improvement Co.*, supra.

The application of the rule here is simple. Mining is the one great industry of Alaska. It is attended by many hazards and complexities, and it is not strange that the Legislature should make of the single industry a classification for adjustment of workmen's compensation. The act is criticized because "mining operations" are to be held to include all work performed on or for the benefit of any mine or mining claim; it being urged that many persons but remotely connected with the working of mines are thereby included. This again is matter for legislative discretion, and the question whether the workmen are engaged in mining operations is one that can be best disposed of when we come to it.

[6] The second objection pertains to the elective aspect of the law. It is insisted that the law makes it more difficult for the workmen to make their election to accept the provisions, and to waive them when the election is once made, than for the employer, and that it is burdensome for the workmen to pay the expenses pertaining to verification and recording. This constitutes only a minor inequality, if inequality it can be called, and is without the indicia of arbitrary discrimination.

[7] Lastly, it is insisted that the act makes no provision respecting workmen under the age of majority for accepting or rejecting the provisions of the act. The Legislature assumed, perhaps, that a minor, having the capacity to contract or to be contracted with, has the capacity to reject or waive such provisions. But, however that may be, minors are not denied the interposition of a guardian or next friend in doing the act for them.

Affirmed.

HUMPHREYS v. WALSH et al.

(Circuit Court of Appeals, Third Circuit. February 19, 1918.)

No. 2294.

1. EXECUTORS AND ADMINISTRATORS ⇨421—ACTION TO IMPRESS TRUST ON ASSETS IN HANDS OF DISTRIBUTEE—EQUITABLE CHARACTER OF ACTION.

An action by the executor of the payee of a note against the distributee of the maker's personal estate, to impress a trust upon a portion of the estate, and to hold the distributee as trustee in respect thereto, under duty to assign and transfer to the payee's executor to the amount of the note, was an action purely in equity, to enforce a purely equitable obligation against one who owed plaintiff no legal duty.

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

2. EXECUTORS AND ADMINISTRATORS ⚡423—SUIT TO SUBJECT ASSETS IN HANDS OF DISTRIBUTEE—CAUSE OF ACTION.

The cause of action was not the debt of the distributee's ancestor on the note, but was the distribution of the ancestor's estate to the distributee many years after.

3. LIMITATION OF ACTIONS ⚡36(1)—STATUTE OF LIMITATIONS—APPLICATION—ACTION NOT AGAINST DEBTOR.

A statute of limitations, with a saving clause as to nonresidence of a debtor, applicable to action on a debt against the debtor, is not applicable to an equitable cause of action to subject a portion of the assets of the debtor's estate in the hands of a distributee to payment of the debt.

4. EQUITY ⚡87(1)—LACHES—STATUTES OF LIMITATION.

In applying the doctrine of laches in equity actions, federal courts are not bound by statutes of limitation of the forum, even when such statutes are applicable by their terms to such actions. Though in actions at law the federal courts are bound by the literalism of statutes of limitation, in equity the question of unreasonable delay within the statutory limitation is still open, and to be determined by the circumstances of each particular case; and even where a statute of limitations exists, and has been made applicable in general terms to suits in equity, defendant may avail of plaintiff's laches, though the time fixed by the statute has not expired.

5. EQUITY ⚡87(1)—LACHES—STATE STATUTE OF LIMITATIONS—EXCEPTION OF STATUTE.

If the limitation of an applicable state statute yields to the doctrine of laches as applied by federal courts, an exception of the statute saving a right of action also must yield, when the statute itself falls before a doctrine with which it is in conflict.

6. EQUITY ⚡72(1)—"LACHES."

In legal significance, "laches" is not mere lapse of time, whether greater or less than the precise time of a statute of limitations; it is delay for such time as makes the doing of equity either impossible or doubtful, as involves the inequity of permitting a claim to be asserted after the death of parties, change of title, or intervention of the rights of others, where, in consequence, evidence has been lost or become obscured, the discovery of the truth is made difficult, and the party attacked is placed in a position of evident disadvantage.

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

7. EQUITY ⚡78—ACTION TO IMPRESS TRUST ON ASSETS IN HANDS OF DISTRIBUTEE—LACHES—EXCEPTION OF STATUTE OF LIMITATIONS.

Where the maker and payee of a note were both dead, suit by the payee's executor and residuary legatee against the distributee of the maker's personal estate, to impress a trust on assets received in the distribution for application to payment of the note, was barred by laches, where brought 33 years after the claim could have been asserted against the maker of the note, 15 years after it could have been proved against his estate in the hands of his administrator, and 14 years after it could have been asserted against the distributee himself, and was not saved in equity by any exception of a statute of limitations as to nonresidence of debtors, even if applicable by analogy.

Appeal from the District Court of the United States for the District of New Jersey; Thos. G. Haight, Judge.

Suit by Edward W. Humphreys against Julia M. Walsh and another. From a decree dismissing the bill, plaintiff appeals. Affirmed.

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

Martin Conboy, of New York City, for appellant.

Frank S. Katzenbach, Jr., of Trenton, N. J., and M. E. Harby, of New York City, for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The question in this case concerns the defense of laches in an equity action as affected by a state statute of limitations, which, if applicable by analogy, purports to save the right of action throughout the non-residence of the defendants. The case is before us on appeal from a decree, whereby the District Court, disregarding the statute, dismissed the bill on the ground of laches. The averments of the bill are in substance as follows:

In 1882, Edward Walsh, Jr., gave Solon Humphreys his promissory note for \$42,825.65, payable six months after date. In 1900, Solon Humphreys died testate, after naming the plaintiff his executor and residuary legatee. In 1901, Edward Walsh, Jr. died intestate, leaving to survive him, as his next of kin, a widow and son, the defendants in this suit, to whom, after administration, his estate was distributed. Edward J. Walsh, the son—who is the only defendant served in this suit and is therefore the only one we shall consider—received in the distribution certain shares of the Mississippi Glass Company, the value of which exceeds the amount involved in this litigation.

It is averred that the note remains due and unpaid, but it is not averred that demand for payment was ever made by either the payee or his executor upon either the maker or his administrator, or upon the defendant in this action as a distributee of the maker's estate before the filing of the bill in 1916.

Edward Walsh, Jr., the maker of the note, was a resident of the State of Missouri to the date of his death, and Edward J. Walsh, the defendant, was a resident of the same state from the death of his father to the date of service in this suit. Solon Humphreys, the payee of the note, and Edward W. Humphreys, the plaintiff, were at all times residents of the State of New Jersey. The estates of the maker and payee were administered respectively in the states of their domicile.

The object of the bill is to follow the debtor's personal estate into the hands of the distributee and impress upon it a trust for the payment of the debt. *March v. Russell*, 3 Mylne & Cr. 31; *Alexander v. Russell*, 3 Russ. 136; *O'Donnell v. McCann*, 77 N. J. Eq. 188, 194, 75 Atl. 909; *Coddington v. Bispham*, 36 N. J. Eq. 224; *Harris v. White*, 5 N. J. Law, 422; *Continental National Bank v. Heilman*, 86 Fed. 514, 516, 30 C. C. A. 232.

The defendant moved to dismiss the bill on the ground that in bringing suit thirty-three years after the debt had become due and fourteen years after the defendant had succeeded to the estate of the debtor, the plaintiff is guilty of laches and is without right to maintain this action in equity. To this the plaintiff pleaded the non-residence of the debtor and of the defendant and the protection of a saving clause of the statute of limitations of the State of New Jersey, which

suspends the operation of the statute against non-resident debtors and saves the right of action so long as non-residence continues. The plaintiff rests his case on the one contention that the New Jersey statute limiting actions at law applies by analogy to this action in equity, and that the exception of the statute, therefore, is available to him and constitutes a valid excuse for a delay in bringing the suit, which, otherwise, he concedes, would be laches.

The discussion in the court below and in this court on appeal was addressed exclusively to the applicability of the cited statute and to the plaintiff's right to sit passively under its protection and await the appearance of the defendant in New Jersey—the plaintiff's jurisdiction—without first resorting to an action on the note against the debtor or against the distributee of his estate in Missouri—the jurisdiction of the debtor and of the distributee. But as we view the case it involves other considerations, and turns, we think, firstly, upon the question, not whether the cited statute of limitations should be applied to this case, but whether that statute embraces an action which so resembles this action that the statute can be applied to it by analogy; and it turns, secondly, upon the broad equitable defence of laches, with respect to which the statute of limitations relied upon, even if applicable by terms or analogy, is a minor consideration.

[1-3] The nature of this action and the particular party defendant have important bearings on the question involved. It is pertinent to note that the action is not against the debtor or against his personal representative and that it is not on the note to recover the debt—for obviously the law adequately affords the plaintiff such a remedy—but the action is against one who has succeeded to the debtor's personal estate, and is brought in equity to impress a trust upon a portion of the estate (specifically described as stock of the Mississippi Glass Company) and to hold the defendant as trustee in respect thereto under duty to assign and transfer the same to the plaintiff to the amount of the debtor's promissory note with interest.

On the plaintiff's own showing, the action is purely one in equity, brought to enforce an obligation purely equitable in character against one who owes the plaintiff no legal duty. The plaintiff's right to bring such an action did not arise, of course, until the equitable duty arose; and the equitable duty did not arise before the happening of the event that imposed it. The event was not the creation of the debt by the defendant's ancestor, but was the distribution of the debtor's estate to the defendant many years after. Therefore, the debt of the ancestor is not the cause of action (though upon it the cause of action is predicated and proof of it is necessary), and the statute of limitations (with its saving clause) applicable to an action on the debt against the debtor, is not in any way applicable to this cause of action against one who is not the debtor. Therefore, our first inquiry, as we have said, is—Whether there is in New Jersey a statute of limitations, applicable to some action at law, which so resembles this action in equity as to justify and make possible its application by analogy.

The saving clause of the only statute which has been cited to us is section 8, New Jersey Statute of Limitations, 3 N. J. Comp. Stats.

3166. This section suspends the operation of the statute and saves the right of action to obligees during the non-residence of obligors in such causes of action as are "specified in the first, second, third, fifth, sixth, and seventh sections of this act." The causes of action so specified are all causes of action at law and are of the kind to which statutes of limitations are very generally directed. We find among them no cause of action resembling, even remotely, the cause of action in this suit. We are not surprised at this, because the statute deals exclusively with actions at law, and is not made applicable, even by general terms, to actions in equity. If this is a correct analysis of the New Jersey statute of limitations, then its saving clause invoked in this case as an excuse for what otherwise is laches, is of no avail to the plaintiff, and the case stands with no state statute that can be applied by analogy to an equity action like this one.

Although no statute of limitations of New Jersey limiting a cause of action akin to this one has been shown us, and although our independent investigation has disclosed no such statute (keeping always in mind that this is not an action on the debt but is an action to raise a trust in the hands of one not the debtor), we hesitate to decide this case upon the ground that there is no New Jersey Statute of Limitations that can be applied to this action. The case was argued by both parties as though there was such a statute, but its inapplicability was urged by the defendant because of countervailing equitable considerations. As this aspect of the case pertains directly to the law of New Jersey, which, as a Federal court, we are anxious not to disturb, we shall confine our decision to the phase of the case arising under the equitable defence of laches as enforced by Federal courts in jurisdictions in which there are state statutes of limitations, which, by terms or analogy, may be applied to equitable actions.

[4] In applying the doctrine of laches in equity actions, it must first be observed that Federal courts are not bound by statutes of limitations of the forum, even when they are applicable by their terms to such actions. *Kirby v. Lake Shore, etc. R. R. Co.*, 120 U. S. 130, 7 Sup. Ct. 430, 30 L. Ed. 569; *Patterson v. Hewitt*, 195 U. S. 309, 25 Sup. Ct. 35, 49 L. Ed. 214. Federal courts pursue their own rules of equity procedure and enforce the doctrine without regard to, and, in instances, even within the period of an applicable statute of limitations. *Hemmick v. Standard Oil Co.*, 91 Fed. 332, 33 C. C. A. 547. It is not necessary to discuss here the reasons that control Federal courts in thus broadly enforcing the doctrine. These are briefly but sufficiently given with supporting cases in 10 R. C. L. 395-408. The Supreme Court of the United States has repeatedly stated and fully established the scope of the equitable defence of laches, when opposed by an applicable state statute of limitations, as enforced by Federal courts. This in substance is—that, while in actions at law courts are bound by the literalism of statutes of limitations, in equity the question of unreasonable delay within the statutory limitation is still open and is to be determined by the circumstances of each particular case, and that even where a statute of limitations exists and has been made applicable in general terms to suits in equity, the defendant may

avail of the plaintiff's laches, notwithstanding the time fixed by the statute has not expired. *Patterson v. Hewitt*, 195 U. S. 309, 25 Sup. Ct. 35, 49 L. Ed. 214; *Gallihier v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 738; *Alsop v. Riker*, 155 U. S. 461, 15 Sup. Ct. 162, 39 L. Ed. 218.

[5] If the limitation of an applicable state statute yields to the doctrine of laches as applied by Federal courts, an exception of a statute saving a right of action, also must yield, for, as in this instance, the exception is not available when the statute itself falls before a doctrine with which it is in conflict. We shall dispose of the case, therefore, from the standpoint of laches, to which the state statute of limitations and its exception, if applicable, are subordinate.

[6] Laches in legal significance is not mere lapse of time, whether greater or less than the precise time of a statute of limitations; it is delay for such time as makes the doing of equity either impossible or doubtful. It is such delay as involves the inequity of permitting a claim to be asserted after the death of parties, change of title, intervention of the rights of others, where, in consequence, evidence has been lost or has become obscured, the discovery of the truth is made difficult, and the party attacked is placed in a position of evident disadvantage.

[7] Applying these familiar equitable considerations to the averments of the amended bill and to the allegations of the accompanying affidavits, we think this case is one to which the doctrine of laches is peculiarly applicable. While the action is not on the note, recovery in the action depends primarily upon proof that the debt of the note is still due. Both parties to the note, and, so far as we have been shown, the only parties who ever had any knowledge of the transaction, have been dead for many years. It would be very easy for the plaintiff to prove the debt by proving the note, and it might be immensely difficult for the defendant—who was not a party to the note and is not charged with knowledge of the transaction—to controvert such formal proof. The maker and payee were relatives, both were men of means engaged in the same business ventures, and both lived seventeen years after the note matured. So far as the record shows, the payee never called upon the maker for payment. The maker died abundantly solvent, yet for sixteen years after his death the payee's executor did not ask for payment; and when at last he did ask for payment, he asked it not of the maker's personal representative, by probate or personal demand, but of one who had succeeded to the maker's estate prima facie discharged of the maker's liability, and who had acquired certain rights therein after its orderly administration. The claim now made against such a party, thirty-three years after it could have been asserted against the debtor, and fifteen years after it could have been proved against the debtor's estate in the hands of his administrator, and fourteen years after it could have been asserted against the defendant himself, is trebly stale and cannot be saved in equity by an exception of a statute of limitations, even if applicable by analogy.

The decree below is affirmed.

ROBINSON v. THURSTON et al.

(Circuit Court of Appeals, Ninth Circuit. February 11, 1918.)

No. 3038.

CONTRACTS §116(1)—VALIDITY—PUBLIC POLICY.

An agreement by a daughter to cancel an indebtedness due from her mother, who was an elderly woman of moderate means, on payment of a nominal consideration, providing that, if the mother should at any time thereafter mortgage or sell any of her real estate, or incur indebtedness amounting at any one time to \$1,000, without the consent in writing of the daughter, then the indebtedness canceled should immediately become due and payable, is valid, and not open to attack on the ground that it is in restraint of trade, for the mother's alienation of her property was in no way burdened.

In Error to the Supreme Court of the Territory of Hawaii.

Action by Caroline J. Robinson against Lorrin A. Thurston and another, executors under the will of Eliza Roy, deceased. A judgment for defendants was affirmed by the Supreme Court of the Territory of Hawaii, and plaintiff brings error. Reversed and remanded, with directions.

The defendants in error are the executors of the will of Eliza Roy, deceased, who was the mother of Caroline J. Robinson, the plaintiff in error here. The latter commenced the action in the circuit court of the First Judicial circuit of the territory of Hawaii against the present defendants in error, as the executors of her mother's estate, to recover upon three certain promissory notes, the first of which was alleged in the complaint to have been executed September 23, 1884, by one W. F. Roy to Samuel C. Allen and Mark P. Robinson, for \$2,000, payable two years after date, with interest thereon at the rate of 10 per cent. per annum, payable semiannually, which the complaint alleged Eliza Roy subsequently, for a valuable consideration, agreed with the holders thereof to pay, and which note the complaint alleged was subsequently assigned to and became the property of the plaintiff in the action—the whole of both principal and interest remaining due and unpaid. The second of the notes the complaint alleged to have been executed by Eliza Roy to John N. Robinson July 31, 1886, for \$3,750, payable three years after date, with interest thereon at the rate of 9 per cent. per annum payable semiannually, and that the note was subsequently assigned to the plaintiff, who remains the owner and holder thereof, no part of the principal of which has been paid and none of the interest thereon, except \$1,030.30. The other note sued on the complaint alleged to have been executed July 23, 1895, by W. F. Roy and Eliza Roy, to Henry Holmes, for \$125, payable on demand, which note was subsequently assigned to the plaintiff, who remains the owner and holder thereof, with both principal and interest unpaid.

The complaint then alleged that an agreement was entered into November 27, 1905, between the plaintiff and her mother, which agreement recited, among other things, that: "Whereas, the said Eliza Roy is indebted to the said Caroline J. Robinson in the following sums [describing the said notes] total amount of principal and interest as of November 23, 1905, \$14,490.83; and whereas, the said Caroline J. Robinson has agreed to cancel and release the said indebtedness and the said notes and mortgages, and to release the said Eliza Roy from said indebtedness and all claims under said notes and mortgages, on the terms and conditions hereinafter contained, and the said Eliza Roy has agreed to said terms and conditions: Now, therefore, in consideration of the premises and of the sum of \$10 to the said Caroline J. Robinson paid by the said Eliza Roy, the receipt whereof by the said Caroline J. Robinson is hereby acknowledged, and the further consideration of the covenants and agreements of the said Eliza Roy hereinafter contained, the said

Caroline J. Robinson doth hereby acknowledge full payment and settlement of said indebtedness, principal and interest, hereinabove set forth, and doth hereby release the same and cancel and discharge the said notes and mortgages. Provided, however, that if the said Eliza Roy shall at any time hereafter mortgage or sell any of her real estate, or shall incur indebtedness amounting at any one time to the sum of \$1,000 and upwards, without the consent in writing of the said Caroline J. Robinson, then and in any such case this acknowledgment of payment of said indebtedness and said release and cancellation and discharge of said notes and mortgages shall be null and void and of no effect, and said enumerated indebtedness and interest thereon shall immediately become due and payable by the said Eliza Roy, her heirs, executors, administrators, and assigns, to the said Caroline J. Robinson, her heirs, executors, administrators, and assigns with interest thereon at the several rates aforesaid in the same manner as though this acknowledgment of payment and release of said notes and mortgages had not been made." The agreement further set out that the said Eliza Roy, in consideration of the foregoing agreements, for herself, her heirs, executors, administrators, and assigns, would not, without the approval in writing of the said Caroline J. Robinson, sell or mortgage any of her lands or incur any indebtedness in excess at any one time of the sum of \$1,000, expressly acknowledged that the indebtedness and interest thereon as set forth in the agreement was then due and payable to the said Caroline J. Robinson, and further agreed that, in case of the violation by her of any part of her agreement, "then and in such case the said indebtedness, principal and interest, shall be and become immediately due and payable to the said Caroline J. Robinson, her heirs, executors, administrators, and assigns, in the same manner as though this acknowledgment of payment and release had not been made."

The complaint further alleged that thereafter, between July 31, 1908, or thereabouts, and June 8, 1909, or thereabouts, "both dates inclusive, the said Eliza Roy did sell and convey certain portions of her real estate, without the consent of the said plaintiff, and did thereafter, without the consent of said plaintiff, incur indebtedness amounting in the aggregate at one time to more than \$1,000; that by the said sales and conveyances, and the incurring of the said indebtedness, the said Eliza Roy did violate the condition of the said agreement, and her said covenants and agreements therein contained, and by reason thereof the said promissory notes, and each of them, together with the interest thereon, have become due and payable to the plaintiff, and the same are now wholly due, owing, and unpaid, save as hereinbefore alleged, to the said plaintiff"; that on December 13, 1913, and within the period prescribed by law for the presentation of claims of creditors against the estate of said Eliza Roy, deceased, the plaintiff duly presented to the defendants to the action, as executors, a duly authenticated claim of the amounts due upon the said notes, which claim was rejected by the executors March 4, 1914, whereupon the action was commenced to recover both principal and interest of the notes.

The defendants filed an answer denying each and every of the allegations of the complaint, and giving notice (pursuant to a rule of the trial court) that among other defenses they would rely upon the defense of payment, the statute of frauds, and the statute of limitations. An amended answer was subsequently filed, admitting certain allegations of the complaint and denying others, and alleging that any and all claims then held by the plaintiff against the said Eliza Roy were fully paid and settled by the agreement of November 28, 1905, and further setting up that more than six years had then elapsed since the notes became due and payable, and that all of them were barred by the statute of the territory of Hawaii in regard to the limitation of actions.

Holmes & Olson, Henry Holmes, and Clarence H. Olson, all of Honolulu, T. H., for plaintiff in error.

Andrews & Pittman, Lorrin Andrews, and Wm. B. Pittman, all of Honolulu, T. H., for defendants in error.

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

ROSS, Circuit Judge (after stating the facts as above). The record shows that in the trial court a jury was waived and the case tried and submitted to the court upon evidence without substantial conflict, resulting in a judgment in favor of the defendants—that court holding that by the agreement of November 27, 1905, the notes constituting the basis of the plaintiff's claim were extinguished, and their legal obligation thereafter forever ended. Upon appeal from that judgment, the Supreme Court of the territory unanimously agreed that the trial court was in error in that regard, and that the legal effect of the agreement referred to was but to suspend the payment of the notes during the observance of the obligations thereby imposed upon Eliza Roy; but a majority of the court, from whose judgment the present writ of error comes, held that the obligations so imposed on Mrs. Roy were in restraint of trade and against public policy, and therefore void, for which reason the judgment of the trial court was affirmed, the Chief Justice dissenting.

Counsel for the defendants in error do not here contest the finding of the trial court (affirmed on appeal) to the effect that Mrs. Roy did incur indebtedness beyond the amount prohibited in and by the agreement in question, and their contention that the plaintiff in the action was estopped from complaining thereof by reason of having led Mrs. Roy to believe that the restraint imposed upon her by the provisions of the agreement had been removed by her consent to the conveyance by her mother of certain of her land (if otherwise meritorious) is rendered without force by the undisputed evidence contained in the record as to the circumstances attending those conveyances. The only question, therefore, with which we have to deal, is whether or not the prohibition against the incurring of indebtedness by Mrs. Roy to the amount of \$1,000 was contrary to public policy as being in restraint of trade, and therefore void, unless it can be successfully maintained that the release of the indebtedness contained in the agreement was absolute. We do not so regard it, nor did the Supreme Court of Hawaii.

The agreement expressly recited that Mrs. Robinson had "agreed to cancel and release the said indebtedness and the said notes and mortgages," and to release her mother therefrom on "the terms and conditions" thereafter stated; wherefore, proceeded the agreement, in consideration of the \$10 payment, and in further consideration of the expressed covenants and agreements of her mother, Mrs. Robinson acknowledged full payment of the indebtedness and thereby released and discharged the same: Provided, however, that should Mrs. Roy at any time thereafter mortgage or sell any of her real estate, or incur indebtedness in the prohibited amount, such acknowledgment of payment and discharge of the notes should thereupon become void and of no effect, and the "said enumerated indebtedness and interest thereon shall immediately become due and payable by the said Eliza Roy, her heirs, executors, administrators, and assigns, to the said Caroline J. Robinson, her heirs, executors, administrators, and assigns, with interest thereon at the several rates aforesaid, in the same manner as though this acknowledgment of payment and release

of said notes and mortgages had not been made." In other words, as we construe the agreement, the release by the creditor of the indebtedness was not absolute, but made dependent—contingent—upon the will of Mrs. Roy, who might or might not, as she chose, incur indebtedness to and over the prohibited extent, with the consequence in the one case that the indebtedness would remain suspended, and in the other that the operation of the release would thereby end, and the obligations theretofore suspended at once become again binding. That was, in effect, the express contract of the parties to the agreement, and we see no sound reason why it should not be enforced. In *Mosler Safe Co. v. Maiden Lane S. D. Co.*, 199 N. Y. 479, 485, 93 N. E. 81, 83 (37 L. R. A. [N. S.] 363), the court said:

"Parties to contracts have the right to insert any stipulations that may be agreed to, provided that they be neither unconscionable, nor contrary to public policy."

In *Brooks v. Cooper*, 50 N. J. Eq. 761, 767, 26 Atl. 978, 980 (21 L. R. A. 617, 35 Am. St. Rep. 793) the court said:

"The contract not being fulfilled between the parties, the question arises: Can it be enforced, or is it so manifestly contrary to public policy, in contravention of the statute, and so injurious to the public good, that it defeats itself? In determining this there must be kept in view the general rule of law that, where there is no statutory prohibition, the court will not readily pronounce an agreement invalid on the ground of policy or convenience, but is, on the contrary, inclined to leave men free to regulate their affairs as they think proper. Where, however, a contract is of such a nature that it cannot be carried into execution without reaching beyond the parties and exercising an injurious influence over the community at large, every one has an interest in its suppression, and it will be pronounced void from a due regard to the public welfare."

In *Daley v. People's Building, etc., Association*, 178 Mass. 13, 19, 59 N. E. 452, 453, the court said:

"Courts are less and less disposed to interfere with parties making such contracts as they choose, so long as they interfere with no one's welfare but their own."

In 9 Cyc. 542, it is said:

"One may agree not to do what he has a legal right to do, even though the promise may be restrictive of his personal rights"—citing *Waite v. Merrill*, 4 Me. (Greenl.) 102, 16 Am. Dec. 238; *Com. v. Schultz*, *Brightly*, N. P. (Pa.) 20.

And in the case of *Baltimore & Ohio, etc., Ry. Co. v. Voigt*, 176 U. S. 498, 505, 20 Sup. Ct. 385, 387 (44 L. Ed. 560) the Supreme Court said:

"It must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare. It was well said by Sir George Jessel, M. R., in *Printing, etc., Co. v. Sampson*, L. R. 19 Eq. 465: 'It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when

entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.”

The record shows that Mrs. Roy was at the time of entering into the agreement with her daughter, an elderly woman living upon her own premises in a country district, upon her own (but obviously, from the evidence, very moderate) means, and was not, so far as appears, engaged in any business, trade, or profession. Assuming that to one so circumstanced the doctrine of the courts holding, in the interest of the public welfare, contracts void that are in restraint of trade, has any application, we agree with the Chief Justice of the court below that the contract here involved was not, in view of the evidence, “unreasonable, oppressive, immoral, or detrimental to the public interest or welfare.”

Accordingly, the judgment must be and is reversed, and the cause remanded to the trial court, with directions to enter judgment for the plaintiff in the action.

BOSTON ELEVATED RY. CO. v. TEELE.

(Circuit Court of Appeals, First Circuit. February 5, 1918.)

No. 1287.

1. TRIAL \Leftrightarrow 244(4)—INSTRUCTIONS—UNDUE PROMINENCE TO PARTICULAR ACTS.

The refusal of defendant's requested instruction that particular acts did not constitute negligence was proper, for that would give an undue prominence to those acts which plaintiff did not assert were, taken by themselves, negligence; the negligence charged being a combination of acts:

2. CARRIERS \Leftrightarrow 320(8)—CARRIAGE OF PASSENGERS—ACTIONS—JURY QUESTION.

Whether a street railway company was negligent in failing to warn passenger that at the place its surface car was stopped there was a considerable space between the car and the platform because of a curve in the platform held for the jury.

3. CARRIERS \Leftrightarrow 320(1)—CARRIAGE OF PASSENGERS—NEGLIGENCE—REGULATIONS.

Where the conduct of the injured passenger was in no way affected by a regulation of the defendant carrier with regard to the point at its platform where cars should stop, the question of the reasonableness of the regulations is properly submitted to the jury.

4. APPEAL AND ERROR \Leftrightarrow 263(1)—REVIEW—EXCEPTIONS REVIEWABLE.

Defendant's exception to that part of the charge alleged to contain a request of plaintiff cannot be sustained on writ of error, where it appeared from the charge that it was not given as an instruction, but only as a statement of plaintiff's contention.

5. CARRIERS \Leftrightarrow 321(6)—CARRIAGE OF PASSENGERS—TRIAL—INSTRUCTIONS.

At defendant's transfer point plaintiff suffered injuries when she stepped into a space between the platform and the car. It appeared that the car was first brought almost to a stop at a place where the platform was parallel to the tracks, and was then slowly propelled to the stopping place at which point the platform curved away from the tracks. Plaintiff alleged that such movement of the car, coupled with the fail-

ure to warn, constituted negligence. The court, having referred to the movement of the car after it was brought nearly to a stop, charged that plaintiff claimed that should be considered, together with all other matters, in determining whether defendant was guilty of negligence, and that such unquestionably was the law. *Held* that, in view of the reference to the preceding contention, the charge was correct.

6. TRIAL ⇨142—PROVINCE OF JURY—CONFLICTING EVIDENCE.

Where reasonable men may draw different conclusions from the undisputable facts the question is for the jury; but, if only one conclusion is possible, the question is one for the court.

7. CARRIERS ⇨320(8)—CARRIAGE OF PASSENGERS—ACTIONS—JURY QUESTION..

In personal injury action by a passenger, who on attempting to board defendant's car at a transfer point stepped in the space between the platform which at that point curved away from the tracks and the car, the questions whether defendant, its servants having brought the car nearly to a stop at the point where plaintiff and others were standing waiting, and then slowly moved it to the point where the accident occurred, without giving any warning as to the space between the car and the track, was negligent, and whether the passenger was guilty of contributory negligence, *held* for the jury.

In Error to the District Court of the United States for the District of Massachusetts; Clarence Hale, Judge.

Action by Mary Hazard Teele against the Boston Elevated Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Endicott P. Saltonstall, of Boston, Mass., for plaintiff in error.

Asa P. French, of Boston, Mass. (Daniel A. Shea, of Boston, Mass., on the brief), for defendant in error.

Before DODGE, BINGHAM, and JOHNSON, Circuit Judges.

JOHNSON, Circuit Judge. This is an action of tort to recover damages for personal injuries suffered by the defendant in error, hereinafter called the plaintiff, on August 23, 1914, in the Park Street station of the subway, in Boston.

The case was tried before a jury in the District Court of Massachusetts, and a verdict was returned for the plaintiff.

The plaintiff in error, hereinafter for convenience called the defendant, brings the case before this court on the defendant's bill of exceptions. The errors assigned are the court's denial of the defendant's motion to instruct the jury that upon all the evidence the plaintiff was not entitled to recover and to order the jury to return a verdict for the defendant, the court's refusal to give certain requested instructions, and also the giving of certain instructions.

The record discloses that the plaintiff, a citizen and resident of Chevy Chase, in the county of Montgomery and state of Maryland, on the day of the accident was visiting her husband's cousin, Miss Phœbe Jeanette Teele, in West Somerville, Mass., and had been with her since the first part of June of the same year; that on the morning of that day, which was Sunday, the plaintiff, her little boy, and Miss Teele left West Somerville to go to the Christian Science Church, on Huntington Avenue, in Boston. They came to Boston, by way of the Cambridge

subway, to the Park Street station, and there waited for a Huntington Avenue car. They had paid their fares when entering the Cambridge subway, and this fare entitled them to change cars at the Park Street station and take a Huntington Avenue car. The plaintiff had been in this Park Street station but once before. She, with her husband's cousin and her little boy, took a place upon the platform opposite the tracks upon which the Huntington Avenue cars came in. These tracks in front of that part of the platform on which she was waiting were parallel with the platform, and continued so for some distance in either direction; but toward its southerly end the edge of the platform curved away from the tracks.

At the time of the trial the platform had been entirely changed from what it was at the time of the accident; but a plan made by the civil engineer in the employ of the defendant, from plans, measurements, and data concerning the old platform, which were on file in the office and marked "Defendant's Exhibit A," and made a part of the bill of exceptions, shows the platform and whatever was erected upon it exactly as it was on the date of the accident, as claimed by the defendant. As shown by this plan, there were designated places for seven cars during the rush hours of the day, and for six cars during other hours.

The plaintiff waited upon the platform some minutes before a Huntington Avenue car came in on the south-bound loop, opposite the platform on which she stood. It was a short, open car; but the record does not disclose how many benches it contained. When the car reached a position nearly opposite the place on the platform where she was standing, it came nearly to a stop, and she, with others who were standing near her, started towards it for the purpose of boarding it. The car did not come to a complete stop, but continued to move on slowly towards the southerly end of the platform to the car berth designated as No. 2, which was just being vacated by a car ahead of it, and which, during hours other than the rush hours, was also designated as the first car stop by a sign exhibited there.

The plaintiff, with a group of five or six others, including her husband's cousin and her little boy, walked along beside the car, near the edge of the platform, waiting for it to come to a stop, so that they might board it. Miss Teele was ahead of the plaintiff and to her right, and other people were directly ahead of her, and so near her that she could touch them. The car came to a full stop opposite the curve in the platform, near the southerly end, so that the distance between the edge of the platform and the car was wider than where the platform was parallel with the tracks. The distance from the top of the platform to the roadbed was 12 or 13 inches, and the plaintiff stepped over the edge of the platform, at the curve, with her left foot, to the roadbed below, and received the injuries for which she claimed to recover.

It was admitted by the defendant that it used, equipped and controlled the Park Street station as a passenger station, and that the car in question was one of its cars. It was also admitted by the plaintiff that the subway was built by the city of Boston and leased to the West End Street Railway Company, which in turn leased it to the defendant, and that the defendant could not be held for any negligent construction of the platform in question.

In her declaration the plaintiff set forth her cause of action in two counts. The first contains the following allegations:

"That the car which the plaintiff desired to board entered said station and came to a stop opposite a stopping place; that the plaintiff walked across the platform towards the said car, but when close to it, and before she could get aboard the same, the defendant company, by its agents, servants, and employes, negligently, carelessly, and without right, restarted the said car and moved it along said platform to another stopping place, where it again came to a stop; that the plaintiff followed along the platform, close to said car, to the place where said car had again stopped, intending to board it; but the defendant company, by its agents, servants, and employes, being under a duty to transport the plaintiff safely over its line and provide safe and suitable means of ingress to said car, wholly regardless of said duty to said plaintiff in that behalf, and in violation thereof, negligently, carelessly, and without right stopped its car on a curve at said last stopping place in such a position that there was a wide, unsafe, and improper space between the edge of the platform at said station and the running board of said car at the point where the plaintiff was about to get aboard; that the plaintiff was at the time unfamiliar with said station, and by reason of the stopping and negligently restarting of said car before making its stop on said curve at said station, as aforesaid, plaintiff was induced to go along said platform to said stopping place on said curve, and in attempting to board said car, because of said inducement, and because of the fact that the defendant company, by its agents, servants, and employes, had negligently left unprotected said space by stopping said car in said position on said curve, and because of lack of warning by said defendant company, by its agents, servants, and employes, as aforesaid, the plaintiff fell into the said space."

In the second count, in addition to the allegations in the first count, the plaintiff alleged that the said defendant company—

"used the said station at all times as a stopping place for a greater number of cars than the platform was built to accommodate, so that the first stopping place of said cars at said station was then and there regularly located on a curve in the track at the platform of said station."

The record discloses that the car in question did not come to a full stop opposite the place where the plaintiff was standing upon the platform when it entered the station, but that it came nearly to a stop there and that the plaintiff started toward it to board it; but as it moved along toward the southerly end of the platform, she, with others, walked along the platform beside it, in order that she might board it when it had come to a full stop.

Stephen C. Mitchell, a civil engineer, in the employ of the Boston Elevated Railway Company for nearly 20 years, and who made the plan marked "Defendant's Exhibit A," testified that:

"If a 12-bench open car were stopped at berth 2, the space between the running board and the car would be 3 inches at the front of the car, 15 inches at the middle, and 11 inches at the rear of the car. If the same 12-bench car were stopped at berth 1, this distance would be 7 inches at the front, 13 inches in the middle of the car, and 10 inches in the rear of the car."

He also stated that these distances would be slightly greater for a 10-bench open car, and a little greater still for a 9-bench open car. He was asked to assume that a 9-bench open car had stopped at a point which would make a space between the platform and the running board

the greatest possible distance. Upon that assumption he said there would be a space of 17 or 18 inches between the platform and the running board.

The only testimony disclosed by the record in regard to the distance between the platform and the car when it actually stopped was given by Miss Phœbe Jeanette Teele, who had boarded the car and taken a seat on the third or fourth bench from the front, and was then attracted by a scream from the plaintiff, and turned and saw her opposite the seat she was in, with one foot down and the other on the platform. She testified that at the place where the accident happened the platform was farther from the running board than it was farther down where they first started, and estimated the space between the running board and the platform, at the place where the accident happened, as certainly a foot in width, if not more; that some parts of the running board were nearer to the platform than other parts, and at the place where the accident happened was farther away from the platform, which was caused by a curve in the platform; that the station platform, about opposite where the car stopped, started to curve to the right, and by so doing left a space between the platform and the car, as the tracks continued on straight.

The negligence of the defendant set out in the plaintiff's declaration was not alone the stopping of the car at the curve in the platform, nor alone bringing it almost to a stop opposite where the plaintiff and others were standing on the platform, and then moving it along to the place where it finally stopped; but the declaration alleged that these acts together, and the failure to give warning to the plaintiff that she was approaching a place of danger, under all the circumstances of the case and the conditions which prevailed at that time, constituted negligence on the part of the defendant company; or, in other words, that the negligence charged was the manner in which the car was operated in respect to the permanent platform under the circumstances, and that the plaintiff, while a passenger of the defendant and in the exercise of reasonable and proper care for her own safety, by the operating of the car in bringing it almost to a stop and then causing it to move along, was induced to follow the car, with others, along the platform, into an unsafe place, of which she had no knowledge, and could have had no knowledge by the exercise of reasonable care on her part, such as called for by the circumstances of the case, and of which she received no warning from the agents or servants of the defendant.

[1] The presiding judge, in his charge to the jury, stated the claim of the plaintiff as follows:

"The plaintiff puts her case substantially upon this proposition: She says that under all the circumstances of the case the facts ought to induce the belief in your minds that the car was not run with the highest degree of safety consistent with the practical conduct of the defendant's business, and briefly for this reason: She says that she was waiting for a car; that she saw a certain car, which she has described—an open car—come around the curve and come down the track and almost stop; that she, thinking that it was going to stop, stepped up to get upon the car with her cousin; that the car did not in fact stop, but after it had almost stopped it went on down the platform; that she was led to walk along the platform by the side of the car; with other persons before her and behind her, and that

she, in walking along the platform, had reason to suppose that the car was proceeding to stop, and that the motorman and conductor were acting with the highest degree of care consistent with their business, and that it was safe for her to walk alongside of the car; that she did walk along; that she did look at the track, and looked at the platform, but that, when she came to board the car, the car, as a matter of fact, stopped where a certain curve had begun, so that the car was thrown away from the platform for some inches—no matter how far—some feet, 16 or 17 inches; and that she was led to use the car, to try to board the car, without noticing or having her attention called to the fact that the running board was that distance from the car, and that she stepped down into the roadbed."

We find no error in the refusal of the presiding judge to give the instructions, requested by the defendant, that it was not evidence of negligence that the car was stopped opposite the curve in the platform, or that it was slowed down and then proceeded along to the farther end of the platform. It was not contended by the plaintiff that either of these acts alone constituted the negligence of the defendant, but that united they furnished evidence of the negligent operation of the car in question, under the conditions which existed at that station at the time of the accident.

Each of these instructions was therefore inapplicable to the issue raised by the pleadings, and each singled out a single act, and asked the court to give prominence to that act, so that, if given, there was danger that the jury might give undue weight to it. In *Perovich v. United States*, 205 U. S. 86, at page 92, 27 Sup. Ct. 456, at page 458 (51 L. Ed. 722), Mr. Justice Brewer, in stating the reason for refusing to give an instruction in regard to one act which should be considered in connection with others, says:

"Singling out a single matter and emphasizing it by special instructions as often tends to mislead as to guide a jury. * * * It is merely one link in a long chain, and the court is seldom called upon by special instructions to single out any single link in a chain, and affirm either its strength or weakness."

In *Grand Trunk Railway Co. v. Ives*, 144 U. S. 408, at page 433, 12 Sup. Ct. 679, at page 688 (36 L. Ed. 485), Mr. Justice Lamar, in considering a refusal to instruct the jury in regard to one act which, with others, was alleged to constitute contributory negligence, uses this pertinent language:

"In determining whether the deceased was guilty of contributory negligence, the jury were bound to consider all the facts and circumstances bearing upon that question, and not select one particular prominent fact or circumstance as controlling the case to the exclusion of all the others."

In *Rio Grande Western Railway v. Leak*, 163 U. S. 280, 288, 16 Sup. Ct. 1020, 1022 (41 L. Ed. 160), Mr. Justice Harlan says of a refusal to give a special instruction:

"It was not an error to refuse this instruction. It was liable to the objection that it singled out particular circumstances and omitted all reference to others of importance."

Evidence of these acts was properly submitted to the jury by the presiding judge, with very clear instructions that it was to be consider-

ed in determining whether there was negligence in the operation of the car or not.

[2] The question of whether the defendant should have given warning of the space between the platform and the car was also submitted to the jury, and we find no error in the refusal of the court to instruct the jury as a matter of law that no duty rested upon the defendant, under all the circumstances, to give warning. We think this was a question of fact to be determined by the jury.

[3] The bill of exceptions discloses that the defendant company had a regulation that required a motorman who brought a car into the Park Street station on the south-bound loop track to proceed to the first car stop sign, which would be at berth No. 2, in other hours than the rush hours, and that, if the car came into the station and reached a point opposite any of the preceding berths, and there was no car at berth No. 2, he should proceed slowly through the station and occupy berth No. 2; that it was his duty to take his car into this berth if he could; that if, when he entered the station, there was a car at berth No. 2, apparently getting ready to move out, it would be his duty to reduce the speed of his car to give the car ahead a chance to go out, and then to slide down into berth No. 2, if he could. This rule was intended to relieve congestion at the station. It is assigned as error that the presiding judge refused to instruct the jury, as requested by the defendant, that the defendant's regulation that all motormen in bringing their cars to a stop at the platform in question should proceed to berth No. 2, being the first car stop, except during rush hours, or to the next adjacent unoccupied berth, is a reasonable regulation. As this regulation in no way affected the conduct of the plaintiff, but was a regulation to be observed by its own employes in the operation of cars in this station, its reasonableness was properly submitted to the jury. *New England R. R. Co. v. Hyde*, 101 Fed. 401, 41 C. C. A. 549.

[4] The defendant's exception to that part of the charge of the presiding judge which is alleged to contain the request of the plaintiff below cannot be sustained, because it appears from the charge that it was not given as an instruction to the jury, but only as a statement of the plaintiff's contention.

[5] The other exception to a portion of the charge of the presiding judge:

"The plaintiff says that should be considered together with all other matters in arriving at your conclusion as to whether or not, under all the circumstances in the case, the defendant was guilty of negligence, and such is unquestionably the law"

—cannot be sustained, because, upon reference to that portion of the charge which immediately precedes it, it is evident that the word "that" referred to the bringing of the car nearly to a stop and then causing it to move along again. It was this operation of the car, by which it was brought almost to a stop, and then, with the plaintiff and others coming toward it, was moved along and stopped at a place where the edge of the platform curved away from the tracks, which the plaintiff alleged to be negligence in the operation of the car. The jury were therefore instructed that the practical stopping of the car and starting

it again "should be considered, together with all other matters, in arriving at your conclusion as to whether or not, under all the circumstances in the case, the defendant was guilty of negligence," and in this we find no error.

[6] The real question presented by the bill of exceptions and in the assignments of error is whether the presiding judge should have directed the jury to return a verdict for the defendant. The facts were undisputed, and whether the defendant was negligent or not, and whether the plaintiff was in the exercise of due care or not, depended upon the inferences which might be reasonably drawn from these facts. If, upon either of these questions, these inferences could lead a reasonable mind to only one conclusion—upon the first that the defendant was not guilty of negligence, or upon the second that the plaintiff was not in the exercise of due care—then clearly it was the duty of the presiding judge to have directed a verdict for the defendant; but if there were inferences which might be justifiably drawn from these facts by fair-minded men that would sustain the allegations of the defendant's negligence and the exercise of due care by the plaintiff, then it was the duty of the court to submit the evidence of these facts to the jury, although other equally fair-minded men might draw an opposite conclusion from them.

"When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court." *Grand Trunk Railway Co. v. Ives*, 144 U. S. 408, 417, 12 Sup. Ct. 679, 683 (36 L. Ed. 485).

"It is well settled," says Mr. Justice Brewer in *Railroad Co. v. Powers*, 149 U. S. 45, 13 Sup. Ct. 749, 37 L. Ed. 642, "that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them."

[7] We think that there were inferences which might be drawn by fair-minded men from these facts which would lead to the conclusion that the defendant was negligent and that the plaintiff was in the exercise of due care at the time of the accident.

The plaintiff below was waiting, with other people, upon the platform, and when the Huntington Avenue car which she wished to board, on its south-bound trip, came into the station, it came to a position nearly opposite that part of the platform upon which she and others were waiting, and came almost to a stop—"practically to a stop," to use the plaintiff's language—so that she and others, supposing that the car would stop, started toward it to board it. It was a short open car; but, before they could get aboard, the motorman started the car, and the plaintiff, with others, followed along near the edge of the platform, which, at the place opposite where the plaintiff had been waiting, and for some distance in either direction, was straight and parallel with the tracks. She had noticed the edge of the platform where it was parallel with the tracks, and knew nothing about the curve at the south-

erly end, where the cement platform had been "cut back," as testified by the company's engineer, Mr. Mitchell, so that the edge of the platform curved away from the tracks.

Whether this operation of the car—its being brought nearly to a stop and then started along again, and finally stopped opposite that part of the platform where the edge curved away from the tracks—in view of the fact that the plaintiff, with others, was waiting to board the car, and walked along beside it toward the curve in the platform, constituted negligence on the part of the defendant, was properly submitted to the jury. Whether or not the plaintiff was in the exercise of due care, under the circumstances of the case, was also properly submitted to their determination, with the instruction that the burden of proving the same was upon the defendant. She had observed from the position where she stood waiting for the car that the edge of the platform was parallel with the tracks, and that it continued so in either direction as far as she observed. As she walked along beside the car, waiting for it to come to a full stop, there were people in front of her and behind her, those in front of her so near that she could touch them, and the question of whether, under these circumstances, she was in the exercise of due care in not observing that the edge of the platform curved away from the car as she walked along beside it, was a question of fact for the jury.

In *Brisbin v. Boston Elevated Railway Co.*, 207 Mass. 553, 93 N. E. 572, and *Harrington v. Boston Elevated Railway Co.*, 221 Mass. 299, 108 N. E. 943, under somewhat analogous conditions to those in the case before us, the court held that there was evidence of the defendant's negligence and of the plaintiff's exercise of due care to be submitted to the jury.

We are satisfied that there were inferences which the jury might justifiably draw from the evidence submitted to them that would lead to the conclusion that the plaintiff, while in the exercise of due care, received her alleged injuries through the negligence of the defendant.

Judgment of the District Court affirmed, with interest, and with costs in this court to the defendant in error.

SUCRERIE CENTRAL COLOSO DE PORTO RICO v. FAJARDO.

(Circuit Court of Appeals, First Circuit. February 5, 1918.)

No. 1294.

1. VENDOR AND PURCHASER 18(1)—CONTRACTS—OPTIONS.

Though on its resident agent's submission of plaintiff's offer for the purchase of a sugar plantation, defendant, a French corporation, replied that the negotiations could not be completed by cable, and suggested that plaintiff come to Paris, plaintiff was given no option for the purchase of the property, entitling him to recover damages because it was sold by defendant before his arrival in Paris to conclude negotiations; it appearing that plaintiff relied on a contract claimed to have been entered into by cabled acceptance of his offer, and, finding that position untenable at trial, advanced the theory of an option.

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

2. JURY \Leftrightarrow 37—INFRINGEMENT OF RIGHT—REVIEW—DIRECTION OF VERDICT.

In an action for breach of an alleged contract for the sale of a sugar plantation, the Circuit Court of Appeals, though finding there was no evidence warranting submission of the case to the jury and that a verdict should have been directed for defendant, cannot, on defendant's writ of error, enter a verdict and render judgment for defendant, but must remand for new trial.

In Error to the District Court of the United States for the District of Porto Rico; P. J. Hamilton, Judge.

Action by Mateo Fajardo against the Sucrerie Central Coloso de Porto Rico. From the judgment, defendant brings error. Reversed and remanded, for further proceedings not inconsistent with the opinion.

Francis H. Dexter, of San Juan, Porto Rico, and Albert B. Boardman, of New York City (O'Brien, Boardman, Harper & Fox, of New York City, and Jacobs & Jacobs, of Boston, Mass., on the brief), for plaintiff in error.

Willis Sweet and Miles M. Martin, both of San Juan, Porto Rico, for defendant in error.

Before DODGE, BINGHAM, and JOHNSON, Circuit Judges.

JOHNSON, Circuit Judge. This is a writ of error from a judgment of the District Court of the United States for the District of Porto Rico, in an action of contract brought by Mateo Fajardo, a citizen of Porto Rico, against the Sucrerie Central Coloso de Porto Rico, a corporation organized under the laws of the republic of France, doing business in Porto Rico, with its principal office at Coloso, in the municipality of Aguadilla, Porto Rico.

The undisputed facts in this case are as follows:

On the 12th day of August, 1916, the defendant was the owner of a certain sugar plantation, known as "Central Coloso," situated at Coloso. Its principal officers resided in Paris, France; but a resident director of the corporation, Carlos Franco Soto, resided at Aguadilla, and had the management of the plantation. On the 12th day of August, 1916, the plaintiff, having heard that the Central Coloso was for sale, called upon the director at Aguadilla and inquired if the report was true, and the price for which the property could be purchased, and also asked for an inventory of the same. He was told by the director that his request would be submitted to his principal in Paris, and the director on that day accordingly sent the following cablegram:

Aguadilla, P. R.

Mateo Fajardo, Proprietor Central Eureka, asks for inventory of Coloso. What is the price? What are your conditions of sale—conditions of payment? I believe that he can exceed offers of other persons. It will be to your advantage to have competition among buyers. Send me complete instructions. We will write the details. Stop. Duplicate telegram requested, translates exact text in French. Code words prohibited.

Franco Soto.

On the 18th day of August, 1916, the director was instructed from Paris by the officers of defendant to advise the plaintiff that the selling

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

price was \$1,500,000, and if the inquiry was a serious one to deliver to the inquirer an inventory of the property. The price was communicated to the plaintiff, and he was also given an inventory of the property, showing it to consist of a sugar plantation, together with land, machinery, and general equipment necessary to the working of a cane plantation and the manufacture of sugar upon a large scale, and its value to be \$2,380,159.11.

The plaintiff, upon receipt of the price and inventory, made an offer, through the director of \$1,400,000 for the property; \$400,000 to be paid in cash and \$1,000,000 in ten years, bearing 5 per cent. interest, and to be secured by a mortgage upon the property.

On September 1, 1916, the director wrote the plaintiff, as follows:

Coloso, Porto Rico, Sept. 1, 1916.

Mr. Mateo Fajardo, Mayaguez.

Dear Sir and Friend: We inclose herewith an itemized statement of the inventory of this corporation, as well as a description of the sugar manufacturing machinery.

We avail ourselves of the opportunity to inform you that we received yesterday a cablegram from our office in Paris which, after being translated, reads as follows: "We cannot arrive at any conclusion by cable if failing to deal with the matter. Why does he not come to Paris without delay? Advise us at the time of his departure."

This cable refers to your suggestion of going over to Paris to deal with the matter personally, and as they asked us to advise them by cable when you leave, please advise us by wire from San Juan the day of your departure.

Without anything further, we repeat that we are at your orders.

Very truly yours,

Sucrerie Centrale Coloso de Porto Rico,

Carlos Franco Soto, Director.

The full text of the cablegram sent by the defendant to its resident director, translated from the cipher which was employed, is as follows:

Paris 30 August 1916.

Soto, Aguadilla.

Cannot arrive at any conclusion by cable. If our party means business, why does he not come Paris without delay? At the time of departure telegraph here. As per your telegram 26th, awaiting for letter from before acting. 12 August. Thanks.

Seilhac.

Upon the day of the receipt of this letter the plaintiff sailed from Mayaguez, Porto Rico, for New York, intending to sail at once from there for Paris. Arriving in New York, he made arrangements for an advancement of money needed for the purchase of the plantation, and sent the following cablegram to the defendant in Paris:

Via Commercial Central Sept. 15 Paris de New York 15
13 Vcial.

Arranging passport; will notify sailing date cable address Cabasa, New York. Fajardo.

In reply the plaintiff received the following cablegram:

Paris 15 September 1916.

Fajardo, Cabasa, New York.

President Coloso absent. We sent him your cable. He will return before the end of September. You will find him if you come now.

Seilhac.

This cablegram was signed by the managing director of the defendant in Paris.

On receipt of this cablegram the plaintiff sent the following cablegram:

Via Commercial Central Sept. 16 Paris New York 30
10 Vcial.
Sailing Saturday; will be there end of September. Fajardo.

The plaintiff sailed from New York on Saturday, September 16, 1916, arrived in Liverpool on September 23, and in London upon the next day, intending to cross the English Channel that night; but, finding that the English government had suspended the crossing of the Channel because of submarines, he sent the following cablegram to the defendant:

Central 26 Sept. 16 London 590 2 25 17 H. 36
Have been delayed on account suspension boats. Will go first boat leaving.
Fajardo, Hotel Cecil.

The plaintiff did not secure passage across the English Channel until the night of September 27. On reaching Paris he went to the office of the defendant and found Mr. Seilhac and gave him a letter from Mr. Carlos Franco Soto, and told him that he had come to complete the purchase of the "Coloso." Mr. Seilhac told him that the property had been sold that morning to another, and the next day he wrote him a letter in French, the English translation of which follows:

Sucrerie Central Coloso de Porto Rico,
3 Rue St. Georges, Paris, Sept. 29, 1916.

Mr. M. Fajardo, Hotel Meurice, Rue de Rivoli, Paris.

Sir: We take the advantage to confirm what we told you yesterday, 28th September, at your call at our office.

The circumstances that have delayed your arrival in Paris have not allowed us to prolong our delay beyond the 28th of September, that we had accepted as the term to give a definite answer.

As we have stated to you, we have awaited for your arrival to the extreme limit, and we were sorry not to have been able to consider the summary offer you made us by cable, which left many points indefinite.

Kindly receive the assurance of our sentiment.

L'Administrateur delegue,
H. de Seilhac.

The plaintiff then returned to Porto Rico and filed this complaint in the District Court, which, after stating the facts as above, set forth the plaintiff's cause of action in part as follows:

"III. Plaintiff further says that, upon receipt of said price and inventory, he immediately offered the defendant at Paris, through their director, Carlos Franco Soto, the sum of one million four hundred thousand dollars (\$1,400,000) for said property.

"IV. Plaintiff further says that, in reply to the said offer, the defendant, on September 1, 1916, and in answer to his said offer, cabled its said director at Aguadilla, in the French language, for delivery to plaintiff, as aforesaid, its acceptance of said offer, but requiring plaintiff to come to Paris without delay, as such business could not be settled by cable."

The defendant in its answer denied that at any time it accepted the offer of the plaintiff. It admitted the receipt, under date of August 31, 1916, by its resident director, of the cablegram of August 30, 1916, but denied that it constituted an acceptance of the plaintiff's offer.

It also states that the plaintiff at the time of his departure from

Porto Rico for New York, as alleged in his complaint, had knowledge that a local mercantile society, known as "Sucesores de Bianchi," was making efforts to purchase the property in question, and that one of the members of the society was at that time in Paris, endeavoring to effect a purchase of the property from the defendant.

It is evident that the construction that can be legally and fairly placed upon the cablegram of August 30, 1916, sent by the managing director in Paris to the resident director in Porto Rico, will determine the rights of the parties.

It is immaterial whether the law of France or of Porto Rico governs the construction, since that of both is practically identical, so far as it relates to the essentials of a contract, and, in principle, is in harmony with our own law.

The whole of this cablegram was not communicated by the resident director to the plaintiff; but so much of it as was communicated appears in the letter of September 1, 1916, addressed to the plaintiff by him. Before the receipt of this letter the plaintiff had received a telephone communication from the resident agent in regard to the cablegram, and testified that in this communication by telephone he was informed that the offer had practically been accepted and the details were to be discussed, and that this was the construction which both he and the resident agent placed upon it.

He testified as follows in regard to this cablegram:

"I relied upon this cable, which I construed an acceptance, and the information that I received from Mr. Franco. I knew that Mr. Franco had no authority to sell the property, but he certainly had the authority to be an intermediary between the French people and me. * * *

"Between me and Mr. Franco Soto there was a complete understanding that my proposition had been accepted as to price—as to price.

"I never said that Mr. Franco Soto told me that Coloso people had accepted my price of \$1,400,000. I said that he understood that they had accepted the price of \$1,400,000, and that they told me to come to Paris to settle the details. * * *"

The resident director testified that the data or notes for transmission of the cable of August 27, 1916, containing the offer of the plaintiff, were furnished by the plaintiff, and on the same day that this cable was sent the plaintiff telephoned him, and he states this was the conversation:

"I now remember perfectly well that on the same day, during the night, Mr. Fajardo called me up by 'phone—and Mr. Fajardo had knowledge that Mr. Bianchi had left for Paris, or was about to sail for Paris—and he said to me by 'phone, 'I would like to send another cable asking them to answer me immediately this cable which we sent.' I persuaded him that that cable would be useless, because Paris would take all the time necessary to consider and go into that proposition, and then I confirmed to him, or stated to him, that Bianchi was leaving for Paris, and then he said, 'Well, I desire also to go to Paris, and therefore I would ask you to send a cable setting forth that I also want to sail for Paris.'

"Mr. Fajardo was the first to suggest the visit or trip to Paris, because Mr. Fajardo knew that Bianchi was leaving or about to leave for Paris. I had no interest whatsoever, of course, in encouraging or contributing to the action of Mr. Fajardo in this matter: I had friendship with him. I had known him for a long time.

"The cable sent was sent in view of the fact that Mr. Fajardo desired to go to Paris."

This was the cable:

Aguadilla, P. R., Aug. 28, 1916.

Fajardo expects to depart for Paris. See if you can do nothing before arrival unless you will accept with the condition specified our telegram of the 25th. Answer as soon as possible. Franco.

He also testified that the telegram of the 25th, referred to in this cable, was the one in which Mr. Fajardo tendered the offer of \$1,400,000, and that he addressed a letter to the company in Paris about this matter on the 29th, and in that letter repeated the conversation which he had held with Mr. Fajardo.

The following extract of this letter was offered in evidence:

"Extract from a letter from Mr. Soto, dated the 29th of August:

"Mr. Fajardo. On Saturday, the 26th, this gentleman called me up on the telephone to ask me to be good enough to transmit to you a cable, asking an immediate reply, if possible, with regard to the proposition of \$1,400,000 which he had made you by cable the day before. I persuaded him that this reply would not, in my opinion, be obtained, and that Paris would take all the time necessary before saying anything at all in this connection, unless he, Mr. Fajardo, submitted the proposition of \$1,500,000 cash down. I also informed him that the news of Mr. Francisco Bianchi's departure for Paris had been confirmed. That is the reason for the cable which I transmitted to you and which I repeat separately.

"Mr. Fajardo had before that communicated to me the desire to go to Paris and negotiate with you personally about this matter, but the accidents of war detained him; departure of Bianchi was necessary to decide him, and he is only awaiting your reply in order to make up his mind."

In reply to his cablegram of August 28, 1916, announcing the plaintiff's intention to go to Paris, Mr. Soto testified he received the cablegram dated August 30, 1916, and signed "Seilhac," that he read the cablegram to Mr. Fajardo over the 'phone, both in French and in Spanish, and that the plaintiff said:

"Carlitos, you can't imagine how glad I am, because what I want I have obtained; that is to say, I want to go to Paris. There I will beat the Bianchis against the wall. If it is necessary to bid one hundred or two hundred thousand dollars more, I will do it, because I want to undo them. I will carry through this business by all means, and, if I fail, I will compel the Bianchis to pay an excess of one hundred thousand dollars or two hundred thousand dollars,' and then he said to me, 'Send me that cable in a letter, because I want to keep it in my files,' and at the same time he said to me, 'When you send me that letter, inserting that cable, send me also a letter of introduction for Paris;' and on the next day I sent him this letter, with a letter of introduction:

"September 1, 1916.

"Sucrerie Centrale Coloso de P. R., 3 Rue St. Georges, Paris, France.

"Sirs: I have the honor to introduce to you by these presents M. Mateo Fajardo, owner of the Central Eureka, who, according to your answers by cable dated August 31, will sail for Paris for the purpose of dealing personally with you, concerning the negotiations in connection with the purchase of the Coloso.

"I would request you to please lend Mr. Fajardo your most efficient co-operation during his sojourn in Paris, and being certain that you will accord him a favorable reception, for which I thank you in advance, I remain,
"Yours obliging."

At the close of the testimony the defendant requested the court to instruct the jury to return a verdict for the defendant. The court's refusal to give this instruction is assigned as error.

In submitting the case to the jury, the court, at the request of the defendant, gave the following instructions in relation to the cablegram of August 30, 1916:

"The court instructs you that this cablegram did not constitute an acceptance of the counter offer made by plaintiff to the defendant in the cablegram transmitted by plaintiff, through the resident manager, directed to Paris, on the 27th of August, 1916, in which plaintiff offered the sum of \$1,400,000.

"The court instructs you that even though you believe from the evidence that when the resident manager, Mr. Franco Soto, advised plaintiff of the receipt of this cable, he failed to advise him of the whole text thereof, and particularly of the latter part, stating, 'Awaiting for letter before acting—August 12th,' this circumstance did not justify plaintiff in construing such cablegram as he understood it, to be an acceptance of his counter offer."

The court further instructed the jury:

"Now gentlemen, you will observe that I can go this far. There was not any sale. It is impossible to consider that there was a sale."

But, having given these instructions, the case was submitted to the jury, with the following instructions, which is assigned as error:

"This suit is based upon the theory that there was an option given by the French company to the plaintiff to come to Paris and negotiate over a \$1,400,000 proposition of sale and to do it in the month of September, and that he had all the month of September. That is the theory of the complaint. Now, it is for you to say whether the facts bear that out. I can only say this, that if you believe the Coloso in Paris took under consideration the offer of Fajardo of \$1,400,000, and said to him to come to Paris and get there in September, and we will consider the terms of payment if you think the papers amount to that, and that Coloso, in the month of September, turned around and put it out of their power to carry out this option, then you would have to find for the plaintiff; that is, if you believe Fajardo did his part in being ready."

The jury having been instructed that there was no evidence of sale, it is evident that their verdict was based upon a finding that an option had been given the plaintiff to purchase the property for \$1,400,000, and that this option was to continue during the month of September, 1916.

[1] The complaint did not allege that the defendant had given the plaintiff such an option, or any option; and, even if the plaintiff had made such allegations, we are unable to place a construction upon the cablegram of August 30, 1916, which would show that an option was given the plaintiff. It states, in unambiguous terms, that it is impossible to conclude negotiations by cable, and asks why the plaintiff does not come to Paris, evidently for the purpose of treating with him personally, because Mr. Soto had notified Mr. Seilhac that the plaintiff desired to go. The plaintiff had not asked for an option, and the letter of introduction which Mr. Soto gave him to present to the officers of the company in Paris conclusively proves that he understood that the plaintiff was going to Paris "for the purpose of dealing personally" with them.

We find in none of the cablegrams or correspondence, or the testimony, any evidence of an option which should have been submitted to the jury, and therefore that there was error in the instructions given by the presiding judge and in his refusal to instruct the jury, as requested by the defendant, to return a verdict for it.

Entertaining this view, a discussion of the other assignments of error is unnecessary.

[2] While we are of the opinion that there was no evidence warranting the submission of the case to the jury, and that a verdict should have been directed for the defendant, nevertheless, as we are without authority to enter a verdict and judgment for the defendant, the case must go back for a new trial. *Slocum v. New York Life Insurance Co.*, 228 U. S. 364, 379, 33 Sup. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914D, 1029.

The judgment of the District Court of Porto Rico is reversed, and the verdict set aside. The case is remanded to that court for further proceedings not inconsistent with this opinion; the plaintiff in error to recover costs in this court.

HOMESTEAD CO. v. DES MOINES ELECTRIC CO.

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

No. 4889.

1. CORPORATIONS ⇨382½, New, vol. 16 Key-No. Series—PUBLIC SERVICE CORPORATIONS—DISCRIMINATION.

It is the duty of a public service corporation, lawfully authorized to use the streets and public places of a municipality in order to furnish to consumers water, gas, electricity, light, heat, power, or any other public utility, to render like contemporaneous service for like compensation to consumers conducting like operations under like conditions and circumstances, and for unjust discrimination between competitors and substantial injury to one of them, caused by a breach of this duty, the injured competitor may maintain an action in tort against the corporation for the pecuniary loss inflicted upon him by such discrimination.

2. DAMAGES ⇨159(1)—ACTION FOR DAMAGES—PLEADING AND PROOF.

In such an action, defendant's liability is not for money had and received, but in tort for damages, which are not measured by the difference between the amount plaintiff paid and the amount he would have paid, if charged at the same rate as his competitor for like service, but may be either more or less, and must be pleaded and proved.

3. CORPORATIONS ⇨382½, New, vol. 16 Key-No. Series—PUBLIC SERVICE CORPORATIONS—DISCRIMINATION IN RATES.

Unreasonable rates charged by a public service corporation are either those that are so low as to be noncompensatory or so much higher than merely compensatory rates that they are exorbitant. The fact that two rates or two sets of rates are unjustly discriminating neither establishes nor necessarily implies that either of them is unreasonable.

4. CORPORATIONS ⇨382½, New, vol. 16 Key-No. Series—PUBLIC SERVICE CORPORATIONS—RATES.

Where maximum rates which may be charged by a public service corporation are prescribed by the state or municipality having authority, such rates are presumptively reasonable, and one charged such rates cannot maintain a suit against the corporation on the ground that they are unreasonable, without having first secured decision or action to that effect by the body having authority to change them.

5. ELECTRICITY ⇨11—RATES—DISCRIMINATION—SUFFICIENCY OF COMPLAINT.

The complaint in an action against an electric company, based on alleged discrimination in rates charged for light and power to plaintiff and a

competitor receiving like service, *held* to state facts sufficient to constitute a cause of action for the recovery of damages, although it was apparently drawn on the erroneous theory that plaintiff was entitled to recover the difference between the amount paid by it and the amount paid by its competitor as money had and received to its use, and stated no proper measure of damages.

6. DAMAGES \Leftrightarrow 40(3)—LOSS OF PROFITS—DESTRUCTION OR INTERRUPTION OF BUSINESS.

The general rule is that the expected profits of a commercial business are generally too remote, speculative, and uncertain to sustain a judgment for their loss; but there is an exception to this rule, to the effect that the loss of profits from the destruction, interruption, or depression of an established business may be recovered, if the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was.

Stone, Circuit Judge, dissenting in part.

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

Action at law by the Homestead Company against the Des Moines Electric Company. Judgment for defendant (226 Fed. 49), and plaintiff brings error. Reversed.

Frank S. Dunshee, of Des Moines, Iowa (Robert M. Haines and Joseph I. Brody, both of Des Moines, Iowa, on the brief), for plaintiff in error.

Frank T. Jensen and Charles S. Bradshaw, both of Des Moines, Iowa, for defendant in error.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

SANBORN, Circuit Judge. The question which this case presents is the sufficiency of the facts stated in the complaint to constitute a cause of action, and it is brought to the attention of this court by a writ of error to reverse an order and judgment which sustained a general demurrer.

The grievance of the plaintiff is that the defendant, Des Moines Electric Company, a public service corporation, that was engaged in furnishing light and power to the plaintiff, and to other consumers thereof, in the city of Des Moines, unjustly discriminated against the plaintiff in the rates it charged and collected for the light and power it furnished, in that (count 1) it charged and collected of the plaintiff's competitor in that city, the Register & Leader Company, a corporation, only about 40 per cent. of the amount charged and collected of the plaintiff for contemporaneous service for like operations under substantially similar circumstances and conditions, to the plaintiff's damage in the sum of \$2,950.94, which was 60 per cent. of the amount the plaintiff paid for the defendant's service in the operation of that part of its business in competition with the business of the Leader Company; (2) in that (count 2), while the defendant charged and collected of many of its other customers low and reasonable rates, it charged and collected of the plaintiff for similar service higher rates that were unreasonably exorbitant, and \$4,918.23 in excess of rea-

sonable, just, and compensatory rates; and (3) in that (count 3) the defendant divided its customers by a specified standard into wholesalers and retailers, and established a low and reasonable rate for its service to wholesalers and a higher rate for its service to retailers, that by the specified standard the plaintiff was a wholesaler, but the defendant charged and collected of it the retail rates, under the false representation that it was serving the plaintiff at rates as low as it was serving any of its customers in a like situation, when the fact was that it was exacting from the plaintiff \$2,321.80 more than it would have collected from it, if it had collected the wholesale rates, and was thereby charging and collecting unreasonably exorbitant rates, \$2,321.80 in excess of reasonable and compensatory rates.

The first count of the complaint set forth these facts: During all the time in which the plaintiff alleged that the defendant was exacting from it discriminatory and exorbitant rates, those rates did not exceed the maximum rates which, by an ordinance of the city of Des Moines, the defendant was expressly authorized to charge and collect for furnishing the light and power. During this time the plaintiff was printing a newspaper and operating a job printing, electrotyping, and photo-engraving plant, and the Leader Company was running two daily newspapers and a job printing and photo-engraving plant. The job printing and photo-engraving plant of the Leader Company was operated, as was the plaintiff's like plant, by a large number of motors for the most part in the daytime. The light and power to operate each of them were furnished by the defendant during the same time under like conditions. The two plants put forth the same kind and quality of work, the owners of these plants bought and sold in the same market, and the Leader Company was the plaintiff's most active competitor. There was an established market value for the products of the two plants, so that the plaintiff was unable to charge more for its output than was charged by the Leader Company for its similar products. The defendant during the time specified furnished the Leader Company the light and power to operate its job printing and photo-engraving plant at a rate which was only about 40 per cent. of the rate it charged and collected for the light and power it furnished the plaintiff to operate its like plant. The Leader Company, by reason of receiving this light and power at a rate which was 40 per cent. of the rate collected of the plaintiff, was enabled to and did put out its product more cheaply than the plaintiff could send its output forth, was enabled to and did bid under the plaintiff in making competitive prices for printing and photo-engraving, the plaintiff was obliged to meet the prices set by the Leader Company in order to hold its printing and photo-engraving business, its overhead expense was unduly increased by the high rates the defendant exacted from it, and it "was deprived of its fair, legitimate profit, and damaged" to the extent of \$2,950.94, which is 60 per cent. of the amount it paid the defendant for the light and power which the latter furnished to operate its job printing and photo-engraving plant.

The sufficiency of these facts to constitute a cause of action for unjust discrimination is denied on the grounds (a) that the plaintiff

is not entitled to recover on account of such discrimination the difference between the amount it paid and the amount it would have paid at the rate its competitor enjoyed, and that that difference is not the measure of its damages; (b) that the facts pleaded failed to show that the plaintiff and the Leader Company were situated alike; and (c) that they do not disclose facts sufficient to sustain a recovery for loss of profits.

The sufficiency of the facts set forth in the second and third counts, each of which is based on a claim that the rates charged to and collected by the plaintiff were exorbitant and unreasonable, because they exceeded those charged and collected of other consumers, and by each of which the plaintiff seeks to recover as money had and received the difference between the amount the plaintiff paid and the amount it would have paid, if the rates to it had been just and reasonable, is denied on the ground that, where maximum rates are prescribed for the service of a public service corporation by a state or a municipality lawfully empowered so to do, no individual consumer or party interested in the rates, who has paid rates not exceeding the prescribed limit, may maintain an action against the corporation on the ground that those rates were unreasonable or exorbitant.

There have been conflicting decisions and there has been much discussion about some of the questions which the propositions asserted by counsel present. But a review of the opinions of the courts and a thoughtful consideration of the arguments of counsel have convinced that the stronger reasons and the weight of authority have established these rules of law by which the decision of the question presented in this case must be determined.

[1] It is the duty of a public service corporation, lawfully authorized to use the streets and public places of a municipality in order to furnish to consumers water, gas, electricity, light, heat, power, or any other public utility, to render like contemporaneous service for like compensation to consumers conducting like operations under like conditions and circumstances. For unjust discrimination between competitors, and substantial injury to one of them caused by a breach of this duty, the injured competitor may maintain an action in tort against the public service corporation for the pecuniary loss inflicted upon him by such discrimination. *Curtis on Electricity*, § 36; *Western Union Telegraph Co. v. Call Publishing Co.*, 181 U. S. 92, 99, 100, 21 Sup. Ct. 561, 45 L. Ed. 765; *Pennsylvania R. R. Co. v. International Coal Co.*, 230 U. S. 184, 203, 204, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315; *Armour Packing Co. v. Edison Electric Illuminating Co.*, 115 App. Div. 51, 100 N. Y. Supp. 605, 607; *St. Paul Book & Stationery Co. v. St. Paul Gaslight Co.*, 130 Minn. 71, 153 N. W. 262, 266, Ann. Cas. 1916B, 286.

[2] Unjust discrimination will not sustain an action against a public service corporation, in favor of the injured competitor, for the difference between the amount he paid and the amount he would have paid if he had paid at the same rate as his competitor similarly situated for like service, as for money had and received, or any other action at law, except an action in tort for his damages. Nor is such

difference the measure of his damages. They may be the same as, or more or less than, such difference, and they must be pleaded and proved before they may be recovered. *Pennsylvania R. Co. v. International Coal Co.*, 230 U. S. 184, 198, 200, 201, 202, 203, 206, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315; *Meeker & Co. v. Lehigh Valley R. R. Co.*, 236 U. S. 412, 429, 35 Sup. Ct. 328; *Lehigh Valley R. R. Co. v. Clark*, 207 Fed. 717, 724, 725, 731, 125 C. C. A. 235; *Lehigh Valley R. Co. v. American Hay Co.*, 219 Fed. 539, 541, 542, 135 C. C. A. 307; *Knudsen-Ferguson Fruit Co. v. Michigan Central R. Co.*, 148 Fed. 968, 79 C. C. A. 46; *Hoover v. Pennsylvania R. Co.*, 156 Pa. 220, 27 Atl. 282, 290, 22 L. R. A. 263, 36 Am. St. Rep. 43.

[3] In the making, regulation, and litigation regarding rates, "unreasonable rates" are either those that are so low as to be noncompensatory, or those that are so much higher than merely compensatory rates that they are exorbitant. The fact that two rates, or two sets of rates, are unjustly discriminatory, neither establishes nor necessarily implies that either of them is "unreasonable." *Interstate Commerce Comm. v. Baltimore & Ohio R. R. Co.*, 145 U. S. 263, 277, 12 Sup. Ct. 844, 36 L. Ed. 699; *American Express Co. v. South Dakota*, 38 Sup. Ct. 656 (U. S. Supreme Court opinion filed June 11, 1917).

[4] A public service corporation furnishing its utility under and pursuant to an act of the Legislature of a state, or under a lawful ordinance of a city, or under other legal provision, which prescribes maximum rates for its service, may fix its own rates, not exceeding the limit thus prescribed, and such rates are presumed to be reasonable. Individuals interested therein as consumers, users, or otherwise may not maintain actions at law or suits in equity against the public service corporation, on the ground that such rates are unreasonable, without having first secured decision or action to that effect by the public tribunal authorized to prescribe the maximum limit of the rates changing the limit, or adjudging the rates complained of unreasonable. *Griffith v. Vicksburg Waterworks Co.*, 88 Miss. 371, 40 South. 1011, 1014, 8 Ann. Cas. 1130; *Vicksburg v. Vicksburg Waterworks Co.*, 206 U. S. 496, 509, 515, 516, 27 Sup. Ct. 762, 51 L. Ed. 1155; *St. Paul Book & Stationery Co. v. St. Paul Gaslight Co.*, 130 Minn. 71, 153 N. W. 262, 264, 265, Ann. Cas. 1916B, 286; *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 432, 433, 436, 437, 439, 440, 441, 443, 446, 447, 448, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; *Paris Mountain Water Co. v. Camperdown Mills*, 98 S. C. 304, 82 S. E. 417, 418; *Union Dry Goods Co. v. Georgia Public Service Corporation*, 142 Ga. 841, 83 S. E. 946, 947, L. R. A. 1916E, 358; *Brooklyn Union Gas Co. v. City of New York*, 188 N. Y. 334, 81 N. E. 141, 142, 15 L. R. A. (N. S.) 763, 117 Am. St. Rep. 868.

[5] The application of these rules to the facts pleaded compels the conclusions: (1) That the second and third counts of the complaint state no cause of action because they are founded on the claim that the rates charged to and collected of the plaintiff were exorbitant, extortionate and unreasonable, although they were less than the max-

imum rates prescribed and adjudged reasonable by the city, and that tribunal has never adjudged them unreasonable, or modified the terms or effect of its prescribing ordinance; (2) because by these counts the plaintiff seeks recovery of the difference between the presumptively reasonable rates the plaintiff paid and the lower rates other consumers of light and power similarly situated paid, not on the ground of damages sustained, but on the ground that this was money had and received by the defendant which equitably belonged to the plaintiff, and an action of that character is not maintainable for this difference; and (3) the facts set forth in the first count of the complaint will not sustain an action as for money of the plaintiff had and received by the defendant for the difference between the amount which the plaintiff paid and the amount it would have paid if it had been charged the rates its competitor, the Leader Company, enjoyed, and the only cause of action they may be sufficient to maintain is one in tort for the pecuniary loss caused to the plaintiff by the alleged unlawful discrimination, and the difference between the amount paid by the plaintiff and the amount he would have paid at the rates charged its competitor is not, and the pecuniary loss caused by the unjust discrimination is, the measure of those damages.

It is contended that the facts pleaded are insufficient to sustain a cause of action for these damages, because those facts do not show that the plaintiff and the Leader Company were similarly situated, or that they received like service from the defendant, in that they disclose the fact that the defendant, in addition to furnishing like light and power to the two competitors for their respective job printing and photo-engraving plants, furnished light and power to the plaintiff to enable it to print a newspaper and operate an electrotyping plant, and to the Leader Company to enable it to print two newspapers. The plaintiff makes no claim of any unjust discrimination in the furnishing of light and power for the printing or operation of the newspapers or the electrotyping plant, but it alleges that the two job printing plants were engaged in the same business, manufacturing and selling like and competitive products, that their owners bought and sold in the same markets, that the defendant furnished their job printing and photo-engraving plants like power and collected of the owner of one but 40 per cent. of the rates it charged and collected of the other, and that this was done during the same period of time. There can be no doubt that if the only service rendered by the defendant to the plaintiff and to the Leader Company had been to furnish them light and power for their job printing and photo-engraving plants the averments of these facts would have been ample to permit full proof that the two companies were similarly situated and were receiving like service at the same time and place, and that the defendant unjustly discriminated against the plaintiff in its charges and collections. It is possible that in the charges and collections for the other services which the defendant rendered to the two competitors it discriminated against the Leader Company to an amount equal to the amount by which it discriminated against the plaintiff in the collection of charges for the service to the job printing and photo-engraving

plants, or that there was some other fact or condition to offset the unjust discrimination which it is alleged the defendant committed in its treatment of these plants. But in the absence of pleading or proof of any such counter discrimination or offset the court may not presume the existence thereof, and on the face of the complaint the light and power furnished to the two job printing and photo-engraving plants is alleged to have been so like and to have been furnished to competitors so similarly situated as to present a sound basis for the averment of unjust discrimination.

Counsel for the defendant argue that the cause of action set forth in the first count is not in tort for damages, but is for the difference in the amount charged and collected of the plaintiff for the service of the defendant to its job printing and photo-engraving plant, and the amount it would have paid for that service at the rates charged to the Leader Company for like service, and that it is based on the claim that the amount of this difference constitutes money had and received by the defendant which justly and equitably belonged to the plaintiff. The pleading lends plausible support to this argument, and indicates that the pleader may have indulged the hope that his client could recover this difference, without proof of damages caused by the unjust discrimination, upon the theory which has been stated. But the question before this court is not one of the form of the action or of the theory of counsel. It is, does the complaint state facts sufficient to sustain an action in tort for damages caused by the unjust discrimination? It sufficiently states like contemporaneous services to the job printing and photo-engraving plants of the two competitors, the like business situation and circumstances of the competitors and of their plants, and the charge and collection from one of rates $2\frac{1}{2}$ times the rates collected of the other, avers that this discrimination compelled the plaintiff to pay for substantially like service \$2,950.46 more than it would have paid at the rates charged the Leader Company, that on account of its competitive relation with that Company it was compelled to sell the product of its job printing and photo-engraving business at the prices set by the Leader Company, and that, "its overhead expense being unduly increased by the unfair requirements of defendant, plaintiff was deprived of its fair and legitimate profit and damaged to the extent of said overcharge." The complaint then "demands damages against defendant for the sum of \$2,950.94 actual damages with interest thereon." Since a demand of a specific amount of damages permits the recovery of any less amount that may be proved, the averment of the specific amount of the damages and the prayer therefor does not disqualify this complaint from sufficiently pleading a cause of action in tort for unjust discrimination.

[6] It is contended, however, that the only damages pleaded are loss of profits, and that the nature, character, extent, and facts showing the certainty of such loss of profits have not been sufficiently set forth. It is true that the general rule is that the expected profits of a commercial business are generally too remote, speculative, and uncertain to sustain a judgment for their loss. But there is an exception to this

rule, to the effect that the loss of profits from the destruction, interruption, or depression of an established business may be recovered, if the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was. It is true that the proof must pass the realm of conjecture, speculation, or opinion not founded on facts, and must consist of actual facts, from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn. *Central Coal & Coke Co. v. Hartman*, 111 Fed. 96, 98, 99, 102, 49 C. C. A. 244, 246, 247, 250. It is not, however, necessary in pleading such profits to set forth all the details of the requisite proof. In the case at bar the pecuniary loss which the unjust discrimination inflicted upon the plaintiff, and not the difference between the amount it paid and the amount it would have paid at the rates charged the Leader Company, is the measure of its damages. Those damages may be the same amount as that difference; they may be more, and they may be less. The plaintiff in effect avers in this complaint that, if the defendant had not unjustly discriminated against it, it would have sold the same amount of its products from its job printing and photo-engraving plant for the same prices that it did sell them, and that it would in that case have had left, after paying its expenses, larger profits than it did have by the \$2,950.94 which the defendant exacted of it by the unjust discrimination. It may be that the plaintiff will have difficulty in proving, it may be that it will be unable to prove, such or any loss of profits under the wise and conservative rules of law which guard against speculation, uncertainty, and conjecture in the determination of such losses. But the averments of the complaint are sufficient to permit it to present competent evidence of a loss of profits caused by the unjust discrimination it pleads upon the theory set forth in its complaint.

The judgment below is accordingly reversed, and the case is remanded to the District Court, with instructions to permit the defendant to answer the complaint.

STONE, Circuit Judge (concurring in part and dissenting in part). This is a suit by a patron against a public service corporation, lawfully authorized to use the streets and public places of a municipality in order to furnish consumers with electric light and power. The entire petition is a tort action in its pleading. The first count is for damages because of a discriminatory rate; the second and third counts for damages because of unreasonable rates.

I concur in the result reached, but not entirely with the rules of law laid down. Because of the importance of the subject involved, I feel obligated to state wherein I disagree. I agree that discrimination and unreasonableness in rates are distinct and separate grievances, and that the existence of either is, as to the patron, a tort. I am compelled, respectfully, to disagree with the announcement that in cases of discrimination the remedy of money had and received can never be employed, and with a portion of the rule of damages set forth.

As to the remedy and proof in cases of discrimination: One of the fundamental principles of our form of government is equality to every person of opportunity and treatment, so far as governmental action extends. This is illustrated in the national and state Constitutions, which forbid and render nugatory all state action resulting in discrimination between members of the same legal classification. The same right of equality inheres in all governmental activity, and, because of the quasi public character thereof, it has its full place in all public service activity. As said by Mr. Justice Brewer, in speaking of one kind of such service (common carriage):

"Common carriers, whether engaged in interstate commerce or in that wholly within the state, are performing a public service. They are endowed by the state with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they render. As a consequence of this, all individuals have equal rights, both in respect to service and charges." *Western Union Teleg. Co. v. Call Pub. Co.*, 181 U. S. 92, 99-100, 21 Sup. Ct. 561, 564 (45 L. Ed. 765).

The evil results of departures by utility companies from this salutary rule of public policy are common knowledge and have received full judicial recognition. That public service companies can, through illegal discrimination, often affect and even control competitive business conditions among their customers, to the extent of enriching one and ruining the other, has been too frequently demonstrated. Even irrespective of competition, favoritism in service or charge may be used for purposes injuriously affecting both the consumer and the public. Without passing upon the truth of the allegation contained in the present petition, yet it is illustrative of possibilities along this line. The statement is:

"The plaintiff further states that the Register & Leader Company, as has been heretofore stated, is the publisher of two daily newspapers having wide circulation in the city of Des Moines, and said company has great influence in city politics and in the conduct of city affairs, and the said discriminatory rates to the Register & Leader Company were granted by the defendant with the corrupt purpose to thereby secure the good will of the Register & Leader Company and its influence in preventing the repeal of the aforesaid Ordinance No. 1566, in order that the defendant might continue to charge the excessive and unreasonable rates specified in said ordinance, and reap the excessive and unreasonable profits which it could make from customers who were unable to protect themselves, and said corrupt bribe was paid to the Register & Leader Company in total disregard of defendant's duty in the premises and in total and wanton disregard of the losses which defendant was thereby inflicting upon plaintiff, and said bribe was paid stealthily and secretly, and with the purpose that same should never be detected, and the payment of said bribe was tortious, wrong, and unjust. * * *"

The above considerations emphasize the necessity of preventing such discrimination, and of shaping the rules of law to that end. This conception is intensified by the thought that discrimination must find its source in the voluntary act of the utility company.

The preventive methods, not statutory, variously tried, have been mandamus, bills in chancery, and suits for damages by the injured party. Obviously, not the least effective methods are such as these, which place a weapon in the hands of the injured party, who, moved

by impulses of self-protection, necessarily acts in the public interest at the same time.

This obligation of equal service being one imposed by law, its violation is, as to the individual, a tort. But wherever one person commits a tort against the estate of another, with the intention of benefiting his own estate, or wherever justice requires it in consideration of benefits received, the tort may be waived and assumpsit brought for the money benefit so received. 1 C. J. 1032; *Fanson v. Linsley*, 20 Kan. 235; *Norden v. Jones*, 33 Wis. 600, 14 Am. Rep. 782. It may be noted that Mr. Justice Brewer, then of the Kansas Supreme Court, concurred in the opinion in *Fanson v. Linsley*. Therefore, though primarily the form of action for such wrong is tort, it is not necessarily so in all instances, for (as with other torts), if this tort has resulted in the payment by the wronged party of money to the public utility which should not have been paid, then the tort may be waived and recovery of that money obtained through an action for money had and received. *Armour Packing Co. v. Edison, etc., Co.*, 115 N. Y. App. Div. 51, 100 N. Y. Supp. 605. Of course, the waiver of the tort would forfeit all right to consequential damages and confine recovery to the sum wrongfully exacted and withheld.

If the action brought be a tort, it would seem to be subject to the ordinary rules pertaining to such suits. The pleading and proof must cover the wrongful act and the quantum of damages. The wrongful act is the denial to one patron of a rate or service accorded another patron in the same legal classification. When this wrongful act has been proven, the right to recover has been established. The remaining inquiry is purely one of quantum of damages. The damages are compensatory, but there would seem to be no reason why, if the proper elements of willfulness and malice exist, exemplary damages should not be allowed—particularly if it also appear difficult to estimate in money the injury. *Scott v. Donald*, 165 U. S. 58, 89, 17 Sup. Ct. 265, 41 L. Ed. 632; *Day v. Woodworth*, 13 How. 363, 371, 14 L. Ed. 181; *Press Pub. Co. v. Monroe*, 73 Fed. 196, 19 C. C. A. 429, 51 L. R. A. 353; *Wilson v. Vaughn* (C. C.) 23 Fed. 229.

In proof of compensatory damages, the ordinary rules of evidence would seem proper and sufficient. Where the discrimination is in service or facilities, there is apparently no common circumstance or fact to aid in the damage inquiry. But I cannot escape the conviction that, where the discrimination is in charge or rate, there is present a minimum measure of damages; i. e., the difference in charge or rate. The legal right is to as good treatment (as low a charge or rate) as is given any other legally similar patron. The tort is in a refusal of that treatment. Certainly there is an injury equaling the difference in money value of the treatment (charge or rate) to which the patron was entitled and that which he received. Public policy, in my judgment, requires this view, for otherwise there could never be recovery in any case of rate or charge discrimination, unless there existed competitive conditions between the patrons involved in the discrimination. What possible other loss or damage is suffered by the householder, who pays one price for his domestic use of gas, wa-

ter, or electricity, while his next-door neighbor, for precisely the same service, rendered under precisely the same circumstances, pays only one-half as much? Or what other injury has the woolen manufacturer received when he pays twice the rate for electric power as does the adjoining candy maker, for precisely the same service, under precisely the same circumstances? Where there is business competition it may be that the discriminating rate has so heavily affected the fixed charges of production as to result in further damage; but, barring competition, the difference in the rate measures the damage, or there is none legally provable. In short, either the definition of what constitutes illegal discrimination as to rates or charges must be so altered as to exclude all of that great class which do not happen to be business competitors, and injured in their business competition, or there results the anomaly of one rule of common law giving a right (valuable not only to the individual, but to the public good), and another rule of the common law, rendering the protection of that right impossible.

Where, as in the present case, competitive conditions are present, and alleged to be affected by the discrimination, there is an additional consideration. The object of business is profit. When any one by an unlawful act reduces the profit of another, the law provides for restitution of that loss. Competition limits the sale price. When a business man is given a lower rate for power, or some other element entering into the fixed cost of the article he produces, it is an absolute certainty that his profit has been increased by just the amount of the reduction. It is equally certain that every competitor has been put at a disadvantage in just that sum. If the competitors have a right to that reduction, and do not receive it, they are damaged, and in just that amount.

The mistake, as I see it, sometimes made in the consideration of the element of damage in discrimination cases, is that nothing is regarded as damage unless it be an actual diminution of the existing property of the one paying the higher rate. So it has been said that if the reduction has resulted in no disarrangement of selling prices, so that the business of the one paying the higher rate has gone on undisturbed, he has not been damaged, though his competitor may have been benefited, and that he cannot complain of a benefit to another. The fallacy is that he is not complaining that some one else has received a benefit; he is complaining because he has not received the same benefit. The law says that he has a legal right to that benefit. If he had this benefit, his profit would be enhanced to just that amount, because his cost price would be just so reduced. His damage is in being deprived of a right (benefit), the value of which can, in such an instance, be definitely and accurately gauged, although his existing business shows no diminution nor disturbance. The point of view is vital. The law leaves it entirely open for the public utility to grant any favor it desires by lowering its charges. Its only condition is that what is granted to one must be given to all similarly situated. The wrong is not in reducing the rate to one; it is in not reducing it to each of the remainder. *New York, N. H. & H. R. Co. v. Ballou & Wright*, 242 Fed. 862, 865,

— C. C. A. — (C. C. A. 9th C.); Wyman Pub. Serv. Corp. § 1290, and citations.

But the favored one may not be satisfied to quietly receive the additional profit through the reduced rate. He may carry this advantage into business competition. He may reduce his selling prices to such an extent as to get business his competitors might have secured or retained. He may do this to the extent of driving them out of business, ruining them, and obtaining a monopoly for himself. These but add to the injury and the resulting damage. If claimed, they must be supported by proof.

The cases of Penn R. Co. v. International Coal Mining Co., 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315, Meeker & Co. v. Lehigh Valley R. R. Co., 236 U. S. 412, 35 Sup. Ct. 328, 59 L. Ed. 644, Ann. Cas. 1916B, 691, Lehigh Valley R. R. Co. v. Clark, 207 Fed. 717, 125 C. C. A. 235, Lehigh Valley R. R. Co. v. American Hay Co., 219 Fed. 539, 135 C. C. A. 307, Knudsen-Ferguson Fruit Co. v. Michigan Central R. Co., 148 Fed. 968, 79 C. C. A. 46, and Hoover v. Penn. R. Co., 156 Pa. 220, 27 Atl. 282, 22 L. R. A. 263, 36 Am. St. Rep. 43, cited in the majority opinion, do not, in my judgment, necessarily lead to a different conclusion. The Knudsen-Ferguson Case did not involve discrimination in any way. I do not find that the other cases brought before the court the propriety of employing the remedy of money had and received. They did hold the rule of damage, where the action brought was in tort, to be as announced; but in each of them the court was construing a statute, while this case involves the definition and application of rules of common law. Also, the statute in question (except in Hoover v. Railroad) involved the important consideration of a published tariff, from which no legal deviation could be made. In such cases there is the vital difference that the lower rate (a departure from the published rate) was, in and of itself, a forbidden, unlawful rate, aside from any question of discrimination, and no one, because of discrimination, or for any other reason, could make that unlawful act the foundation of a right to the same unlawful act in his favor (Paris Mountain Water Co. v. Camperdown Mills, 98 S. C. 304, 312, 82 S. E. 417, 418), while in this case the lower rate was of itself entirely lawful, but a tort was committed in not giving the same rate to others of the same class.

My conclusion, therefore, is that the first count of the petition is good; that there can be no recovery on any theory of money had and received, because the pleading is for a tort; that proof of facts constituting illegal discrimination in the rate charged, joined to proof of the difference in rate, would authorize recovery for the difference in what plaintiff did pay and would have paid under the lower rate; that any further damage arising from a disturbance of competitive conditions must be proven. Hence the demurrer to this count should have been overruled.

As to the demurrer to the second and third counts of the petition, I agree that the demurrer was properly sustained. Those counts are in tort for damages based on allegations that certain rates were unreasonable. The rates in question were at all times within the maximum

limits of an ordinance passed under state legislative authority as an exercise of police power and not as part of any contract. As long as that ordinance endures, it clothes the rates prescribed therein with a presumption of reasonableness, and no action for damages can be sustained for alleged injury therefrom.

This suit, being one in tort for damages, does not involve the right of individuals as consumers, users, or otherwise, to challenge the reasonableness of the rates established within the city ordinance maximum by a direct proceeding in equity, the result of which would be to sustain or annul the alleged unlawful rates as to all of the class to which the complainant might belong. I am not prepared to say that the citizen may not thus, through an action against the utility company, challenge the reasonableness and validity of such an ordinance. If there be no such right, then it results that where the legislative branch, through statute or ordinance, establishes a maximum rate, such action by implication annuls every common-law remedy the citizen has had to protect himself through the courts from an extortionate rate so authorized. Until that question is squarely presented, I do not care to affirm or deny the existence of such right. It may not, however, be out of place to suggest in this connection the language of Mr. Justice Miller, in his able concurring opinion in *Chicago, Milw. & St. Paul Ry. Co. v. Minnesota*, 134 U. S. 418, 459, 10 Sup. Ct. 702, 703 (33 L. Ed. 970), where he says:

"3. Neither the Legislature, nor such commission acting under the authority of the Legislature, can establish arbitrarily and without regard to justice and right a tariff of rates for such transportation, which is so unreasonable as to practically destroy the value of property of persons engaged in the carrying business on the one hand, nor so exorbitant and extravagant as to be in utter disregard of the rights of the public for the use of such transportation on the other.

"4. In either of these classes of cases there is an ultimate remedy by the parties aggrieved, in the courts, for relief against such oppressive legislation, and especially in the courts of the United States, where the tariff of rates established either by the Legislature or by the commission is such as to deprive a party of his property without due process of law.

"5. But until the judiciary has been appealed to to declare the regulations made, whether by the Legislature or by the commission, voidable for the reasons mentioned, the tariff of rates so fixed is the law of the land, and must be submitted to both by the carrier and the parties with whom he deals.

"6. That the proper, if not the only, mode of judicial relief against the tariff of rates established by the Legislature or by its commission, is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates as being within the limits of a just compensation for the service rendered.

"7. That until this is done it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method."

GLOBE & RUTGERS INS. CO. OF CITY OF NEW YORK v. PRAIRIE OIL & GAS CO.

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

No. 28.

1. INSURANCE ⇨542(1)—FIRE POLICIES—PROOFS OF LOSS.

Substantial compliance with the requirement of a fire policy as to proofs of loss is sufficient, though failure to comply will defeat recovery.

2. INSURANCE ⇨542(2)—FIRE POLICIES—PROOFS OF LOSS—SUFFICIENCY.

Proofs of loss, setting forth the time and origin of the fire, that no other person or party had any interest in the property destroyed, or any incumbrance thereon, specifying the cash value of the items making up the loss, the amount of other insurance on the property, and, after stating that no act had been done by the insured in violation of the policy, stated that the insured would produce its books of account and make replies to interrogatories propounded by the insurer relating to the loss, were sufficient.

3. INSURANCE ⇨558(2)—FIRE INSURANCE—PROOFS OF LOSS—WAIVER.

Where the insurer's adjuster acknowledged receipt of the proofs of loss and returned them, stating as his reason that he had offered to replace the oil lost and his offer had been declined, any defects in the proofs of loss made under a fire policy were waived.

4. INSURANCE ⇨542(2)—FIRE POLICIES—PROOFS OF LOSS.

Where the insured gave elaborate proofs of loss of tanks and oil, the proofs cannot be deemed insufficient, and recovery denied, because the insured, in computing the transportation charges, which, it was admitted, had enhanced the value of the oil, did not compute the charges on the same basis as did the insurer.

5. INSURANCE ⇨560(3)—FIRE POLICIES—PROOFS OF LOSS—WAIVER.

Specification of a particular defect in proofs of loss furnished by the insured is a waiver of others.

6. INSURANCE ⇨558(1)—FIRE POLICIES—WAIVER OF FORFEITURES.

An offer by the insurer, after receiving proofs of loss, to replace the property destroyed, waives all known forfeitures, including defects in the proofs of loss.

7. INSURANCE ⇨595—FIRE POLICIES—AGREEMENT TO REPLACE PROPERTY.

Where a fire insurer exercises its option to replace the property destroyed, the contract of insurance from that time becomes converted into a new and independent undertaking on the part of the insurer to replace the property, restoring it to its former condition.

8. INSURANCE ⇨595—FIRE POLICIES—REPLACING OF PROPERTY.

Where a fire policy gave the insurer an option to replace the property lost or damaged with other property of like kind and quality within a reasonable time, and part of the property lost was petroleum oil, the insurer cannot defeat recovery under the policy on the ground its offer of replacement was rejected, where it did not offer to replace the oil with similar oil; petroleum oils varying greatly in their properties.

9. INSURANCE ⇨595—FIRE INSURANCE—REPLACING OF PROPERTY.

Where oil tanks and their contents, which were insured against fire, were burned, and the oil lost, the insurer, though given an option in the policy to rebuild the property, or replace the same with property of like kind and quality, cannot elect to replace the oil without replacing the tanks, on the theory that it could tender the oil and insured was bound to provide a place to store it, for that would cast an unconscionable burden on insured, and the insurer has no right to replace part of property destroyed and pay for the remainder.

10. INSURANCE ⇨499—FIRE POLICIES—MEASURE OF DAMAGES—ACTUAL CASH VALUE.

Where a fire policy declared that the insurer should not be liable beyond the actual cash value of the property at the time of the loss, and that the loss or damage should not exceed what it would cost insured to repair or replace the same with material of like kind and quality, the actual cash value of petroleum oils covered by the policy, and which were lost through fire, is the market value of such oils.

11. TRIAL ⇨141—DIRECTION OF VERDICT.

Where an insurer was liable for the cash value of oil destroyed, and all of the evidence showed that the market value of such oil was 75 cents per barrel, and no evidence that it could be bought for a lesser price, it was proper to direct a verdict for the insured on the basis of that price.

12. INSURANCE ⇨668(13)—QUESTION FOR JURY.

Where petroleum oil, which had been piped for 400 or 500 miles from the field, and was practically pure, was destroyed while stored in a tank, and the insured showed that, on account of the sediment in the tank, it deducted a certain number of barrels, there is no question for the jury; there being no evidence to show that the deduction on account of the sediment or impurities in the oil was not sufficient.

13. INSURANCE ⇨668(13)—QUESTION FOR COURT—TRANSPORTATION OF OIL—PIPE LINES—RATES.

An oil company, which operated a pipe line and was required to charge the tariffs established by the Interstate Commerce Commission, stored oil, which it had piped for several hundred miles, at a point for which no tariff had been established. The oil was there destroyed by fire. In an action on the fire policy, the insurer contended, it being admitted that the transportation of the oil enhanced its value, that the question of the cost of piping the oil was for the jury. The oil company contended, however, that the piping charges should be ascertained by apportioning the rate established for carriage to a more distant point. *Held*, that the charges were properly ascertained in that manner, and hence there was no question for the jury as to the actual cost.

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

Action by the Prairie Oil & Gas Company against the Globe & Rutgers Insurance Company of the City of New York. There was a judgment for plaintiff on a directed verdict, and defendant brings error. Affirmed.

The plaintiff is a corporation existing under the laws of the state of Kansas. The defendant is a corporation existing under the laws of the state of New York. The plaintiff sues on a policy of insurance issued to defendant on February 6, 1914, insuring against all direct loss or damage by fire, except as in the policy provided, to the amount of \$6,477,000. The property insured consisted of iron tanks (used for storing petroleum) and their contents. While the policy was current, two fires occurred: (1) On September 2, 1914, destroying tanks numbered 8, 9, and 13, together with their contents, at Barney Farm, Drumwright, Okl.; and, (2) on September 6, 1914, destroying tank numbered 1306, with its contents, at Shannondale, Mo. The two fires are made the subject of two separate causes of action in the same complaint.

The defendant's answer sets up a general denial as to each cause of action. As a separate and partial defense to the first cause of action it sets up the assured's refusal to permit the defendant to replace the property destroyed; and as a separate defense to the first and second causes of action the answer alleges that the plaintiff had wholly failed to serve on defendant a

statement, signed and sworn to by it, stating its knowledge and belief as to the time and origin of the fires, its interest, and that of all others in the property, the cash value of the various items making up the same, the incumbances, if any, thereon, other insurance, if any thereon, and a copy of the description and schedules in all policies, as well as any changes in the title, use, occupation, location, possession, or exposure of the property from the time the policy was issued.

As to the first cause of action it is stipulated between the attorneys that the number of barrels of fluid destroyed in tanks 8, 9, and 13 at Barney Farm, Drumwright, Okl., by fire, on September 2, 1914, was as follows: Oklahoma crude fluid, 122,778.77 barrels, less fluid saved, 2,899.59 barrels; net amount of petroleum destroyed, for which the plaintiff in error admits liability as to quantity only, was 116,282.80 barrels; that the tanks themselves were each of 55,000 barrels capacity, and were worth at the time of the fire in the aggregate \$38,250 (\$12,750 each), and were totally destroyed by said fire, and that the amount of the liability of the plaintiff in error is the sum of \$15,000 (\$5,000 each). The occurrence of the fire of September 2, 1914, the ownership of the property on that day by the assured, and that the fire was not caused by any of the causes excepted in the policy were also admitted.

As to the second cause of action it is also stipulated that the number of barrels of fluid destroyed in tank No. 1306 at Shannondale, Mo., by fire on September 6, 1914, was as follows:

| | |
|------------------------------------|-----------------|
| "Contents of tank No. 1306: | |
| Oklahoma crude fluid..... | 52,025.77 bbls. |
| Less sediment..... | 1,085.51 " |
| | <hr/> |
| | 50,940.26 " |
| Less oil saved..... | 7,882.00 " |
| | <hr/> |
| Net amount of fluid destroyed..... | 43,058.26 " |

"In connection with the above figure, 43,058.26, representing total amount of fluid destroyed, in barrels, it will be on the trial of this action the contention by the defendant (insurance company) that there should be deducted therefrom 1,291.75 barrels which will be claimed by the defendant (insurance company) represents sand and water in the fluid destroyed, and which contention the defendant (insurance company) reserves the right to endeavor to prove at the time of the trial of this action."

The stipulation admits that tank 1306 was the property of the assured, and was totally destroyed by fire on September 6, 1914; that the value of the said tank at the time of the fire was \$12,750, and that the plaintiff in error is liable in the amount of \$5,000; the occurrence of the fire of September 6, 1914; the ownership of the property on that day by the assured; and that the fire was not caused by any of the excepted causes in the policy.

At the close of the trial counsel for defendant moved to dismiss, and the motion was denied. Counsel for plaintiff moved for a direction of a verdict for the plaintiff on each cause of action, and this was granted, and judgment entered for \$8,451.19.

Leo Levy, of New York City (Alex. Davis, of Brooklyn, N. Y., of counsel), for plaintiff in error.

Bruce Ellison and Andrew A. Fraser, both of New York City (William B. Ellison, of New York City of counsel), for defendant in error.

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

ROGERS, Circuit Judge (after stating the facts as above). [1]
This is an action upon a policy of insurance, and the defendant claims

that the action cannot be maintained because the proofs of loss were insufficient. The object of the clause concerning proofs of loss inserted in a policy is to give the company proper information as to the facts rendering it liable. Failure reasonably to comply with such a clause, if not waived by the company, defeats recovery. A substantial compliance is, however, all that is required. *Glazer v. Home Ins. Co.*, 190 N. Y. 6, 82 N. E. 727; *Davis v. Grand Rapids Ins. Co.*, 157 N. Y. 685, 51 N. E. 1090; *De Raiche v. Liverpool, etc., Ins. Co.*, 83 Minn. 398, 86 N. W. 425.

[2] The court below held the proofs of loss in the case at bar sufficient, and this court is of like opinion. The proofs set forth the time and origin of the fires; that no other person or party had any interest in the property destroyed or any incumbrance thereon; the cash value of the various items making up the loss is set out in detail aggregating \$125,396.86; the amount of other insurance and in what companies it was placed is specifically stated; a copy of the descriptions and schedules in all the policies is annexed; and the fact is set forth that no act had been done or caused to be done by the assured in violation of the policy which would become void. The proofs also stated that the insured would produce its books of account and other proper vouchers and make replies to interrogatories propounded by authority of the company relating to the loss. This surely was all that the law required. The objections raised are technical, and were properly disregarded. The statement of loss showed that the total value of the oil in all the plaintiff's tanks at the time of the fire did not exceed \$38,080,000. At the same time the number of barrels of oil at the time in each tank that was destroyed is set forth and the value is stated, as well as the amount of the loss.

[3] Moreover, in a letter dated February 24, 1915, the adjuster acknowledged receipt of proof of loss and returned the same, stating as his reason for so doing that he had offered to replace the oil, and his offer had been declined. As it raised no objection to the proofs, it was therefore a waiver of any defects. *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 390, 403, 13 L. Ed. 187.

[4-6] As to the proof of loss in the second cause of action—the Shannondale loss—the objection made was in the omission to deduct the sand and water salvage and in the statement of the transportation charges at 34 cents, instead of 13 cents. These differences represented a dispute between the parties, and the insured was, of course, not bound to make the proof of claim according to the insurer's view upon that issue. As to all other defects, if any, they were waived by the specific mention of these as the only ones. *Thompson v. Liverpool, etc., Co.*, Fed. Cas. No. 13,966; *McManus v. Western Assur. Co.*, 43 App. Div. 550, 558, 48 N. Y. Supp. 820, 60 N. Y. Supp. 1143. But, even if there were merit in the claim that the proofs of loss were insufficient, which there is not, defendant would not be entitled to raise it on its own showing. It is striving to maintain two propositions, one of which destroys the other. It insists that the plaintiff is not entitled to recover because its proofs of loss are insufficient, and it at the same time insists that plaintiff is not entitled to recover, because it (the de-

defendant) offered to replace the property destroyed and its offer was rejected. It overlooks the fact that, if an offer to replace was made, it was made after the proofs of loss were received, and that the law is that such an offer waives all known forfeitures. *Bersche v. Globe Ins. Co.*, 31 Mo. 546.

[7, 8] The defendant also relies upon the following provision contained in the policy:

"This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality. Said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable 60 days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other like kind and quality within a reasonable time, on giving notice, within 30 days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described."

The defendant insists that it exercised the option to replace, to which it was entitled, and that the plaintiff refused its offer. Where an insurance company has elected to replace, the law is that from that time the contract of insurance becomes converted into a new and independent undertaking on the part of the insurers to replace the property, restoring it to its former condition. *Richards on Insurance* (3d Ed.) § 244.

It is urged that the court below was in error in not submitting to the jury the question whether or not there was an offer made by the defendant to replace. But no error was committed in this respect, if the facts relied upon as constituting the offer did not in law amount to one which the plaintiff was bound to accept. The offer defendant claims it made was an offer to replace the oil involved in the first cause of action. No claim is made of any offer to replace the oil involved in the second cause of action. It may be conceded that, if an offer was made as to the oil involved in the first cause of action, and plaintiff without legal excuse refused to allow the defendant to replace it, the first cause of action fails. We fail, however, to find any evidence in the record of an offer which could be regarded as sufficient in law.

The defendant's answer sets up that, within 30 days after its receipt of proof of loss, it notified the plaintiff that it desired and was ready to replace the property "with other property of like kind and quality," and that it offered so to do, both orally and in writing. There is, however, no evidence in the record that the offer to replace was an offer to replace with oil of "like kind and quality" to that which was destroyed. Petroleum oils vary greatly in their properties, and the lan-

guage of the policy made it incumbent on the defendant to replace in kind and quality in case it replaced at all.

[9] The policy insured, not simply the oil, but also the tanks in which the oil was contained, and the offer was to replace the oil, and it did not propose to replace the tanks. It is difficult to see how the oil could be replaced without at the same time replacing the tanks to receive it. The insurer was informed, when its agent proposed that the oil be replaced, that there were no tanks which could receive it, and he replied that he would advise his clients that they had a right to tender the oil, and, if the plaintiff did not provide a place to put it, "they [the insurance company] could pour it on the ground." The law gave it no such right. If the company proposed to replace the oil, it was bound also to replace the tanks, having insured both. The option to replace is an option to replace the whole loss. It is not permissible to replace in part and pay in part. May on Insurance (4th Ed.) p. 1005, §.430. If the policy had covered only the oil, it might have been necessary to hold that the insured took the chance of having at hand suitable tanks or some other containers in which to receive the oil, but not so when the policy covered the tanks as well as the oil. It would be only a burden to offer the oil when there were no tanks in which to receive it. It would be quite as unreasonable as to replace some, but not all, parts of a machine. The contract in all such cases is one to restore the position of the insured, and under the option the restoration must be by specific performance. Any specific performance must be complete, or it is not restoration. It surely cannot be the law, if a company insures a house and its contents, and both are totally destroyed, that, if the company has an option to replace, it could exercise it by replacing goods and chattels of like quantity and quality on the ground unprotected, while it paid in cash the value of the house. If there are adjudicated cases supporting any such proposition, they are unknown to us. The property destroyed is to be restored to its former condition, and it must be as serviceable and valuable as before the fire. *Commercial Fire Ins. Co. v. Allen*, 80 Ala. 571, 1 South. 202.

[10, 11] This brings us to inquire whether the value of the oil destroyed was sufficiently established to sustain the direction of the verdict. The policy provided that:

"This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality."

The actual cash value of the oil at the time of the fire was to be the measure of damages, but it could not exceed what it would cost the insured to replace it. The cash value of an article is the amount of cash for which it will exchange in fact. *Ankeny v. Blakley*, 44 Or. 78, 74 Pac. 485; *National Bank of Commerce v. City of New Bedford*, 155 Mass. 313, 29 N. E. 532. And cash value is the market value for which an article will sell for in cash on the market. *Missouri, K. & T. Ry. Co. of Texas v. Murray* (Tex. Civ. App.) 150 S. W. 217, 218;

Frick v. United Firemen's Ins. Co., 218 Pa. 409, 67 Atl. 743. We think the evidence clearly shows that at the time of the Oklahoma fire the cash value of oil in that state was 75 cents a barrel. At that time the state of Oklahoma had a state Corporation Commission which fixed the price of oil and no one had a legal right to sell oil in that state for less than the price so established. A member of the commission testified that the price of oil at the time of the fire was 75 cents a barrel. There were other witnesses who gave similar testimony. No witnesses were produced who testified that oil could have been purchased in Oklahoma for less than 75 cents a barrel at the time when this loss occurred. The oil destroyed came from the plaintiff's own wells, and it had no right to sell for less than the established price, the market price, which was 75 cents a barrel. This seems sufficient to establish what the cash value of the oil was, and, as there was no evidence to contradict it, there was no question for the jury.

As respects the oil destroyed at Shannondale, Mo., and which is involved in the second cause of action, the evidence is that it had the same value as the oil in the Oklahoma or Custing field. We do not find in the record contradictory evidence upon that point.

[12] The plaintiff in its proof of loss in connection with the Shannondale fire stated the contents of the tank there destroyed as 52,285.77 barrels of oil, less 1,058.51 barrels deducted for sediment (sand and water), and less 7,882 barrels saved, making a total loss of 43,058.26 barrels of oil destroyed. The defendant, however, claims that it is entitled to a 3 per cent. deduction for sediment, and the deduction made by the plaintiff in its proof of loss was actually much less than that to which it was entitled on a 3 per cent. basis. The reason why the allowance actually made for the sediment was not on the 3 per cent. basis, as explained by the plaintiff's witness, appears to have been that the sediment for which it is customary to deduct is for sediment accumulated in the various tanks through which the oil passed at a considerable distance before it reached Shannondale, and that when it reached the Shannondale tank it arrived 100 per cent. pure having passed over a distance of from 400 to 500 miles by which time the sediment had been pretty well precipitated, so that there remained only about a quarter of 1 per cent. of sediment, or practically a negligible quantity. The testimony, however, shows that there was a certain amount of sediment in the Shannondale tank which had been accumulating since the tank was built, and that the company had allowed for it in its proof of loss. The 3 per cent. deduction was actually made at the wells, and in addition an actual deduction of 1,085.51 barrels was made for sediment in the tank. We think that this left no question for the jury, as there was no contradictory testimony going to show that the allowance had not been made for sediment, or that the amount allowed was not sufficient.

[13] This brings us, in conclusion, to the defendant's claim, urged upon the argument, that there was a question for the jury respecting the gathering, pipage, and transportation charges. The defendant claims that the plaintiff is only entitled to what it cost it to pipe the oil and gather it, as it did its own gathering and piping, bringing its

own oil in its own pipes from its wells in Bartlesville, Okl., to Shannondale, in Missouri.

The plaintiff claims that it is entitled to recover these gathering and pipage charges, which charges enhanced the value of the oil. The prices charged for these services were on the basis of a tariff approved by the Interstate Commerce Commission, and were mandatory. The tariff as published regulated the charges from Bartlesville to Wood River, Ill. There was no published tariff to Shannondale. The amount charged to Bartlesville was therefore proportioned in accordance with the through rate to Wood River. It was conceded by defendant's counsel at the trial that the plaintiff was entitled to recover the cost of carriage to the tanks. This he did in reply to a statement made by the trial judge that:

"The cash value would be the cost of production plus the cost of carriage. I think he would be entitled to show the cost of carriage to their tanks."

To which defendant's counsel answered:

"If there were a tariff to Shannondale, yes; but he is not entitled to fix the apportionment between the points."

To which the court replied:

"That is the only way he has to fix it."

The testimony disclosed that plaintiff had no way of determining what it actually cost it to pipe the oil, and it charged on the basis of the rate fixed by the Interstate Commerce Commission; its officer testifying that it could not carry for less than that and that they could not charge more. It being admitted by counsel at the trial that, if there had been a published tariff to Shannondale fixing the carriage charge, the rate so fixed could be accepted, we think that the court was justified, under the circumstances, in permitting the evidence to go in that the charge made was proportioned on the basis of the rate as fixed to Wood River.

Judgment affirmed.

THE TRANSFER NO. 21.

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

No. 6.

1. SHIPPING Ⓒ209(2)—PROCEEDINGS FOR LIMITATION OF LIABILITY—SURRENDER OF OFFENDING VESSEL.

The petition in proceedings for limitation of liability is required to surrender only the vessel or vessels in fault, and as a vessel without motive power in tow alongside a tug cannot be in fault for a collision, the surrender of the tug, or the giving of a stipulation for its value, is all that is required, although both are owned by the petitioner.

2. COLLISION Ⓒ9—NAVIGATION RULES—LOCAL CUSTOM.

The established custom for vessels navigating the channel between Ward's Island and the Astoria shore on a flood tide to keep to the left-hand side of the channel and pass starboard to starboard, owing to the peculiarities of the locality, is a reasonable one, and is not in violation

of article 25 of the Inland Rules (Act June 7, 1897, c. 4, § 1, 30 Stat. 101 [Comp. St. 1916, § 7899]), which require steam vessels to keep to the right or starboard side of the fairway in narrow channels "when it is safe and practicable."

3. COLLISION ⚡67—NAVIGATION RULES—BEND SIGNALS.

Inland Rules, art. 18, rule 5 (Comp. St. 1916, §§ 7892), which requires a vessel, when nearing a short bend, where from the height of the banks it cannot be seen from the other side, to give a signal by a long whistle, does not apply to a vessel lying still near a bend.

4. COLLISION ⚡71(3)—MOVING AND STATIONARY VESSEL—LOOKOUT.

The fact that the lookout on a tug, which with her tow was lying still, did not see a small motorboat, which approached in the night, held not a fault which contributed to a collision, where the boat approached from around a point and could not have been seen until 30 seconds before the collision.

5. COLLISION ⚡59—MAKE-UP AND SPEED OF TOW.

There is no obligation on the part of a tow to go, or to be able to go, at any particular speed with reference to other vessels, unless in narrow waters or crowded harbors.

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

Proceeding in admiralty for limitation of liability by the New York, New Haven & Hartford Railroad Company, owner of Transfer No. 21. Otto Schmuck and others, owners of the motorboat Pilot, appeal from a decree finding Transfer No. 21 without fault for a collision. Affirmed.

Charles M. Sheafe, Jr., of New York City (James T. Kilbreth, of New York City, of counsel), for petitioner.

C. J. Earley, of New York City (Norman B. Beecher, Chauncey I. Clark, and John L. Galey, all of New York City, of counsel), for appellants.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. November 25, 1912, at about 5:40 a. m., the motorboat Pilot, 33 feet long, 9 feet beam, bound east from New York to Long Island Sound on a fishing trip, came into collision with float No. 53 on the port side of Transfer No. 21, which with another float, No. 57, on her starboard side, was proceeding west from Oak Point to Greenville, N. J. The place of collision was near the Astoria shore, just below Hallett's Point. The tide was running strong flood, the wind blowing a gale from the west, and the morning very dark. The motorboat went under the bow, passed out under the stern of the float, and was carried by the tide to the foot of Hoyt avenue, Astoria. The motorboat was a total loss, Otto Schmuck, her owner, sustained personal injuries, and his guests, Joseph F. Willax and W. D. Livingstone, were drowned. Actions at law were begun in the Supreme Court of the state of New York for all these injuries, to recover damages aggregating \$112,000.

[1] The New York, New Haven & Hartford Railroad Company, owner of Transfer No. 21, and of the two floats, filed a petition for

limitation of liability and gave a stipulation for the appraised value of Transfer No. 21 in the sum of \$65,000, there being no pending freight. Schmuck and the personal representatives of Willax and Livingstone moved that the limited liability proceeding be dismissed, on the ground that the court was without jurisdiction, because the petitioner had not also surrendered or given a stipulation for the value of the two car floats. Judge Lacombe denied the motion, holding that, neither car float being at fault, the petitioner had complied with the statute in giving a stipulation for the value of Transfer No. 21. We agree with him. A tug and tow are for some purposes regarded as a single vessel, as, for example, in connection with the steering and sailing rules; but in this circuit the petitioner in limited liability proceedings is required to surrender only the vessel or vessels at fault. A tow without motive power, alongside a tug and moved by it, cannot be at fault. In the case of *The Bordentown* (D. C.) 40 Fed. 682, Judge Addison Brown required the claimant to surrender, not only the tug *Bordentown*, which was in charge of the navigation of the tow and at fault for proceeding in threatening weather, but also the helper tug *Winnie*, because she supplied part of the motive power and was acting under the orders of the master of the *Bordentown*. This court, in the subsequent case of *The W. G. Mason*, 142 Fed. 913, 74 C. C. A. 83, said that, if the decision in *The Bordentown* was based upon the consideration that the personal liability of the owner was conclusive of the liability of the *Winnie* in rem, it was erroneous. So in this case the petitioner, as owner of Transfer No. 21, may be in fault, and so liable to her value, but it is not in fault as owner of the floats, because neither of them did or could do anything whatever either to cause or prevent the collision.

[2] This brings us to the question of the merits. The flood tide between Ward's Island and the Astoria shore runs true; that is, straight down the channel, but with an eddy on the Astoria shore below Hallett's Point. It was abundantly proved that vessels going west strike over from Negro Point to the Astoria side of the channel, so as to get the benefit of the eddy in rounding Hallett's Point, while vessels going east keep to the middle of the channel and cross over to the Ward's Island side, coming down near Negro Point, so as not to be carried by the tide onto Scaly Rocks. This is especially true of hawser tows. In other words, vessels meeting going east and west pass starboard to starboard on the flood tide at this point. This is what Transfer No. 21 did, blowing the required bend signal as she crossed over to the Astoria side, but keeping practically stationary about two hours before the collision happened, because she was not able to round Hallett's Point even in that weaker tide. This appears to us a reasonable custom of navigation arising from the peculiarities of this locality. In the case of *The E. A. Packer*, 58 Fed. 251, 7 C. C. A. 216, and the case of *The Josephine B*, 58 Fed. 813, 7 C. C. A. 495, relied upon by the appellants, the court held that there was no sufficient proof of custom.

[3] The claimants charge Transfer No. 21 with negligence in not frequently blowing a bend whistle while lying below Hallett's Point

to notify vessels coming from the west that she was there. Inland Rule 5 reads:

"Whenever a steam vessel is nearing a short bend or curve in the channel, where, from the height of the banks or other cause, a steam vessel approaching from the opposite direction cannot be seen for a distance of half a mile, such steam vessel, when she shall have arrived within half a mile of such curve or bend, shall give a signal by one long blast of the steam whistle, which signal shall be answered by a similar blast, given by any approaching steam vessel that may be within hearing. Should such signal be so answered by a steam vessel upon the farther side of such bend, then the usual signals for meeting and passing shall immediately be given and answered; but, if the first alarm signal of such vessel be not answered, she is to consider the channel clear and govern herself accordingly. * * *"

This rule contemplates a vessel continually moving and approaching the bend, which was not the case with Transfer No. 21. If the situation of a vessel lying still near a bend is such as to make a signal prudent, we can only say that Congress has not provided for it by this rule.

The Transfer is also charged with fault for navigating on the wrong side of a narrow channel; that is, on the port side of mid-channel, in violation of article 25 of the Inland Regulations. Assuming that the waters are such as to constitute a narrow channel, article 25 applies only when it is "safe and practicable" to do so. The customary navigation at this point on a flood tide would make compliance with the rule neither safe nor practicable. Vessels going westward on the starboard side of the channel near Ward's Island would meet vessels coming eastward on the rapid tide. Collisions and confusion would inevitably follow. Navigation in accordance with the practice resulting from experience in the particular locality was in our opinion proper.

[4] Transfer No. 21 is next charged with failure to keep a vigilant lookout. It is certainly true that the lookout did not discover the motorboat till the moment of collision, and, if this contributed to the collision, Transfer No. 21 is at fault. The little motorboat was going with the tide at a speed of at least 12 miles an hour, and as she was, according to Schmuck, but 600 feet from the Transfer when she rounded Hallett's Point, the collision happened within 30 seconds. There was then, according to Schmuck, abundant room for the motorboat to pass clear port to port, and he attributes the collision, not to the fact that he did not see the Transfer, but to her suddenly sheering to port. The District Judge disbelieved this story, and we agree with him. The Transfer was not moving over the land, and if the lookout had seen the motorboat 30 seconds before the collision there was nothing she could have done to prevent it. Indeed, the whole of Schmuck's testimony is discredited by the fact that when he testified before the inspectors, about two months after the collision, he located it at a point near the Astoria ferry, more than a quarter of a mile west of Hallett's Point.

[5] Finally, the petitioner is charged with fault for letting the Transfer take so heavy a tow that she could not make headway against the flood tide at Hallett's Point. We know of no obligation upon the part of tows to go at any particular speed with reference to other ves-

sels. If the conditions of business make it expedient to take tows so heavy that progress can be made only on favoring tides, there is no reason we know of to forbid it. Indeed, this is true of much of the hawser towing in Long Island Sound. A different question would arise in case of a claim against a tug for damage sustained by her tow, or if damage were done by the tug and tow to other vessels in narrow waters or crowded harbors.

The decree is affirmed.

PUFFER MFG. CO. v. ROBERTSON, State Revenue Agent, et al.

(Circuit Court of Appeals, Fifth Circuit. February 25, 1918.)

No. 3096.

1. TAXATION ⇨498—JURISDICTION—MULTIPLICITY OF SUITS.

Where by written contracts of conditional sale, each providing for retention of title until payment of the purchase price, and that the buyer should pay all taxes levied or assessed against the property, complainant sold soda fountains and apparatus to many different purchasers in various counties in Mississippi, complainant is not, Code Miss. 1906, § 4740, providing an adequate means for contesting unlawful assessments, entitled to invoke the aid of equity to enjoin the state revenue agent from giving notice that such property had escaped taxation for want of assessment, on the theory that taxes had been assessed against the various purchasers and paid by them, for, though assessment of complainant's property would result in many proceedings, there was no common question decisive as to all the proposed assessments.

2. TAXATION ⇨498—ASSESSMENT—INJUNCTION.

As the Mississippi Constitution requires an assessment of property, as a condition to its taxation, and the statutes provide an adequate method for assailing assessments, a court of equity has no jurisdiction to enjoin a Mississippi state revenue agent from notifying assessors and other taxing officials that property had escaped taxation for want of assessment, on the theory that it had been assessed against others and the taxes by them paid, for without an assessment there could be no recovery of back taxes.

3. TAXATION ⇨320—STATUTES—MODIFICATION.

Stipulations by state revenue agent concerning assessments are unavailing, where in conflict with the state statutes for raising revenue.

Appeal from the District Court of the United States for the Southern District of Mississippi; Henry C. Niles, Judge.

Bill by the Puffer Manufacturing Company against Stokes V. Robertson, State Revenue Agent for the State of Mississippi, and others. From a decree dismissing the bill, complainant appeals. Affirmed.

W. Calvin Wells, of Jackson, Miss., and Holmes & Holmes, of Yazoo City, Miss., for appellant.

James R. McDowell and Fred M. West, both of Jackson, Miss., for appellees.

Before WALKER and BATTS, Circuit Judges, and EVANS, District Judge.

EVANS, District Judge. The purpose of the bill is to enjoin the state revenue agent from giving notice to the assessors and tax col-

lectors of various counties of the state of Mississippi, and of the municipalities and levee boards of that state, that certain soda water fountains and apparatus belonging to complainant, which had been sold to various customers in different counties under contracts of conditional sale, had escaped taxation by reason of not having been assessed. A temporary injunction was refused, and the bill was dismissed, and from this decree an appeal was allowed.

The Puffer Manufacturing Company, incorporated under the laws of the state of Maine, with its principal place of business at Winchester, Mass., is engaged in the manufacture and sale of soda water fountains and apparatus. In the course of its business it sold to different customers in about 80 counties in the state of Mississippi divers and sundry soda water fountains and soda water apparatus under written contracts of conditional sale, providing for the vendor's retention of title until the purchase price is paid, and that the purchaser will pay all taxes levied or assessed against the property described in the contract. The bill alleged that the various purchasers had returned for taxation the property sold to the particular purchaser, and the taxes due thereon had been assessed in each instance against the purchaser, and had been paid by the purchasers. The terms of the contract of conditional sale with the different purchasers were contained in a printed form and were essentially the same. The bill further charged that in 1915 the state revenue agent gave notice to various assessors in a few counties of the state that soda water fountains and apparatus sold by complainant to its various customers in these counties had escaped taxation by reason of not having been assessed in previous years, and was proceeding to assess this property, when complainant and the attorney of the state revenue agent entered into an agreement that, if complainant would furnish the revenue agent with a correct list of all the personal property held under conditional sale in the state, the revenue agent would assist in the ascertainment of this information, and would delay action until an honest effort had been made to ascertain from these purchasers whether the taxes had been paid. The bill charges, and the answer denies, a breach of this agreement.

[1] The statutes of Mississippi create a revenue agent, whose duty is to discover whether any person or property has escaped taxation. If he finds that any property has escaped taxation, it is his duty to give written notice to the tax collector of that fact. It then becomes the duty of the collector to make the proper assessment, and give ten days' notice in writing to the person or corporation whose property is assessed, and all objections to such assessment shall be heard at the next meeting of the board of supervisors of counties or board of mayor and aldermen of municipalities. An appeal lies to the circuit court from the order of the board approving or disapproving such assessment. Code 1906, § 4740. It is admitted that complainant owns items of personal property in over 80 counties in the state, and that no taxes on these items of personalty were assessed against complainant. But complainant contends that it sold these items of property at different times to different persons, taking from each purchaser a

contract that the legal title to the particular property should remain in it as vendor until the purchase price was paid by the vendee, and that the vendee would have the taxes assessed against him and pay the taxes as assessed, and, further, that the taxes had been assessed against the various purchasers and paid by them. It is clear that complainant has a remedy to contest in each jurisdiction the liability of its property in the particular taxing district for assessment on the rolls as property which has escaped taxation. But it contends that the remedy afforded by the statute is inadequate, for the reason that under the facts of the case more than 80 proceedings will be necessary, and that if all the controversies are settled in one suit a multiplicity of actions will be avoided.

We do not think this is a case for the application of the rule that a court of equity will take cognizance of a controversy to prevent a multiplicity of suits. That doctrine is only applicable when the apprehended suits present a common point of controversy. The complainant sold a separate soda water apparatus to about 80 different purchasers. The sales were separate and distinct. No single sale was connected with or related to another sale; each being an independent transaction. The question in each case is whether a particular purchaser complied with his own contract as to the assessment and payment of the taxes on his purchase. There is no common point in the controversy in the ascertainment of the fact of each purchaser's complying with his individual covenant. It may be convenient to the holder of 100 promissory notes, given by as many different promisors residing in as many different counties, for different amounts and for different considerations, to join them in one action; but such convenience will not outweigh the inconvenience of the defendants, arising from the joinder of so many unrelated and distinct causes of action in one suit. The controlling and prominent fact in the complainant's claim for relief is that each of his vendees has paid the tax on the property of complainant in the vendee's possession. The taxes due to the levee board, or municipality, in one taxing district, on property located in that district, is absolutely unrelated to the taxes due in another taxing district, on property located in that district.

[2] Moreover, it has been decided by the Supreme Court of Mississippi that the Constitution of that state requires an assessment of property as a condition of its taxation. *Revenue Agent v. Tonella*, 70 Miss. 701, 14 South. 17, 22 L. R. A. 346. If the revenue agent be enjoined in this case as prayed, no assessment would be made, and the different taxing districts would be precluded from a recovery of back taxes, if it should turn out that the property of complainant had escaped taxation. It is no reply to say that the bill charges that the taxes have been paid, for the reason that the statute provides how that issue shall be made. The statutes of Mississippi afford an opportunity to the complainant to try the issue on each transaction, and the validity of these regulations for the assessment and collection of taxes are not assailed.

[3] It does not require argument or citation of authority to prove that the statutes of the state, enacted for the collection of its revenue, cannot be superseded by stipulations between one of its officials and the owner of property which is subject to assessment and taxation.

Judgment affirmed.

DAILEY et al. v. CARROLL et al.

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

No. 74.

1. SHIPPING Ⓒ41—DEMISE BY CHARTER—HARBOR SCOW.

An oral charter of a scow having no motive power for harbor use, even though the owner sends with it a "master" in his own pay, constitutes a demise, and makes the charterer a bailee.

2. SHIPPING Ⓒ54—CHARTER OF SCOW WITH MASTER—LIABILITY FOR NEGLIGENCE OF MASTER.

An owner of a scow, without motive power and used for harbor business, who lets his boat and man as master to a chartered owner pro hac vice, thereby, in the absence of special agreement to the contrary, represents that the man is reasonably competent to attend to the care or internal economy of the boat; and customary cleaning, pumping, mooring, and watching, including watching her lines, are parts of such care, and as between the owner and charterer the owner is liable for any injury to the boat, or by the boat, by reason of the negligence of her master in caring for her.

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

Suit in admiralty by John D. Dailey and De Witt C. Ivins against William F. Carroll and the City of New York. Decree for libelants against respondent Carroll, and he appeals. Affirmed.

Dailey & Ivins orally chartered from Carroll the scow Edna L. Woods, at a price that "included the captain." This "captain came with the scow," was not paid by the charterer, and there was no arrangement that charterer could discharge him. Carroll admitted that he hired and paid the man. Libelants used this and many other scows in receiving and transporting to proper places of disposition rubbish and refuse gathered in the city of New York. Such scows were loaded under a dump on a pier in the East River.

While lying partly laden under the dump, and because her lines were improperly made fast, or not timely adjusted, the tide careened the Woods until her load slid off into the slip. The court below found that maladjustment of lines was the fault of the scow master, in that he did not watch them and the tide, but unwarrantably absented himself from the scow (where he lived). By contract with the city, libelants were obliged to dredge from the slip what had been dumped off the scow, and filed this libel to recover from the scow owner such dredging expense, alleging that during all the chartered period the scow had "a master in charge to look after the loading of said [scow] and to care for her as agent and servant of [Carroll] while engaged in the work" of (inter alia) receiving cargo. This allegation the answer of Carroll specifically admitted, notwithstanding which he denied all liability, and under the Fifty-Ninth rule in admiralty (29 Sup. Ct. xlvii) impleaded the city of New York, alleging that the loss of the cargo and the consequent cost of dredging was proximately caused by the negligence of the city's employes in

sundry particulars not here necessary to mention. The trial judge deemed the allegations against the city not proven and dismissed the claim. As no assignment of error complains of such dismissal, the matter will not be considered further.

The court below entered decree requiring the scow owner to pay the expense caused by the aforesaid dumping of cargo, on the ground that the scow master, when he negligently left his lines in improper and dangerous condition, was the servant and agent of the owner (i. e., the respondent), who thereupon appealed from said decree.

Foley & Martin, of New York City (James A. Martin and George V. A. McCloskey, both of New York City, of counsel), for appellant.

Alexander & Ash, of New York City (Mark Ash and Edward Ash, both of New York City, of counsel), for appellees Dailey and Ivins.

Lamar Hardy, Corp. Counsel, of New York City (Terence Farley and Charles J. Nehrbas, Asst. Corp. Counsel, both of New York City, on the brief), for appellee city of New York.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] There is no doubt that the oral charter of the scow Woods, even though the owner sent with it a "master" or laborer in his own pay, constituted a demise, and made the charterer a bailee. *The Willie*, 231 Fed. 865, 146 C. C. A. 61. This holding, repeatedly announced by this court in cases of which *Hastorf v. Long, etc., Co.*, 239 Fed. 852, 152 C. C. A. 638, is a recent instance, has always been in respect of boats with no motive power, incapable of navigation in the sense of independently pursuing a course, and depends ultimately on the fact, commonly known, that the so-called "captains" of such craft are no more than laborers or deckhands, who cannot reasonably be looked upon as are shipmasters exercising a real command, based on statute, custom, and historic law.

The single question argued is whether under such a charter the scowmaster for any purpose, or in respect of any duty, remained the employé and therefore the agent of the man who alone had hired and could have discharged him—i. e., the scow owner. Whether under the pleadings as above outlined the point can be taken may well be doubted; but, as the matter has been discussed without any reference to the pleadings, we shall decide what the parties intended to submit.

[2] The evidence shows the charterer in absolute control and entitled to direct the navigation and employment of the vessel. These are the indicia by which the nature of the charter party is tested and decision reached as to whether it is a demise or not. *United States v. Shea*, 152 U. S. 178, 14 Sup. Ct. 519, 33 L. Ed. 403. They do not conclude the point argued. That point may be illustrated by asking what was made the subject of the bailment, or what came to the bailee? Not the bare boat, but the boat and man; and just as the boat was impliedly warranted seaworthy, so the man was impliedly represented competent and careful to take care of the boat; he existed and was supplied for that purpose.

It is, we think, impossible to lay down any hard and fast definition as to what is comprised in the phrase "caring for a boat." To do so would require consideration of contingencies perhaps unforeseeable, and certainly not suggested by anything in this record. Cases must largely depend upon special facts; but we may and do hold that an owner, who lets his boat and man to a chartered owner, pro hac vice thereby, in the absence of special agreement to the contrary, represents that the man or men who go with her are reasonably competent to attend to the care or internal economy of the vessel in question, and further that customary cleaning, pumping, mooring, and watching are parts of such care, and watching a vessel includes watching her lines. As to mooring, cf. *The Lyndhurst*, 147 Fed. 110, 77 C. C. A. 336, for the rule as to fastening tow lines.

If the man whom the owner pays and furnishes for this purpose fails (for example) to watch and arrange his lines according to the exigencies of the tide, he fails to serve the charterer just as much as the boat would fail to serve, should she be unseaworthy through no fault of the charterer. Third persons may, of course, regard charterers such as these libelants as owners, and the crew as the charterer's crew; but, as between the parties to the contract of charter, the question may always be asked: For whom was a given employé acting when the act complained of occurred?

The point is not without direct authority. *Hastorf v. Hudson, etc., Co.* (D. C.) 110 Fed. 669, we affirmed upon the opinion of Judge Addison Brown, 114 Fed. 1019, 52 C. C. A. 566. That case covers the point here presented. In *Hastorf v. Long, etc., Co.*, 239 Fed. 854, 152 C. C. A. 638, we said, of a vessel under a charter precisely like the present one:

"Between the owner and the charterer in cases of such boats [i. e., harbor craft without motive power] the former is liable for any injury *to the boat* by reason of the negligence of her master in caring for her."

There can be no difference between injury *to* the boat caused by her master's negligence and injury by the boat similarly occasioned.

We have not overlooked *Gibson v. Manetto Co.*, 194 Fed. 331, 114 C. C. A. 291. That case relates to an entirely different class of vessels; our decisions have, as above indicated, rested on the nature and exigencies of harbor business only. The case of *The Carroll*, 248 Fed. 475, — C. C. A. —, decided this day, marks the different result when the laborer is chosen by the charterer. *Hahlo v. Benedict*, 216 Fed. 303, 132 C. C. A. 447, and cases cited, covers the demise of a navigating vessel.

Decree affirmed, with interest, and costs to libelants. No costs to the city of New York.

THE F. B. SQUIRE.

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

Nos. 49-51.

1. ADMIRALTY ⚓118—REVIEW ON APPEAL—FINDINGS OF FACT.

Where a narrow issue of fact is presented, upon which the evidence is conflicting, the decision of an experienced trier of facts, who heard the witnesses, is not to be set aside, unless certainty of error can be asserted.

2. MASTER AND SERVANT ⚓301(1)—LIABILITY FOR INJURIES TO THIRD PERSONS—MASTER PRO HAC VICE.

A vessel arrived in port with a cargo of wheat, a small part of which was damaged, and was sold by the underwriter while still in the ship. It was taken out by the purchaser, the ship furnishing the winch and winchman, and through the negligence of the winchman employés of the purchaser engaged in the work were injured. No contract for such service was made, and no charge was made by the ship therefor. It was customary for the ship to furnish winch and winchman in such cases, and everybody assumed that this would be done. There were only 500 bushels of the wet wheat, and it was to the interest of the ship that it should be promptly taken out. *Held*, that the winchman did not become pro hac vice the employé of the purchaser, but remained the servant of the ship, which was liable for his negligence.

Appeals from the District Court of the United States for the Western District of New York.

Suits in admiralty by Walter L. Kennerdell, by Frank Preston, and by George Hackemer, Jr., an infant, by his guardian ad litem, against the steamship F. B. Squire; the Jenkins Steamship Company, claimant. Decrees for libelants, and claimant appeals. Affirmed.

Final decrees in admiralty were entered in the District Court for the Western District of New York. The steamship Squire, laden with wheat, arrived at her port of destination (Buffalo) with a small portion thereof wet. This damage was ascertained before unloading. Claim was made against underwriters of cargo, who accepted liability, considered the wet wheat their own, and offered it for sale. Sale was held on or alongside the ship; the damaged wheat being still in the hold. The successful bidder testified that the insurers' agent advised him that the shipmaster would "hoist the grain up" out of the hold, but that he had no talk, and made no specific arrangement, with said master.

The insurers' agent, who conducted the sale, did not remember that he had had any conversation on the subject, but that he "may have said that [the purchaser] probably could arrange with the captain to hoist it." The ship captain testified that the agent said to him, "Will you give [the purchaser] a winch?" and he replied, "Yes, I will accommodate him with a winch," adding "I will give [him] a man to operate the winch." The captain further declared that he never permitted anybody but his own men to run a winch, and that he had no arrangement for payment to the ship in respect of the winch and workman, in so far as their labor hoisted wet, rather than sound, grain. In point of fact, no charge was ever made by the ship as to damaged grain, nor was payment for the service ever offered. Whether this method of procedure was customary the master did not know.

There was evidence that in respect of wet grain it was the custom of Buffalo "to furnish the labor to deliver the wet grain out of the hold of the ship," though one witness confined that custom to the delivery of "wet stuff out of the cargo hold," when the carrier was liable for damage, saying that, when "the underwriters sell the grain, we [i. e., the shipowners] don't pay any

attention to it whatever." It is clear from the evidence that, if the ship had charged for the winch and man, the underwriters would have felt obliged to pay. But it is also plain by inference that (at least) when the amount of injured grain was very small, compared with the whole cargo, the ship put it overside with the rest of the lading and made no separate charge; it being the admitted duty of the vessel to deliver her sound cargo alongside at her own cost and charges. At the rate sworn to, the expenses of hoisting out the amount of wet grain in this case (500 bushels) would have been very trifling, and no one paid any attention to it.

The purchaser of the "wet stuff" sent employes of his own into the hold to prepare drafts. One man employed by the purchaser was stationed at the hatchway (standing on a hatch cover), in order to steer or guide the drafts coming out of the hold at the end of a fall moved by the winch; that machine being operated by a member of the steamer's crew. One of the drafts caught under the hatch cover, dislodged it, and precipitated hatch cover and man into the hold, producing, either by the fall itself, or contusions from the falling hatch cover, injuries to the three libelants named above. They severally instituted these suits against the ship. The trial court sustained all the libels, and the claimants of the steamship took these appeals.

S. H. Holding, of Cleveland, Ohio (Holding, Masten, Duncan & Leckie, of Cleveland, Ohio, of counsel), for appellant.

Hamilton Ward, of Buffalo, N. Y. (W. J. Wetherbee, of Buffalo, N. Y., of counsel), for Kennerdell and Preston.

Lawrence J. Collins, of Buffalo, N. Y., for libelant Hackemer.

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

HOUGH, Circuit Judge (after stating the facts as above). [1] The record contains some direct evidence that the winchman hoisted the draft so rapidly that it could not be guided clear of the hatchcovers. On conflicting testimony regarding matters which must all have occurred in a few seconds, the trial judge believed that this unnecessary and dangerous speed had occurred, and found therein the proximate cause of disaster. It is not possible to reconcile the stories of the few witnesses herein who could speak of the accident itself, and without exception their testimony is the reverse of disinterested. It is easy to point out discrepancies and improbabilities, but the main question stands out clearly enough, namely, whether the hatchcover fell into the hold by the clumsiness of the man who stood on it or by the haste of the winchman.

When so narrow an issue is presented by such a record, the decision of an experienced trier of facts, who saw and heard the plain men who told their stories in language loose and ungrammatical, to say the least, is not to be set aside unless certainty of error can be asserted. That we should hesitate to reach the same conclusion from the printed depositions does not, and should not, induce reversal of a finding based on sight and hearing. For these reasons we accept and adopt as a finding of fact that the winch was run with such speed that reasonable skill could not prevent the train of happenings resulting in the injuries giving rise to these three libels. *Brookheim v. Greenbaum*, 225 Fed. 763, 141 C. C. A. 89; *New England S. S. Co. v. New York & Co.*, 207 Fed. 73, 124 C. C. A. 633.

Assuming that the negligent act producing injury was that of the winchman, the question remains whether, when it was committed, that man was the servant of the ship engaged in ship's work, or pro hac vice the employé of the purchaser of the wet grain. On this vital point each party appeals to the rules of law stated in *Standard Oil Co. v. Anderson*, 212 U. S. 215, 29 Sup. Ct. 252, 53 L. Ed. 480. It is there pointed out that one wishing to accomplish a given work, and neither having the necessary workmen, nor desiring to take them into his general service, may procure help from another for the accomplishment of that particular work. This emergency employment may take either of two forms: In the first the temporary workers become the servants of the man to whom they are lent; in the second the general employer retains his mastership by agreeing to "furnish the completed work" through his own employés.

To assign any given case to one or the other class, inquiry must be made "whose is the work being performed," while carefully distinguishing "between authoritative direction and control and mere suggestion as to details or necessary cooperation, where the work furnished is part of a larger undertaking." These are the principles by which (as the court remarked in the cited case) the facts in evidence are to be considered.

The facts in the present litigation are in one sense very easy of statement. No one concerned or interested in the wet grain at the time bestowed a thought on the subject now advanced as the corner stone of decision. We are satisfied that it was customary for the ship to furnish winch and man, that everybody assumed that this would be done, that the grain was sold on that tacit assumption, and that no one expected any special charge to be made for putting a little wet wheat overside.

Evidence is to be read in the light of experience, and it is plain enough that the ship wanted the grain out promptly, as she was to sail in a few hours, that to refuse a winch and man would cause anger and delay, and that any captain who would not oblige in a matter apparently so small would not thereby increase his popularity alongshore. Therefore it was in a real sense for the benefit of the ship that man and machine were furnished.

Evidence producing in its entirety the foregoing impression wholly fails to prove any change in the usual and normal relations of the parties; they were not aware of change, thought of none, intended none, and it is very artificial to attribute to their words a meaning or result not thought of by the speakers. No one would have been more astonished than the ship captain to have been told that his winchman had become an employé of the grain purchaser. For these reasons we find no proof of any agreement that winch and man should change their normal relation to the ship, and the burden of evidence is on him who alleges a variation from the normal. If there was no contract—i. e., no meeting of minds—on the subject, the mere fact that the ultimate object was to get out of the hold the grain of a man to whom the ship owed no contractual duty did not change the relationship of any man to any master. As pointed out above, there was much reason for

the ship's wanting to get rid of the grain, and even a gratuitous service does not discharge him, who renders it from the duty of ordinary care.

Being therefore of opinion that employment pro hac vice is not proven, that the burden is on claimants in that regard, and that libelants were injured in the negligent performance of work partly for the benefit of the ship and by a ship's servant, the decrees appealed from are affirmed, without interest and with one bill of costs, to be taxed in the case of Kennerdell.

THE ELEANORE.

THE J. PIERPONT MORGAN.

(Circuit Court of Appeals, Sixth Circuit. January 11, 1918.)

No. 2970.

1. COLLISION ⇨153—REVIEW ON APPEAL—FINDINGS OF FACT.

Where the issues involved only questions of fact, the finding of the District Court, which heard the witnesses in an admiralty case, that a steamer passing through a channel of the Detroit river was not in fault for the sinking of a barge anchored or moored near the edge of the channel, will not be disturbed by the appellate court, if there is material evidence to support it.

2. ADMIRALTY ⇨73—HEARING AND DECISION—LATITUDE OF PROCEDURE—PERSONAL KNOWLEDGE AND EXPERIENCE OF JUDGE.

Under the latitude allowed courts of admiralty in dealing with facts relating to navigation, it is not improper for a judge to use his own knowledge of navigation and seamanship, or of the locality in question, which he had acquired by personal observation and experience, in considering and weighing evidence, and deciding cases of conflicting evidence.

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

Suit in admiralty by Harris W. Baker, owner of the barge Eleanore, against the steamer J. Pierpont Morgan; the Pittsburg Steamship Company, claimant. Decree for claimant, and libelant appeals. Affirmed.

Ferris D. Stone and Miller, Smith, Canfield, Paddock & Perry, all of Detroit, Mich., and Frank S. Masten, of Cleveland, Ohio, for appellant.

George W. Cottrell and Hermon A. Kelley, both of Cleveland, Ohio, for appellee.

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

McCALL, District Judge. On the night of October 3, 1914, the barge Eleanore, 180 feet long, 35 feet beam, and 10 feet extreme depth, property of libelant, Baker, lay moored near a concrete crib, which was being constructed on or near the easterly margin of Livingston Channel, in the vicinity of the mouth of the Detroit river.

About 11 o'clock on the night in question, the steamer J. Pierpont Morgan, a steamer 600 feet long, 58 feet beam, and 27.4 feet depth, property of the Pittsburg Steamship Company, passed down through the channel, when the barge was torn from her moorings, went against the crib, and sank. Baker, the owner of the barge, brought this suit against the Morgan to recover for the damage wrought. The court below found that the Morgan was not, and that the Eleanore was, at fault, and dismissed the libel. Libellant appealed.

The Detroit river at this point, since the beginning of navigation, appears to have been troublesome for mariners, originally because of its shallow water and stony bottom. To remedy this condition, the government in the fall of 1912 completed an additional channel, known as the "Livingston Channel," through what was naturally shoal water. The channel is about 3 miles in length and 300 feet wide. In the fall of 1914 the government was engaged in erecting two cribs in shoal water outside of and near the eastern margin of the channel and, as respects its length, near its middle, and had contracted with the owner of the Eleanore for the services of the barge and a crew of three men during the construction of the cribs, which were intended for the placing of lights for the better marking of the easterly edge of the channel. The barge was loaded with material to be used in cement work, and on October 1st she was taken to a point where the work was to be done, and moored about 30 or 40 feet easterly of the crib, with her stern a few feet nearer thereto than the bow. It is averred that the barge was moored "in a safe and proper place, with sufficient lines and fastenings, including four anchors, with steel cables, in good holding ground; that her anchor lights were duly displayed and burning brightly, and she was plainly visible to all using those waters"; and while so moored the steamer Morgan passed down at a great and excessive speed, and produced such a suction and swell as to tear her from her moorings, and drive her violently against the crib, causing her to sink. This, it is averred, resulted from the negligence of the Morgan, her officers and crew, in the following particulars:

"(a) In not keeping a proper and sufficient lookout. (b) In navigating at an excessive rate of speed. (c) In failing to properly check her speed. (d) In neglecting to control and reduce her suction and displacement waves, while the Eleanore was within her influence and effect. (e) In failing to take such course and speed as the safety of the Eleanore required. (f) In causing said damage by her suction and displacement."

The libelee denies each of these allegations, and avers that, if the Eleanore was sunk and damaged, it was in no wise caused by the fault or negligence of the claimant or of the steamer Morgan, or those in charge of her, but was caused solely by the fault and negligence of the barge Eleanore and those in charge of her, in the following particulars:

"(1) She was in charge of incompetent and negligent officers and watch. (2) She was insufficiently and improperly moored and anchored. (3) She was improperly and insufficiently lighted. (4) She did not have steam with which to sound her whistle or to manipulate her engines and machinery. (5) She was negligently allowed to sink and become damaged after she had broke away from her moorings."

[1] The issues joined present only questions of fact which were tried to the court below. The witnesses were introduced and testified in open court, and it thus had the benefit of seeing the witnesses and hearing at first hand the testimony, covering 183 pages in the printed record. The testimony is voluminous, and a review of it here would extend the opinion beyond any reasonable length. We have given it careful consideration, and, having in mind the view expressed by Mr. Justice Greer in *The Hypodame*, 6 Wall. (73 U. S.) 216, 18 L. Ed. 794, that "the District Courts have better opportunities for examining such cases and forming a correct conclusion than any other," we are content to express concurrence in the finding of the District Judge to the extent that the Morgan was without fault, and are of opinion that that conclusion should not be disturbed. This being conclusive of the case, it would serve no useful purpose to review the findings respecting the negligence of the *Eleanore*.

[2] It is insisted that the court erred in considering his own "personal observation," in determining the strength and effect of cross-currents in the Livingston Channel. In his opinion Judge Tuttle said:

"I indicated at the beginning of this hearing my personal observation, in order that parties and counsel might know about it."

It would seem that, if counsel intended to except to his hearing and disposing of the case, because of his knowledge of the condition of the channel and the difficulty attending its navigation, obtained by his "personal observation," they should have done so at that time, and, not having done so, we think objection predicated on that ground comes too late when made by libelant for the first time on appeal.

However that may be, it is well settled that much latitude is allowed courts of admiralty in dealing with facts relating to navigation. Not only may the court itself take judicial notice of many things of which the common-law courts would require proof, but it is not bound by all the rules of evidence applied in courts of common law. Mr. Benedict, in the recent edition of his work on Admiralty Practice and Procedure (section 437), says:

"Courts of admiralty are not bound by all the rules of evidence which are applied in courts of common law, and they may, where justice requires it, take notice of matters not strictly proved, and may receive in evidence testimony which might not be admissible in other courts."

A court of admiralty also may call to its assistance men of experience in navigation, known in England as "Trinity masters," and in this country as "nautical assessors," who may sit with the court and advise with it. Judge Taft, speaking for this court in *The Fountain City*, 62 Fed. 87, 10 C. C. A. 278, said:

"It has been the practice in this circuit, and particularly in that court over which so experienced and able an admiralty judge as Mr. Justice Brown presided for nearly 20 years, for the District Judge to call to his assistance navigators of experience as nautical assessors. It was based on the practice, followed by the English admiralty judges, of advising with the elder brethren of Trinity House as to practical questions of seamanship and navigation. It has been approved by the Supreme Court of the United States, and it is of such long continuance that it is too late now to question its validity."

It being permissible for a judge to summon advisers, skilled in navigation and seamanship, to assist him in deciding questions arising in admiralty courts, it would not be improper, as we think, in such circumstances for a judge to use his knowledge of navigation and seamanship, which he had acquired by personal observation and experience, in considering and weighing evidence, and deciding cases of conflicting evidence. This is especially true in this case, since the knowledge the trial judge had of the Livingston Channel and its navigation, as stated in his opinion, is in accord with much of the testimony of witnesses pertaining to the same question, and we are satisfied that the trial court was not unduly nor erroneously influenced by its knowledge of the situation obtained by "personal observation."

We think this assignment, as well as others which we have considered, are without merit.

Affirmed, with costs.

THE CARROLL.

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

No. 78.

SHIPPING 654—CHARTER—LIABILITY OF CHARTERER FOR INJURY TO VESSEL.

Libelant chartered a barge for one year to respondent by a charter which required the charterer to exercise ordinary care and skill in its use, and to return it in as good condition as when received, reasonable wear, damage caused by accidents of the seas, etc., excepted. Libelant furnished a master, who was accepted and paid by respondent, which, however, was not bound to keep him. *Held*, that the charter was a demise, which made the charterer a bailee and liable for failure to return the barge in good condition, unless the injury or loss was occasioned by some act of libelant, or one for whom he was responsible, or by an excepted cause, which could not be avoided by the exercise of ordinary care and skill; that the master was not the servant of libelant, but of respondent; and that leaving the barge, which was without motive power, in an exposed position for 18 hours, where she was injured by the action of the seas, was a failure to exercise ordinary care, which rendered respondent liable for the injury.

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

Suit in admiralty by Lewis K. Thurlow, owner of the barge Panay, against the New England Steamship Company, Skeffington S. Norton, Joseph T. Lilly, John B. O'Reilly, and John T. Farrell, composing the firm of Norton, Lilly & Co., and the steamtug Carroll, the Carroll Towing Line, claimant. Decree for libelant against the New England Steamship Company, which appeals. Affirmed.

Libelant owns the barge Panay, and sued for injury to that vessel, caused by unnecessary exposure to a severe gale. The Panay was chartered by libelant to the New England Steamship Company for one year, by an instrument giving the charterers the bare boat; i. e., without crew or master. Libelant furnished a master, whom charterer accepted and paid, but there was no obligation to keep the man, and as matter of fact he was shifted to another boat of respondent's fleet at charterer's will. The charter party required

charterer "to exercise ordinary care and skill in * * * using * * * said barge, * * * to return the said barge * * * at the expiration of this charter party in as good order and condition as when received, reasonable wear and tear and damage caused by the acts of God, * * * strandings, and all other dangers and accidents of seas, rivers, harbors, and navigation excepted."

The charterer loaded the Panay with cargo for a steamer lying at the Bush Terminal, obtained a permit from the agents for said steamer, Norton, Lilly & Co., to put it aboard, placed the barge alongside the steamer, and left her with the barge master aboard. The tug Carroll subsequently removed the Panay to a berth where she was more exposed to the weather, the wind and sea rose during the night, and early next morning the barge master reported to the charterer by telephone that he was in danger. The charterer's agents did not promptly get assistance to her, so that after some hours she dumped her cargo and was herself considerably injured. This occurred more than 18 hours after the Carroll had taken her from alongside the steamer.

The libel charged the New England Steamship Company as charterer, and accused both respondents and the Carroll of negligence in giving the Panay a dangerous berth and not timely taking her to a place of safety. The court below entered decree against New England Steamship Company only, and dismissed the libel as to Norton, Lilly & Co. and the Carroll. The New England Steamship Company took this appeal.

Hyland & Zabriskie, of New York City, (Nelson Zabriskie, of New York City, of counsel), for libellant.

Charles M. Sheafe, Jr., of New York City, for New England S. S. Co.

Kirlin, Woolsey & Hickox, of New York City (Cletus Keating and John M. Woolsey, both of New York City, of counsel), for Norton, Lilly & Co.

Foley & Martin, of New York City (William J. Martin and George V. A. McCloskey, both of New York City, of counsel), for the Carroll.

Before WARD, ROGERS, AND HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). That the charter party was a demise, and made the New England Steamship Company a bailee, admits of no doubt. There was not even the usual hiring of the boat and taking the master with her, he remaining under owner's pay, which we have repeatedly held to constitute a demise in respect of harbor craft. *Hastorf v. Long, etc., Co.*, 239 Fed. 852, 152 C. C. A. 638; *Monk v. Cornell, etc., Co.*, 198 Fed. 472, 117 C. C. A. 232. This scow master was entirely the servant of the charterer; the charterer appointed and controlled him; that he came with the boat is not decisive. *Hahlo v. Benedict*, 216 Fed. 303, 132 C. C. A. 447. The New England Company was therefore by its contract liable for failure to return the Panay in good order and condition, unless her injury or loss was occasioned by some act of the owner, or of one for whom the owner was responsible, or by a cause excepted in the charter party. These exceptions are understood to mean such causes of injury as could not be prevented or avoided by the exercise of that ordinary skill and care covenanted for by the charterer—if not implied from the nature of the agreement.

That barges without motive power are daily insured from injury by

removing them to more sheltered berths is a matter of common knowledge. Danger of this kind may be, and commonly is, avoided by the exercise of this ordinary care and skill. Therefore the libel must be sustained against the New England Steamship Company, unless the injury was caused (a) by the negligence of the master, who (b) at such time was the servant or agent of the owner. Since, as above pointed out, this master was for all purposes the charterer's master, it makes no difference to this libelant whether he was negligent or not. Therefore that defense fails, although it may be said in passing that we perceive no fault in him.

Though Norton, Lilly & Co. were the agents of the steamship, the evidence proves that, after they had issued to the New England Steamship Company the "permit" for cargo, they had nothing more to do with the management or berthing of barges like the Panay. That matter was in charge of the lessees of the wharf at which the steamer lay, whose employé gave directions as to how barges should be unloaded and where they should lie while awaiting their turn. He it was who employed and directed the Carroll to put the Panay where, on the following day, she was injured by storm. This wharfinger is not a party to this suit, and therefore the question of negligence on his part is not before us. The Carroll was not even called upon to produce evidence in the court below, and it is plain that her relation to the injured barge terminated when in calm weather she placed the Panay where ordered by the wharfinger's agent.

The decree below is affirmed, with costs to all the appellees.

PAMPA GRAIN CO. v. OKLAHOMA CITY MILL & ELEVATOR CO.

(Circuit Court of Appeals, Fifth Circuit. January 28, 1918. Rehearing
Denied March 13, 1918.)

No. 3028.

SALES Ⓒ202(6)—**SALE OF GRAIN—TIME OF TAKING EFFECT—DELIVERY.**

The buyer of wheat, in accordance with the rules of the Texas Wheat Growers' Association, wrote letters of confirmation, directing shipment to Galveston for export, and reciting: "Delivery of grain not perfected until grain reaches destination and has been inspected and weighed." The seller, having signed and returned such letters of confirmation, loaded the grain for shipment; bills of lading being issued to the seller, with directions to notify the buyer. Drafts attached to the bills of lading were paid by the buyer on presentation; the bills of lading being delivered to the buyer. *Held*, that title then passed to the buyer, notwithstanding want of inspection and weighing, for there may be a sale without completed delivery, so that loss of the grain in a flood at Galveston must fall on the buyer.

Walker, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

Action by the Oklahoma City Mill & Elevator Company against the

Pampa Grain Company. There was a judgment for plaintiff (237 Fed. 715), and defendant brings error. Reversed and remanded.

W. H. Kimbrough, R. E. Underwood, and M. J. R. Jackson, all of Amarillo, Tex., for plaintiff in error.

Frank Wells, J. R. Keaton, and D. I. Johnston, all of Oklahoma City, Okl., for defendant in error.

Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

BATTS, Circuit Judge. The Pampa Grain Company sold to the Oklahoma City Mill & Elevator Company two lots of wheat, of 6,000 bushels and 15,000 bushels; the Elevator Company being represented in the transaction by Kent Barber, and Tom F. Connally, and the Pampa Grain Company by A. C. Matthews. Immediately after the transaction between these representatives of the concerns, and in accordance with the practice resulting from an observance of the rules of the Texas Wheat Growers' Association, the Oklahoma City Mill & Elevator Company wrote letters of confirmation, which were signed by the Pampa Grain Company and returned. These letters constitute evidence of the contract between the parties. Pertinent provisions are:

"We confirm purchase from you to-day by Tom F. Connally of ——— capacity cars 6,000 bushels No. 2 hd. wheat at \$1.18½ basis, delivered Galveston, shipment this week days via ———. Galveston weights and Galveston grades. Ship to S. O. Notify Oklahoma City Mill & E. Co., Galveston, for export. Care of Galveston Wharf Company Elevators.

"Please comply with routing requested. We reserve the right to change destination of shipment in transit. Draw on us at Oklahoma City, with shipper's order bill of lading attached, leaving sufficient margin to guarantee weights and grades. Shipper pays weighing, inspection, trackage, and exchange, if any. Delivery of grain not perfected until grain reaches destination specified and has been inspected and weighed. We reserve the right to unload off grades grain without first notifying you. On contract not filled in contract time we reserve the right to cancel, extend time or buy in for seller's account."

After the signatures:

"Lower grades to apply at the following discounts: No. 3, 58 or better, 1 cent off; 57, 2 cents off; 56, 3 cents off. * * * Rejected wheat, 58 lb. or better, 6 cents off; one cent additional off for each lb. below 58 lb. No-grade wheat, if merchantable, 58 lb. or better, 7 cents off," etc.

Immediately after the making of these contracts, the wheat was loaded on cars of the Atchison, Topeka & Santa Fé Railway Company, and bills of lading were issued to the Pampa Grain Company, "notify Oklahoma City Mill & Elevator Co., at Galveston, Texas." Drafts, with these bills of lading attached, were put in bank by the Pampa Grain Company, and, upon presentation, were paid by the Oklahoma City Mill & Elevator Company. After payment of the drafts and the delivery of the bills of lading to the Oklahoma Company, the grain was destroyed in the storm at Galveston in August, 1915. The issue is as to who is to stand the loss. No question would arise as to the completion of the sale, except for the language in the confirmation:

"Delivery of grain not perfected until grain reaches destination specified and has been inspected and weighed."

There may be a sale without completed or perfected delivery. By delivery of the bills of lading, and by the express terms of the confirmation letter, the Oklahoma Company acquired complete dominion over the property, with the right to change its destination in transit, to sell at this changed destination, or to sell in transit. The Oklahoma Company acquired with reference to it all the rights of ownership. It must be held to have the corresponding obligations and liabilities. As the owner of the property it must stand the loss of its destruction. The contract contemplated that there might be readjustments in weight, and this was what was in the minds of the parties as required for perfecting the delivery at the point of destination. The contract as written leaves the destination uncertain. The phrase "wheat at \$1.18½ basis, delivered Galveston," has reference to the price, and was not, within itself, sufficient to name the place of delivery. The order in the letter was to ship to Galveston for export, but the right to change destination of shipment in transit was reserved, and, in any event, Galveston was not the point of ultimate destination. However that may be, it is quite certain that the incidents of ownership passed to the Elevator Company by the payment for the property and the receipt of the bills of lading, and the loss must necessarily fall upon it.

The judgment is reversed, and the cause remanded for proceedings not inconsistent herewith.

Reversed and remanded.

WALKER, Circuit Judge (dissenting). It does not seem to me that the conclusion stated in the foregoing opinion, to the effect that the delivery of the wheat was complete when the buyer got the bill of lading for it, is consistent with the language of the contract, saying that it was sold—

"basis delivered Galveston. * * * Delivery of grain not perfected until grain reaches destination specified and has been inspected and weighed."

The wheat was at the seller's risk until the delivery called for by the contract was complete. The price stated was agreed to be paid, not for wheat delivered to a carrier destined to Galveston, with the right in the buyer to change the destination, but for wheat delivered at the original or substituted destination. When the contract expressly calls for an actual delivery at destination, there is no room for saying that a constructive delivery by furnishing a bill of lading was all that was required to put the subject of the sale at the buyer's risk. It is an everyday occurrence for a seller to get the price of his goods before, by delivery, they cease to be at his risk. It seems to be a fair inference that the sole purpose of the stipulation for the buyer getting the bill of lading on paying the draft for the price was to enable it to get the wheat when it reached its destination, without exposing the seller to the risk of losing the price of it, though it was actually delivered. That stipulation is not at all inconsistent with the existence of an intention that the wheat should remain at the seller's risk until

the actual delivery called for by the contract was complete. After the seller received the price, it could not be harmed by such control over the wheat while in transit as was conferred by delivery of the bill of lading. It seems to me that the failure to make the stipulated actual delivery deprived the seller of the right to retain the price paid.

THE EMILIA S. DE PEREZ.

(Circuit Court of Appeals, Fifth Circuit. February 8, 1918.)

No. 3129.

1. SHIPPING Ⓒ84(3)—STEVEDORES—TACKLE—DUTY OF VESSEL.

Where a vessel furnished the tackle for use by stevedores, it owed a duty to the stevedores to use reasonable care to see that the tackle was fit for use, and the furnishing of tackle with defects which a reasonable inspection would have disclosed is negligence.

2. SHIPPING Ⓒ86(2)—STEVEDORES—PERSONAL INJURIES—EVIDENCE.

On libel by a stevedore, injured in loading a vessel when a bale of cotton fell as the result of the breaking of a clevis furnished by the vessel, a finding that the defect in the clevis could have been ascertained by an ordinarily careful inspection *held* warranted under the evidence.

3. MASTER AND SERVANT Ⓒ354—WORKMEN'S COMPENSATION ACT—APPLICATION TO STEVEDORES.

A stevedore employed by a Texas company was injured while loading a vessel. Under the Texas Workmen's Compensation Act (Acts 33d Leg. c. 179 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz]) the stevedore asserted a claim against his employer and received payment from an insurer, with whom the stevedore's employer as well as the agents of the vessel had taken out insurance. *Held* that, as the Texas act was inapplicable to the stevedore's claim against the vessel, and as he asserted no claim against the insurer as an insurer of the vessel or its agents, such payment did not bar his claim against the vessel, but amounted at most to a pro tanto satisfaction.

4. APPEAL AND ERROR Ⓒ932(1)—REVIEW—PRESUMPTIONS.

Where testimony showing a pro tanto satisfaction of libellant's claim was received, it must be assumed on appeal that the lower court gave proper effect thereto.

Appeal from the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge.

Libel by E. P. McGowen against the steamship Emilia S. De Perez, claimed by Angel F. Perez. From a decree for the libellant, claimant and the sureties on his stipulation for release of the vessel appeal. Affirmed.

William B. Lockhart, of Galveston, Tex., for appellant.

Marsene Johnson, of Galveston, Tex., for appellee.

Before WALKER and BATTIS, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. The appellant was the claimant of the steamship Emilia S. De Perez, which was libeled by the appellee in an action seeking to recover damages for a personal injury received by him

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

while he was in the employment of the Galveston Stevedore Company, which was loading the ship, as an independent contractor, in the port of Galveston.

[1] The libellant was injured on April 29, 1915, while working in the lower hold of the ship, by the fall of a bale of cotton, which was being loaded into the ship, and which struck him in its fall. The bale fell because of a defective clevis, to which was attached the hook which held the cotton, while it was being loaded. There was no dispute as to existence of a defect in the clevis that broke, or that it was partly an old break. The only matter in dispute was as to whether the defect could have been discovered by a reasonably careful inspection. The tackle, including the clevis, was furnished the stevedores by the ship, and it owed the duty to the stevedores to use reasonable care to see that the tackle was in fit condition for use. This would require of the ship to use reasonable care to inspect the appliances furnished, before they were used, and, if such reasonable inspection would have disclosed the defect before the clevis was used by the stevedores, the ship would have been negligent in failing to make the discovery and in furnishing the defective clevis.

[2] The appellant contends that the defect was not discoverable and that the accident was unavoidable. It is not claimed that the appellee was himself at fault. The evidence tended to show that there was a partly new and partly old break at the point of fracture. There was no evidence as to its condition before the accident, except as might be inferred from its condition after. There is no evidence of any specific inspection of the clevis by the ship or the stevedores before the accident happened. The witness Goudge, who was manager for the stevedore company, testified for the claimant that the ship furnished the equipment; that the tackle was not examined personally by him, or minutely by any one; and that, unless the hook was obviously too small, and objected to by the gang for that reason, no examination was made. This witness also testified that there was a rusty place in the break, but one that was not discernible from the outside. In response to an inquiry as to how rust could get inside, if there was no exposure to the outside, the witness said:

"That it would have to find an opening or kink or flaw in the welded part, and it appeared perfectly sound, but when it broke open it probably rusted half way through; that there could be a fibrous streak in the wire, that would not be discernible without looking at it with a magnifying glass."

Again he testified:

"That there was nothing you could see on the outside of the shackle to show there was any flaw in the welding at all, but there was a mark of rust in one edge of it, but the greater part of it was new."

The appellee testified that he saw the broken clevis right after the accident; that it showed black and an old break. His witness Page testified that he saw the clevis after it was broken, and did not piece together the broken parts, but that, if it had been put back in position, he thought the hole could have been seen going through it, though he

could not say this with positiveness, as he did not make the experiment.

We are not prepared to say that the District Judge erred in concluding from this testimony that the defect was one that would have been discernible by an ordinarily careful examination, especially as no such examination was made of it before the accident.

[3, 4] The appellant also contends that the decree was erroneous because of the asserted effect of the appellee's acceptance of the sum of \$112.50 in the November succeeding his injury from the American Indemnity Company, with whom the Galveston Stevedore Company and the ship-agents of the claimant's ship, for the benefit of the ship, had taken out insurance, as required by the Workmen's Compensation Act of the state of Texas. It is conceded that the provisions of the Texas statute are not applicable to the situation. *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, Ann. Cas. 1917C, 900. The contention is that the appellee, by having voluntarily asserted a claim against the Galveston Stevedore Company, his employer, under the Texas law, has elected to waive his remedy elsewhere.

Whatever force the argument might have, as against the appellee's right to now proceed against his employer, the Galveston Stevedore Company, we think it should be given no such effect against the right of appellee to pursue the ship. He was concededly not employed by the ship, and could not have been benefited by any insurance the ship had taken out to protect its employes, and he made no claim against the American Indemnity Company, as insurers of the ship or its agents, but only against the insurance taken out by the Galveston Stevedore Company to protect its employes, of whom appellee was one. The receipt taken by the American Indemnity Company recognizes this by its recitals. The release purports to be taken in favor of American Indemnity Company and the Galveston Stevedore Company only, so far as it applies to the Workmen's Compensation Act. As the appellee was not employed by the claimant, and could not have successfully asserted a claim to insurance taken out by the claimant or his agents for the employes of the ship, and as the appellee, in fact, made no such claim, and was paid nothing on account of such a claim we do not think he is precluded from pursuing the ship, unless, independently of the Texas act, the effect of the release was to satisfy his cause of action in full against both joint tort-feasors, the ship and the stevedore company; and appellant claims it should be given that effect.

What might have been the effect of the release, if it had not been executed with the understanding of both parties to it that it was to evidence the receipt of insurance paid appellee under the Texas Workmen's Compensation Act, we need not inquire. Its recitals show that both parties understood the Texas law to be applicable, and executed the release to carry out its terms. This being true, the release should be given no greater effect than the Texas law would, if applicable, have given to the receipt of the payments by the appellee. If the law had been applicable to the accident, the receipt of the stipulated insurance

would have precluded the appellee from suing his employer; not because the payments necessarily fully satisfied his cause of action, but because, under the Texas law, he was not permitted to pursue both remedies. The Texas law did not, however, preclude him from pursuing a stranger, who was jointly liable for his injury. In order to bar his action against a stranger, it would be necessary to show that he had been fully satisfied by the payment made to him for the cause of action for his injuries. This could only be done by showing an agreement on his part to accept them in full satisfaction, or by convincing the court that they were adequate in amount to that end. We think the utmost effect to be given the payments made to him and the release signed by him, either under the Texas Workmen's Compensation Act or at common law, would be to estop him from suing his employer and as a pro tanto satisfaction of his cause of action against a stranger. The evidence as to the amount received by appellee was before the District Judge, and we must assume that he gave it its legal effect in fixing the amount of the decree rendered.

The decree of the District Court is affirmed.

GLENWOOD IRR. CO. v. VALLERY.

VALLERY v. GLENWOOD IRR. CO.

(Circuit Court of Appeals, Eighth Circuit. January 26, 1913.)

Nos. 4833, 4834.

1. JURY \Leftrightarrow 37—REVIEW—FINDINGS BY JURY—AMOUNT OF RECOVERY.

Where the amount plaintiff was entitled to recover was uncontroverted, and the court charged the jury to find for that amount in event they found for plaintiff, a reversal of judgment based on a verdict for a less amount is not a violation of the rule that a fact tried by jury cannot be re-examined in the federal courts, otherwise than according to the rules of the common law, because the amount of the recovery was not in issue or submitted.

2. APPEAL AND ERROR \Leftrightarrow 973(5)—REVIEW—DISCRETION—REFUSAL OF NEW TRIAL.

Where the amount of plaintiff's recovery was uncontroverted, but the jury, in violation of the court's charge, found for a less amount than that established by the evidence, the reversal of a judgment based on such verdict was not a violation of the rule that a refusal of the trial court to disturb the verdict on motion for new trial is a matter of discretion, for it was the duty of the trial court as a matter of law to decline to enter judgment upon such verdict.

3. APPEAL AND ERROR \Leftrightarrow 979(5)—REVIEW—DISCRETION OF TRIAL COURT.

Where the trial court, though the jury, in violation of the instructions, found for an amount less than that which the uncontroverted evidence showed plaintiff was entitled to recover, if at all, the refusal of a motion for a new trial was such an abuse of discretion that a reversal of the judgment on writ of error was proper.

4. COURTS \Leftrightarrow 295—FEDERAL COURTS—JURISDICTION.

The federal court may entertain a suit by a receiver appointed therein against a resident of the state of which the receiver was a resident.

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

Action by George W. Vallery, as receiver of the Colorado Midland Railway Company, against the Glenwood Irrigation Company. There was a judgment for plaintiff for partial relief, and both parties bring error. Judgment reversed on plaintiff's writ, with directions to grant new trial, and defendant's writ of error dismissed.

E. L. Clover, of Denver, Colo., for plaintiff in error in No. 4833.

Henry T. Rogers, Daniel B. Ellis, Lewis B. Johnson, Pierpont Fuller, and George A. H. Fraser, all of Denver, Colo., for defendant in error in No. 4833 and plaintiff in error in No. 4834.

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

AMIDON, District Judge. Vallery, as receiver of the Colorado Midland Railway Company, brought an action, as plaintiff, against the Glenwood Irrigation Company, as defendant, to recover damages for a trestle destroyed by fire alleged to have been set by defendant. The value of the bridge and the expense caused by its destruction was fixed by the evidence, at \$1,973.89. As to this amount there was no controversy. The trial judge in his charge told the jury in substance that, if they found in favor of the plaintiff, he was entitled to recover that amount. It was developed in the evidence that the railroad company carried insurance upon its trestle, for which it had collected \$1,200; but the judge in his charge told the jury expressly that no deduction could be made from their verdict on account of the insurance. The jury, in disregard of the charge, returned a verdict in favor of the plaintiff for \$760.03. It is reasonably clear that they arrived at this amount by deducting the \$1,200 from the amount of plaintiff's damages. Both parties immediately excepted to the verdict, and both parties have sued out writs of error to review the judgment entered upon it. Plaintiff asks that it be set aside because, as a mathematical demonstration, it was contrary to law as declared to the jury by the court; the defendant, for errors of law occurring at the trial.

[1-3] No issue was submitted to the jury as to the amount of plaintiff's recovery. They were confined by the charge to determining defendant's liability for the fire. It is manifest, therefore, that the amount of the damages was not "a fact tried by the jury," within the meaning of the Seventh Amendment to the federal Constitution. The verdict is perverse and directly violative of the charge of the court. When that appears as a matter of mathematical calculation, the verdict cannot stand. It is error of law to enter judgment upon it, which an appellate court may properly review. The verdict stands in this case as it would in a suit on a promissory note for \$2,000, upon which no payment had been made, and the jury returned a verdict for \$1,000. The judgment in such case for \$1,000 would be reversible as for an error of law. *Pierce v. Schaden*, 62 Cal. 283. Such a reversal does not violate the rule that a fact tried by a jury cannot be

re-examined in the federal courts otherwise than according to the rules of the common law, because the amount of damages was not in issue and was not submitted to the jury for trial. Nor does such a decision violate the rule that a refusal of the trial court to disturb the verdict on motion for new trial is matter of discretion, because the duty not to enter judgment upon such a verdict is one of law, and not of discretion. Or, if there was discretion, it was so abused as to support correction on writ of error. *Pugh v. Bluff City Excursion Co.*, 177 Fed. 399, 401, 101 C. C. A. 403; *James v. Evans*, 149 Fed. 136, 141, 80 C. C. A. 240; *Higgins v. U. S.*, 185 Fed. 710, 717, 108 C. C. A. 48; *Thompkins v. M., K. & T. Ry. Co.*, 211 Fed. 391, 397, 128 C. C. A. 1, 52 L. R. A. (N. S.) 791.

[4] Defendant attacked the jurisdiction of the court because both plaintiff and defendant were citizens of Colorado. That objection, however, is not tenable, because the plaintiff was a receiver appointed by the federal court.

On the question of defendant's liability there was sufficient evidence to justify the submission of the cause to the jury.

The judgment is reversed on plaintiff's writ of error, with direction to grant a new trial. In view of the conclusion reached, defendant's writ of error is dismissed.

UNITED STATES v. ROUTT COUNTY COAL CO. et al.

(Circuit Court of Appeals, Eighth Circuit. January 24, 1918.)

No. 4852.

1. CORPORATIONS ⇨428(7)—KNOWLEDGE OF VICE PRESIDENT—IMPUTATION.

Where the vice president of the purchasing company had knowledge of and had participated in the fraudulent procurement of a patent to land, his knowledge is chargeable to the purchasing corporation, so that, in a suit to cancel the same, the defense of bona fide purchaser is unavailable.

2. PUBLIC LANDS ⇨120—BONA FIDE PURCHASERS—DEFENSES.

In a suit to cancel a patent to coal lands on the ground that it was procured by fraud, the defense of bona fide purchaser is available to a lessee for a term of years, who had prior to institution of the suit paid practically the whole of the consideration.

3. VENDOR AND PURCHASER ⇨231(3)—BONA FIDE PURCHASERS—NOTICE—RECORD.

The record of title in the office of the register of deeds does not import notice of all suspicious or speculative inferences which might be drawn from the muniments of title as a result of a mathematical comparison of the dates of various different instruments.

4. PUBLIC LANDS ⇨138—BONA FIDE PURCHASERS—CONSTRUCTIVE NOTICE.

That the receiver's receipt for public land bore a date subsequent to the date of the conveyance by the entryman is not a fact which would charge subsequent purchasers with notice of the fraud, for delays in issuing receipts in the land office are frequent and the transaction might well have been innocent.

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Bill by the United States against the Routt County Coal Company, the Rugby Fuel Company, and others. From a decree dismissing the bill as to the named defendants, complainant appeals. Modified, so as to declare void the title of the Routt County Coal Company, and otherwise affirmed.

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

Frank McDonough, Sr., of Denver, Colo. (Frank McDonough, Jr., of Denver, Colo., on the brief), for appellees.

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

AMIDON, District Judge. [1, 2] This is a suit brought by the United States to cancel a patent for coal land on the ground of fraud. The lands were entered by a man by the name of Miller, at the instance of Frederick A. Craise, the president of the Empire Oil, Coal & Copper Company, and for the benefit of that company. Craise acted as his attorney in the land office, paying all the expense and the purchase price of the land. Miller simply lent the use of his name, and conveyed the property to the Empire Oil, Coal & Copper Company at the time the receiver's receipt was issued. The court below properly found that the entry and patent were fraudulent as against Craise and the Empire Company. The entry was made in 1901, and patent was obtained in 1906. In 1904 the Empire Company conveyed the land to the Routt County Coal Company. At that time Craise was vice president of the latter company. His knowledge of the fraud was therefore imparted to it. It results that, while the Routt County Coal Company paid a valuable consideration, it took with notice, and cannot hold the title. That company executed a lease of the property now held by the Rugby Fuel Company. The lease runs for 11 years, with a right of renewal for an additional 11 years. This lease was taken for a valuable consideration, the greater part of which had been paid before this suit was brought, and without notice of any fraudulent practices.

The trial court dismissed the bill as to Routt County Coal Company and the Rugby Fuel Company, upon the ground that they were both bona fide purchasers. The decree was right as to the latter company, but wrong as to the former, for the reasons above stated.

[3, 4] An attempt is made to impart constructive notice of the fraudulent character of Miller's entry to all purchasers from these facts:

Miller executed his deed for the property to the Empire Company August 4, 1902. It was filed August 18th of the same year. The receiver's receipt bears date August 13th, nine days subsequent to Miller's deed, and was filed August 18th, the same day as the deed. Counsel for the government argues that, because Miller's deed

bears date nine days earlier than the receiver's receipt, this is such a suspicious circumstance as to put any subsequent purchaser of the title upon inquiry and charges him with notice of the fraud upon the ground that if the inquiry had been made the fraud would have been discovered. That is not the law. The record of title in the office of the register of deeds gives constructive notice to subsequent purchasers of all liens, titles, and interests created by the instruments previously filed. The registry, however, does not impart notice of all the suspicious or speculative inferences which an inspector, familiar with a fraudulent transaction, might draw as the result of a mathematical comparison of the dates of different instruments. We say this for two reasons:

(1) The fact that the receiver's receipt bears date subsequent to Miller's deed is as susceptible of an innocent explanation as of a fraudulent one. Delays in issuing receipts in the land office are frequent. The proof may be accepted, and the officers state that it is entirely satisfactory, and that the receipts will be issued in due course of business. Such delay may also be due to some merely formal matter, which the entryman is required to supply before the receipt will be issued. In either case the execution of the deed prior to the issuance of the receipt would be an innocent transaction.

(2) As is already stated, the registry was not notice of inferences which could only be drawn by mathematical calculation from the dates. Such a circumstance would not be sufficient to put a purchaser upon inquiry within any sound rule of law. *United States v. Detroit Timber & Lumber Co.*, 131 Fed. 668, 67 C. C. A. 1; *Shulthis v. McDougal*, 170 Fed. 529-540, 95 C. C. A. 615; *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 26 Sup. Ct. 282, 50 L. Ed. 499; *Tobey v. Kilburne*, 222 Fed. 760-764, 138 C. C. A. 308.

The decree of the trial court is modified, so as to declare null and void the title of the Routt County Coal Company, and otherwise is affirmed.

AMERICAN FALLS MILLING CO. v. STANDARD BROKERAGE & DIS-
TRIBUTING CO.

(Circuit Court of Appeals, Eighth Circuit. January 26, 1918.)

No. 4969.

1. EQUITY ⇨41—JURISDICTION—RETENTION AFTER DENIAL OF INJUNCTION.

Under Judicial Code (Act March 3, 1911, c. 231) § 267, 36 Stat. 1163 (Comp. St. 1916, § 1244), providing that suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law, a court of equity, after denial of an injunction, which was the only equitable relief sought, has no jurisdiction to proceed with the cause for the purpose of awarding damages to complainant, but the cause should be transferred to the law side of the court, pursuant to equity rule 22 (198 Fed. xxiv, 115 C. A. xxiv).

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

2. EQUITY ⇨41—JURISDICTION.

Where the only equitable relief sought, which was an injunction, was denied, a court of equity is without jurisdiction to retain the cause and award complainant damages; equity rule 23 (198 Fed. xxiv, 115 C. C. A. xxiv) declaring that if, in a suit in equity, a matter ordinarily determinable at law arises, such matter shall be determined according to the principles applicable, without sending the case to the law side of the court, applying only to a case wherein the court of equity has jurisdiction.

Appeal from the District Court of the United States for the District of Utah; Tillman D. Johnson, Judge.

Bill by the Standard Brokerage & Distributing Company against the American Falls Milling Company. Injunction prayed for was denied, and from a decree awarding damages to complainant, defendant appeals. Decree affirmed as to denial of injunction, but otherwise reversed, with directions to transfer trial of the issues relating to damages to the law side of the court.

J. D. Skeen, of Salt Lake City, Utah (O. R. Baum, of American Falls, Idaho, and D. A. Skeen, of Salt Lake City, Utah, on the brief), for appellant.

Charles C. Dey, of Salt Lake City, Utah (A. L. Hoppaugh and Harold P. Fabian, both of Salt Lake City, Utah, on the brief), for appellee.

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

MÜNGER, District Judge. Appellee was a merchandise brokerage company having its place of business at Salt Lake City, Utah, and appellant was a milling company having its mill in Idaho. The brokerage company, hereinafter referred to as plaintiff, brought suit against the milling company, hereinafter called defendant, alleging that it had a contract for the exclusive sale of defendant's products in Utah, which the defendant had violated by making sales directly to customers, and praying for an injunction against further violation of the contract and for damages because of the sales defendant had made. A decree was rendered denying the injunction, but awarding damages to plaintiff because of sales made by the defendant. None of the testimony given on the trial is preserved in the record, and the questions presented arise upon the face of the pleadings and decree.

[1, 2] The denial of the injunction refused the only equitable relief asked by plaintiff. Under the allegations of the pleadings, this denial must be taken as a finding that the proofs did not entitle plaintiff to an injunction when the bill was filed, as there were no allegations showing any change of status after the bill was filed. The relief that is asked by the plaintiff, other than the injunction, is for damages for breach of contract, a purely legal demand. Section 267 of the Judicial Code provides that:

"Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law." Comp. St. 1916, § 1244.

Appellant complains because it was entitled to the judgment of a jury on the issues found by the court. When a cause of action cognizable at law is entertained in equity, because of some equitable relief sought by the bill, and the proofs fail to establish the right to such equitable relief at the time the suit was brought, the court is without jurisdiction to proceed further and to try the issues at law. *Mitchell v. Dowell*, 105 U. S. 430, 432, 26 L. Ed. 1142; *Russell v. Clarke's Executors*, 7 Cranch, *69, *91, 3 L. Ed. 271; *Kramer v. Cohn*, 119 U. S. 355, 357, 7 Sup. Ct. 277, 30 L. Ed. 439; *Buzard v. Houston*, 119 U. S. 347, 354, 7 Sup. Ct. 249, 30 L. Ed. 451; *Lewis v. Cocks*, 23 Wall. 466, 469, 23 L. Ed. 70; *Clark v. Wooster*, 119 U. S. 322, 325, 7 Sup. Ct. 217, 30 L. Ed. 392; *Linden Inv. Co. v. Honstain Bros. Co.*, 221 Fed. 178-181, 136 C. C. A. 121; *Alger v. Anderson (C. C.)* 92 Fed. 696-710; *Lewis Pub. Co. v. Wyman (C. C.)* 168 Fed. 756, 762; 1 Pom. Eq. Jur. (3d Ed.) § 237; *Union Stockyards Co. v. Nashville Packing Co.*, 140 Fed. 701, 706, 72 C. C. A. 195; *Van Raalt v. Schneck (C. C.)* 159 Fed. 248, 251. See, also, case note in 19 L. R. A. (N. S.) 1064, 1066. The action was not maintainable under equity rule 23 (198 Fed. xxiv, 115 C. C. A. xxiv), because that rule only applies to a case wherein a court of equity has jurisdiction, and does not confer jurisdiction of actions cognizable at law. *Linden Inv. Co. v. Honstain Bros. Co.*, supra; *Vosburg Co. v. Watts*, 221 Fed. 402-408, 137 C. C. A. 272.

The decree of the lower court will be affirmed as to the denial of the injunction, but otherwise reversed, with directions to transfer the trial of the issues relating to damages to the law side of the court, in accordance with the provisions of equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv).

THE ESPERANZA DE LARRINAGA.

(Circuit Court of Appeals, Fifth Circuit. January 30, 1918.)

No. 3128.

1. MASTER AND SERVANT ⇔101, 102(1)—INJURIES TO SERVANT—SAFE PLACE TO WORK.

It is the duty of the employer to furnish a safe place for the employé to work; but there is no obligation to furnish an easy and convenient place.

2. SHIPPING ⇔84(3)—INJURIES TO STEVEDORE—LIABILITY OF VESSEL.

An employé of a stevedore company, who for convenience in directing operations placed himself on the middle section of a hatch, the other two sections of which had been removed for loading, and was injured when the cover gave way, is not entitled to recover against the vessel, the hatch being safe when the three sections were in place, and the only insecurity resulting from the removal of the other two, for the fault, if any, was that of the contracting stevedore in charge of the loading, and not the vessel; this being particularly true in view of the fact that it was not imperative for libellant to take a position on the hatch cover to direct operations.

Appeal from the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge.

Libel by J. M. McNeel against the steamship Esperanza De Larrina-

ga, claimed by the Miguel De Larrinaga Steamship Company. From a decree for libellant, claimant and the sureties on its stipulation appeal. Reversed and remanded, with directions to dismiss the libel.

W. B. Lockhart, of Galveston, Tex., for appellants.

Lewis Fisher, of Galveston, Tex., for appellee.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

BATTS, Circuit Judge. The appellee was an employé of the Galveston Stevedore Company, and, while working as such in the loading of the steamship Esperanza, was injured, and, upon trial of a libel instituted by him, was awarded damages. Appellee was a "toter," in charge of men loading cotton in the hold of the Esperanza, and was, from the top of a section of the hatch into which the cotton was being lowered, directing the winchman in charge of the winch by which the cotton was handled.

The hatch was in three sections, the accident resulting from the giving way of the cover to the middle section. The fore and aft sections were uncovered, but the cover to the middle section had not been removed. The hatch was divided by beams athwartship, and upon these beams were placed fore and afts, $5\frac{1}{2}$ by $6\frac{1}{2}$ inches, on which the hatch bars were placed. These fore and afts had bearings on the athwartship beams of about $2\frac{1}{2}$ inches. The evidence is to the effect that all of the beams and fore and afts in the hatch cover were in good condition, and adapted to and adequate for the service for which they were intended. Certain witnesses for the appellee state that the fore and afts were worn at the ends, and that after the accident they put them back in place in the middle section of the hatch, and that they were not long enough to hold. The evidence, however, indicates that the hatch cover, including the beams and fore and afts by which it is supported, is to be considered as a whole, and that, when the fore and afts of the end sections of the hatch are in place, the fore and afts of the middle section are snug and secure. The testimony in behalf of the appellee is not inconsistent with the proposition that the beams athwartship and the fore and aft beams, when used under conditions intended, are entirely good and sufficient for the service required of them.

The evidence indicates that the stevedores are expected, in loading a ship, to uncover all the sections of a hatch, and that the use of one of the sections, without the bracing support of the others, is dangerous. The stevedore companies undertake to compel the men employed by them to entirely uncover the hatch in use, and the rules under which they work provide for fines for going onto the cover of one of the sections when the other sections of the hatch are uncovered. The testimony is without conflict to the effect that such a use of a portion of the hatch cover is dangerous, though it also indicates that the danger is one which is frequently assumed by the workmen. Appellee testified that it was necessary for him to get on this covered part of the hatch in order to direct the winchman, stating that timber on the floor prevented him from using the deck, and obstructed the view of himself and the winchman. This statement is contrary to the weight of the

evidence. While it is perhaps true that the point selected by him on the top of the covered part of the hatch was the one most convenient to him, it is clearly made to appear that he could have found a place on the floor of the deck from which his duties could have been discharged. After the accident the entire hatch was uncovered, and the loading was finished without removing the timber, and without any change in the location of the winchman.

[1, 2] It is the duty of the employer to furnish a safe place for the employé to work; but there is no obligation to furnish an easy and convenient place. The stevedore company is at liberty to refuse the employment, if the structure of the ship or the placing of part of the cargo makes the handling of the balance so inconvenient as to render the loading an undesirable undertaking. In this case the timber about which complaint is made was placed by the stevedore company. The evidence makes it clear that all of the beams fore and aft, and other parts required to cover the hatch, were of the ordinary kind, and were properly fitted and in good condition. The vessel was turned over to the stevedores for their work with the hatch covered. Any insecurity which might thereafter have existed with reference to the middle section of the hatch resulted from the action, not of the vessel, but of the contracting stevedores. Any cause of action which the appellee might have had was against the stevedore company.

Fowler & McVitie, as representatives of the stevedore company, and also of the Larrinaga Line, to which the Esperanza belonged, had, prior to the accident, taken out insurance, under the terms of the Texas Employers' Liability Act (Acts 33d Leg. c. 179 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz]), in the American Indemnity Company, in their names and that of the stevedore company, for the benefit of that company on all vessels represented by them, the vessels paying the premiums. When appellee was injured, a report of the accident was made, and thereafter McNeel, the appellee, was paid in accordance with the terms of the insurance policy, and in accordance with the Texas Employers' Liability Act. The Employers' Liability Act of Texas is confined by its terms to employers and employés. The appellee was not an employé of the steamer Esperanza. He was, however, an employé of the Stevedore Company. The conclusion reached renders it unnecessary to determine whether the taking out of insurance in behalf of the ship and of the stevedore company, and the acceptance by the injured person of the benefits of this insurance, discharged any cause of action he might have had against the ship.

The judgment is reversed, and the cause remanded to the District Court, with directions to dismiss the libel.

FALL v. BENNETT.

(Circuit Court of Appeals, Eighth Circuit. January 24, 1918.)

No. 4942.

1. JUDGMENT ⇨622(2)—CONCLUSIVENESS—MATTERS CONCLUDED.

Where, after a patient began an action for malpractice in an operation, the physician in another court sued the patient on the quantum meruit on

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

account of his services and recovered judgment, the patient defaulting, the default judgment is not, though rendered prior to the determination of the action for malpractice, a bar against recovery.

2. APPEAL AND ERROR ⇐730(i)—ASSIGNMENT OF ERROR—PRESENTATION OF GROUNDS OF REVIEW.

An assignment of error, complaining of the refusal of a request conceded to be faulty, presents nothing for review, where there was no assignment of error on the ground that the judge failed to charge correctly concerning the subject-matter of the request refused.

In Error to the District Court of the United States for the District of Nebraska; Thomas C. Munger, Judge.

Action by Harlan A. Bennett against Clifford P. Fall. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Henry H. Wilson, of Lincoln, Neb. (Sackett & Brewster, of Beatrice, Neb., and Burkett, Wilson & Brown, of Lincoln, Neb., on the brief), for plaintiff in error.

Benjamin S. Baker, of Omaha, Neb. (Baker & Ready, of Omaha, Neb., on the brief), for defendant in error.

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

AMIDON, District Judge. [1] Bennett sued Fall to recover damages for malpractice in an operation for appendicitis. He recovered a verdict, and the defendant below brings error here. While the action was pending in the lower court, Fall sued Bennett, in a county court having jurisdiction up to \$1,000, on quantum meruit on account of his services for performing the operation. Bennett defaulted, and judgment was rendered against him for \$212.15. Fall set up that judgment as a bar to recovery in the present action. The trial court struck out the defense, and that is the principal error relied on.

The case was ably argued, both orally and in the briefs. The discussion, however, is academic; and can be justified only as the last resort of a defeated defendant. Counsel for Fall admits that the greater number of authorities are against his position, but insists that the better reasoning and the New York decisions are with him. In this case we are in favor of the greater number of authorities, because we think they embody the better reasoning. It may be we are led to this view because some of the authorities are decisions of this court and of the Supreme Court. *Brown v. First National Bank of Newton*, 132 Fed. 450, 66 C. C. A. 293; *Watkins v. American National Bank*, 134 Fed. 36, 67 C. C. A. 110; *Merchants' Heat & Light Co. v. James B. Clow & Sons*, 204 U. S. 286, 27 Sup. Ct. 285, 51 L. Ed. 488; *Virginia-Carolina Chemical Co. v. Kirven*, 215 U. S. 252, 30 Sup. Ct. 78, 54 L. Ed. 179. Text-writers point out the conflict between the New York decisions and the weight of authority, and state the reasons pro and con. Bigelow on Estoppel, p. 215; 2 Black on Judgments, § 769.

[2] It was claimed that Fall's negligence resulted in what is known as an operative hernia, and it was set up in the answer that Bennett was negligent, in that he did not have a surgical operation for the correction of the hernia. It was shown that he waited for 18 months

before having such an operation, although he knew of the hernia, and he sought in his action to recover damages for the loss of employment. The defendant, Fall, formulated a request to charge on the subject of this defense, which is conceded to be faulty. The only error assigned is for failure to give the request thus presented. There is no assignment of error because the judge failed to charge correctly on the subject, so there is no merit in this assignment.

The judgment is affirmed.

KNISELY v. BURT.

(Circuit Court of Appeals, Fifth Circuit. February 14, 1918.)

No. 2957.

COURTS ⇨405(5)—CIRCUIT COURT OF APPEALS—JURISDICTION.

Where a demurrer was sustained to plaintiff's petition on the ground that the amount in controversy was below the jurisdictional amount for federal courts, the Circuit Court of Appeals has no jurisdiction to review the question on writ of error.

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Action by Genevieve B. Knisely against Angelo R. Burt. There was a judgment for defendant, and plaintiff brings error. Writ dismissed.

Henry L. Lazarus, Eldon S. Lazarus, and David Sessler, all of New Orleans, La., for plaintiff in error.

Henry L. Sarpy, of New Orleans, La., for defendant in error.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

PER CURIAM. The court sustained an exception or demurrer to the plaintiff's petition on the ground that the amount sued for was less than is required to give the court jurisdiction of the suit. As the jurisdiction of the court was put in issue, and the case was disposed of by a decision of that issue in favor of the defendant, the judgment is not subject to be reviewed by this court on writ of error. United States v. Jahn, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87.

The writ of error is dismissed.

CORONA CHEMICAL CO. v. LATIMER CHEMICAL CO.

(Circuit Court of Appeals, Eighth Circuit. February 11, 1918.)

No. 4881.

1. PATENTS ⇨112(3)—GRANTING OF PATENTS—PRESUMPTION.

The granting of a patent creates the presumption of patentable invention.

2. PATENTS ⇨313—INFRINGEMENT—DISMISSAL—VALIDITY OF PATENT.

A patent for an improved acid arsenate of lead in the form of a fine powder cannot, on motion to dismiss a bill for infringement, be declared invalid for want of invention on the ground that the prior art as disclosed by the patent showed nothing new was produced, except a difference

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

in degree of fineness of the powder, for in so recondite a science as chemistry a difference in degree may produce revolutionary results, and hence the validity of the patent should be determined by trial on the merits.

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Bill by the Corona Chemical Company against the Latimer Chemical Company. Motion to dismiss the bill was sustained (240 Fed. 423), and complainant appeals. Reversed, with directions.

Russell Wiles, of Chicago, Ill. (W. H. Swenarton, of New York City, and Dyrenforth, Lee, Chritton & Wiles, of Chicago, Ill., on the brief), for appellant.

Walter W. Boughton, of Denver, Colo., for appellee.

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

AMIDON, District Judge. This is a suit in equity by the Corona Chemical Company, as plaintiff, against the Latimer Chemical Company, as defendant, charging infringement of Hall patent, No. 1,064,639. The patent is for acid arsenate of lead in the form of fine powder, whereas the substance in the prior art had been in the form of paste. The patentee claims for his arsenate a distinct improvement in its adaptation for use as an insecticide. Defendant moved under the equity rules to dismiss the bill. The patent was attached to the bill. The court read it and the prior art as therein described, and ruled that plaintiff's invention produced nothing but a difference in degree of fineness of the powder, and dismissed the bill on the ground that this did not involve patentable invention.

[1, 2] There is nothing either in the patent or the bill to support the broad conclusion at which the court arrived. It is true that the patent disclosed that the powder of the patentee was finer than prior powders of the same substance, and to that extent the powder shows a difference in degree; but it was an unwarranted inference to say that the difference in degree did not produce a difference in the function of the substance when applied as an insecticide in the spraying of fruit trees. That was an inference upon which the plaintiff was entitled to a trial upon the merits. The granting of a patent creates a presumption of patentable invention. In so recondite a science as chemistry a difference in degree may produce revolutionary results. *Mineral Separation Co. v. Hyde*, 242 U. S. 261; 37 Sup. Ct. 82, 61 L. Ed. 286. It would be an exceptional case which would justify striking down a patent in such a field on demurrer to the bill. We express no opinion as to plaintiff's patent, but simply hold that he is entitled to a trial.

The case is reversed, with directions to the trial court to overrule the motion to dismiss, and permit the defendant to answer, and then proceed with the trial of the case.

GLOBE KNITTING WORKS v. SEGAL et al.

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

No. 2291.

1. PATENTS \Leftrightarrow 328—VALIDITY AND INFRINGEMENT—UNION SUIT.

The Clarke patent, No. 1,035,819, for an improvement in knit underwear of the type known as union suits, while not covering a broad invention by the use of a new material in a new way, produced new results in such garments of a useful character, measured by the increased comfort they afford the wearer and the popular demand they created, and discloses patentable invention; also *held* infringed.

2. PATENTS \Leftrightarrow 27(2)—INVENTION—NEW USE OF OLD DEVICE.

The transfer of elastic features previously used in drawers or overalls to union suits, when they are subjected to different strains and do not perform precisely the same functions, and therefore do not produce the same result, may constitute patentable invention.

3. PATENTS \Leftrightarrow 36—EVIDENCE OF INVENTION—POPULAR RECOGNITION.

Where the question of invention is close, as it usually is when the thing done is simple, the thing achieved, its recognition by the art, and the demand for it by those who use it, are matters properly to be put in the scale and weigh in favor of invention.

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

Suit in equity by the Globe Knitting Works against Keeva Segal and Benjamin Segal, doing business as the Quaker Manufacturing Company. Decree for defendants, and complainant appeals. Reversed.

For opinion below, see 239 Fed. 322.

Prichard, Saul, Bayard & Evans, of Philadelphia, Pa., for appellant.

E. Hayward Fairbanks, of Philadelphia, Pa., for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The bill charges infringement of Letters Patent No. 1,035,819, issued August 13, 1912, to A. E. Clarke, assignor of the plaintiff, for improvements in knit underwear. The defenses are invalidity and non-infringement. The District Court, while indicating its opinion that the garment of the patent lacked patentable novelty, dismissed the bill on the ground that infringement of the claim, if valid, could not be found under the narrow construction which it gave it. 239 Fed. 322. The plaintiff took this appeal.

[1] The patent is for improvements in underwear of the type generally known as "union suits." These garments comprise a shirt and drawers made in one continuous piece. When the two elemental garments are thus combined in one, the demands of the human body upon the unified garment are radically different in number and character from demands made upon its two elements when worn separately. To meet these requirements and to attain their objectives of convenience and comfort, the art has produced union suits of many

patterns. The fundamental types, as known to the trade, are "open crotch" and "closed crotch." The manifest discomfort of the former has greatly increased the use of the latter. To the latter class, the garment of the patent in suit belongs.

The human body, in different positions of sitting, stooping, reaching, subject a garment of one close-fitting piece, extending over its entire surface from neck to feet, to many strains. These strains begin at the shoulders, and extending downwardly, are arrested at the crotch, where, if not relieved by some compensatory means, they produce a discomfort that makes the wearing of union suits undesirable or wholly impracticable. Here is a problem. It was first met by the open crotch pattern, and in a measure solved. But this solution of the problem produced a new discomfort, which caused the trade, in response to popular demand, to confine itself chiefly to the closed crotch pattern with its original problem of shoulder strain and crotch binding, and to seek its solution.

Johnson (No. 973,200) conceived that the strain upon the crotch of a union suit and its consequent tightness and discomfort, could be relieved by supplying more material at that place. Terwillinger (No. 992,291) conceived the same idea. Both obtained patents for the particular means which they conceived for putting that idea into practice. But this solution brought still another discomfort to the wearer of union suits. Instead of being of a pattern that would fit the body snugly, when in motion or in repose, union suits of these patterns were made larger from shoulders to crotch, in order to supply a fullness of material to take up the strains. The result was that the extra strain-relieving material, when not performing its function, became an useless and baggy excess of material and became also an active and ever present cause of discomfort.

This was the state of the art when Clarke entered it. Manifestly he was not a pioneer. He did not claim to have invented a union suit. He claimed, simply, to have made improvements upon garments of that kind. He found in the art union suits with crotches and flaps and inserts, and set about to solve a problem admittedly there.

The means he conceived is set forth in the patent in suit and is nothing more than a combination of old elements of an union suit and flaps, and "an elastic knit fabric extending well up in front of the garment and extending down the leg seams, forming a lateral elastic closed crotch that is firmly sewed to the front of the garment and the leg seams and to the lower edges of the flaps, substantially as shown and described." The insert or gusset as shown and described is a somewhat diamond shaped piece of fabric, which in practice gets its elasticity from the weave of the fabric into ribs or wales, set in the garment with the ribs or wales placed transversely, the direction of the strains coming from the shoulders and body. Simple as this arrangement appears, it accomplished several things. It did away with the baggy fullness of union suits of the prior art and permitted the making of a garment that conformed snugly to the outline of the body. Its elasticity acted as a compensating means for the strains as they came from the shoulders and prevented tightness at the crotch in

various positions of the body, and relieved the wearer from discomfort. These things it did, as we are informed by the testimony.

To be sure, the range of invention in a garment of this character is obviously not broad, and Clarke's invention is not a great one. Yet, if the inserted fabric, cut in a particular shape and possessing a particular yielding quality, takes up strains in the garment, and transforms discomfort into comfort for the one wearing it, and achieves this in a manner not before employed, it is not impossible that the idea contains patentable novelty—unless something in the prior art, or in a kindred art, so closely resembles it as to make the improvement a mere improvement rather than an invention. And such the defendants insist is the claimed invention of the patent.

[2] There is nothing in the prior art, if restricted to garments of the union suit variety, which anticipates or otherwise negatives the invention of the patent. But in the prior art of drawers, overall-pants and like nether garments, there are a number of patents containing elastic crotch pieces or gussets in varied forms and arrangements, of which Scriven (No. 625,423) for drawers and Stecker (No. 924,013) for overall-pants may be taken as representative. At first view it would seem that it did not require an exercise of the inventive faculty for Clarke to put Scriven's drawers gusset and Stecker's overall-pants insert, with some variation, into an union suit and cause them to do there the same thing and produce the same result. But the fact is that drawers and overall gussets, when transferred to union suits, do not perform precisely the same function and therefore do not produce the same results. Body movement strains upon drawers and pants, which cover but half of the body, are entirely different from strains in union suits moving from the whole body. It is also a fact that Clarke, whether or not he got his idea from the art of drawers making, was the first to apply it to union suits, with a result that is as surprising as the idea seems simple. The plaintiff paid Clarke \$50,000 for his invention, \$35,000 in cash and \$15,000 in stock of the plaintiff corporation with a market value of par. And the plaintiff apparently knew its business, for in two years after acquiring the patent, it manufactured between \$600,000 and \$700,000 of garments under the patent and received and continues to receive royalties from seven corporations manufacturing under licenses.

[3] The District Court, in considering without deciding the validity of the patent, evidently inclined to the opinion that Clarke's use of an elastic knit crotch piece was little more than a substitution of material, and approached, if it did not fall within, the principle of law that the substitution of one material for another, which does not involve change of method nor develop novelty of use, even though it may result in a superior article, is not necessarily a patentable invention. *Florsheim v. Schilling*, 137 U. S. 64, 11 Sup. Ct. 20, 34 L. Ed. 574. True, undergarments of earlier patterns had inserts at the crotch, but no union garment, so far as the record shows, had ever been made with an elastic insert at the crotch. Therefore, in a sense, Clarke did substitute one material for another, but we think he did something more. *Frost Co. v. Cohn* (C. C.) 112 Fed. 1009. By the substitution,

or more properly speaking, by the use of a new material in a new way, he produced new results of a useful quality measured by the increased comfort they afforded and the popular demand they created. Simple as it may seem, the elastic knit crotch piece produced results desired by those who wear the garment and the payment of large tribute by those who manufacture it. When the question of invention is close, as it usually is when the thing done is simple, the thing achieved, its recognition by the art, and the demand for it by those who use it, are matters properly to be put in the scale and weigh in favor of invention. *Neill v. Kinney*, 239 Fed. 309-314, 152 C. C. A. 297. We find the patent valid.

Upon the issue of infringement, the District Judge found that the defendant did not infringe, unless the claim of the patent be construed so broadly, that an undergarment made up of any combination of elements into which the idea of a knitted elastic gusset enters as an element, would be an infringement. He declined to construe the patent thus broadly. We do not think that, to find infringement, the claim must be thus broadly construed. Clarke's patent is not for an elastic knit gusset alone. It is for a combination containing such a gusset as an element, and the rule of the patent law, that the omission of one element of a claim for a combination avoids the charge of infringement, applies to this patent as to any other. The question of infringement in this case, therefore, is not whether the claim of the patent may be infringed by the use of an elastic knit gusset in *any* combination of elements, but whether the defendants infringe by making the garment here charged as infringing, because it embraces *all* the elements of the claim of the patent. They are (1) the body of the union suit, (2) the presence, location and adjustment of flaps, and (3) the elastic knit gusset. The mere inspection of the two garments determines the question of infringement. In looking at them and comparing them in the light of the testimony, we cannot escape the conclusion that the garment of the defendants corresponds precisely in elements and substantially in detail with the claims of the patent. The parts are the same, they are in the same positions and relation, are intended for the same uses, perform the same functions and operate exactly as disclosed by the patent,—with one exception. This is found on the under or inside flap of the defendant's garment, which is a continuous piece extending from the under arm seam across to its inner edge. In the patent, this flap is described as "stitched to the opposite side of the garment and extending under the first named flap." The second or inside flap of the patent, in the position disclosed, is the element of the patent, not the mere stitching of the flap. The defendants' second or inside flap, being in the same place and performing the same function, though made in a continuous piece from the arm seam, is a full equivalent of this element; and the extension of the second flap from the arm seam without stitching does not constitute an omission by the defendants of one of the elements of the patent claim whereby they avoid infringement.

We find that the patent is valid and infringed, and direct that a decree be entered in accordance with this opinion.

HILLS v. HAMILTON WATCH CO.

(District Court, E. D. Pennsylvania. January 9, 1918.)

No. 1471.

1. PATENTS ⇨328—VALIDITY AND INFRINGEMENT—WATCH BARREL.

The Thalhofer patent, No. 672,655, for an improved watch barrel, designed, as stated by the patentee, to improve the mechanism in simplicity of construction and the facility with which the parts may be disassembled, in such respects discloses utility and invention, but is limited to the specific structure shown, and, as so limited, *held* not infringed.

2. PATENTS ⇨312(3)—INFRINGEMENT—EVIDENCE.

When the question of infringement is in doubt, the fact that the patent is a mere paper patent may turn the scale against infringement.

3. PATENTS ⇨312(3)—SUIT FOR INFRINGEMENT—RIGHT TO RELIEF IN EQUITY.

The facts that complainant in an infringement suit bought the patent as a part of the assets of an insolvent corporation, that it was never made use of, that defendant had been making the alleged infringing device for seven or eight years, and had built up a valuable trade therein before complainant brought suit, and that he did not bring it to a hearing until the end of the patent term, are sufficient grounds for denying him relief in equity, by injunction and accounting.

In Equity. Suit by Edward R. Hills against the Hamilton Watch Company. On final hearing. Decree dismissing bill.

S. W. David and Max W. Zabel, both of Chicago, Ill., and Cyrus N. Anderson, of Philadelphia, Pa., for plaintiff.

Wm. Steell Jackson, of Philadelphia, Pa., and Charles J. Williamson, of Washington, D. C., for defendant.

DICKINSON, District Judge. The conclusions reached in this case are:

1. The patent of the plaintiff is valid (thus including a finding of utility), but the claims, in view of the prior art, are to be so read as to restrict all proprietary rights to the specific structure described.

2. The structural differences between the defendant's device and that described in plaintiff's patent are so real, or at least the doubt of their being merely formal and the differences being only in the use of mechanical equivalents, is so great, as, in view of the patent of the plaintiff being a mere paper patent, to justify a finding of no infringement.

3. In any event, in view of all the equitable considerations involved, the interference of a chancellor is not justified.

These are relatively short texts for a very long sermon. It would facilitate the trial and final disposition of cases in patent litigation if counsel were more fully in accord with the spirit of the new equity rules, requiring trials to be had as at law, by doing, as trial lawyers have found it well to do, avoid contesting every possible controvertible point, and select what they believe to be the turning point of the case. Litigants and their counsel, however, who in good faith and with earnestness present for discussion features of the case which they

deem of importance, have a right to evidence that these features have all received consideration, even at the expense of what would otherwise give undue volume to the record. These comments are called forth by the fact that every possible point, even the question of title to the patent, was here in controversy at some time or other. This was doubtless due to the attitude of the parties toward each other, and was unavoidable.

[1] The controversy, as presented by the plaintiff, is over the infringement of letters patent No. 672,655, issued April 23, 1901, to Joseph Thalhofer, for an improved watch barrel, the title to which has passed to the plaintiff by assignment. The answer presents issues which raise the question of validity, as well as infringement, and also the right of the plaintiff to the equitable remedies asked to be allowed. The rights granted patentee were never asserted through the manufacture or the making of any commercial use of the patented device or mechanism. The patent, viewed in the light of this fact alone, may be characterized as a paper patent. The significance of the fact of nonuse is sought to be explained away, and the justness of the characterization of plaintiff's patent as a mere paper patent to be denied by the plaintiff, by a statement of the excusing facts that the patentee died shortly after the grant of the patent, leaving no estate to supply the administrator with funds to push the patent, and he was in consequence obliged to dispose of it, and that the purchasing company, by reason of financial and other business difficulties, had not been able to either manufacture watches embodying this invention or to make any commercial use of it as a mechanism, and that the plaintiff had succeeded to the title to the patent through a purchase of other assets of the company.

The defendant, on the other hand, draws from the fact of this nonuse, and other features which enter into the present controversy, the inference that the nonuse was due to the worthlessness of the patent, because of its recognized invalidity by reason (among others) of the inutility of the device as described in the application and claims. The scope of the rights of the plaintiff, with which we would be impressed as *prima facie* springing from the grant of letters, is restricted by a general understanding of the state of the prior art and of the experiences of the application in the Patent Office as disclosed by the file wrapper.

The patented device, although constituting an important part of the works of a watch, relates to one part only of the works, being that part which is directly associated with and under control of the mainspring. The part of the works of a watch which incloses or within which the mainspring is confined is called the "barrel." The motive force which drives the machinery of the watch is the unwinding of the mainspring, and this barrel rotates as the spring unwinds. To enable the mainspring to supply this power, it must be wound up, and this is accomplished by the inside end of the metal ribbon, which constitutes the mainspring, being connected with a mechanism which is actuated by the stem winder. By the means indicated the mainspring is wound up and the end of it held to its position, with the re-

sult that the mainspring in its unwinding rotates the barrel and what has in this record been called the integral main wheel.

The experience of every one who carries a watch has brought home to him knowledge of the fact that the parts of the watch mechanism referred to require frequent attention, and prepares him to give ready belief to the necessity of having them so made as that the parts may be readily disassembled and reassembled to facilitate the cleaning of the watch and its repair, because of a broken mainspring or otherwise. This thought has an important bearing upon the common sense of the claim to inventive merit which is put forth on behalf of the plaintiff, and invites our attention to what advance the inventor himself thought he had made over the prior art, and to what limits, if any, he had set to his claim. The application very clearly discloses this. He makes no claim to novelty, and none to an increase in the efficiency of his device over others known to the art, beyond what was involved in the gain in simplicity of construction and in the facility with which the parts of the watch, as he would have it constructed, were disassembled. He frankly acknowledges the similarity of his construction with the constructions already in use, and asserts no difference in results beyond a difference in degree in operative efficiency. There is an admission of simplicity of construction and facility in the taking apart and putting together of the mechanism in the then known constructions; but the inventor claims for his own a greater simplicity and a greater facility, and that only. In order to accomplish this relative value in results, he describes what he claims to be a somewhat different, and to this extent novel, construction of special parts of the watch, and a somewhat different, and to this extent new, arrangement of parts, or, to quote his own language:

"To this end [i. e., in order to get greater simplicity and increased facility] my invention consists in the novel construction, arrangement, and combination of the parts" shown and described in the application.

The impression is thus made, which the very able and forcible argument addressed to us by counsel for the plaintiff has not removed, that the language of the claims must be read with the general thought above outlined in mind, and that this results in narrowing the claims to a special form of mechanism meaning or a special combination of mechanisms. This truth should not blind us, however, to the other truth, an analogue for which we may borrow from the military art. When the fighting is in the open and over a wide terrain, a gain of miles may be of no real value, while the gain of a few yards in trench fighting may be of the utmost, and indeed of vital, importance. So in every highly developed art, any advance, even if it be one merely in simplicity or cost of construction, as it becomes increasingly difficult, takes on an increasing value.

The impression thus made by reading the application is deepened by a perusal of the file wrapper. Some only of the prior art devices were cited for reference in the Patent Office. None of these were found to deny the right of the applicant to his patent, when his claims had been brought within the limits to which he was confined. The line of thought which led to this conclusion can easily be followed. When it

was pointed out that Hunter or Potter had a construction which was like that of the applicant functionally, and in the respect that the results differed only in degree, and that in this respect the parts of the respective constructions, which were different, were nevertheless equivalent, the obvious answer was that the construction, so far as it was useful and novel, or the arrangement or combination, so far as it was new and yielded a new result, constituted patentable invention. The proposition that such a device is patentable is accompanied, however, with the corollary proposition that the claim is limited to that device, and does not cover another, and that another device, involving other construction of parts and another arrangement or combination, is also patentable, although the two are functionally equivalents.

These propositions would direct our minds to the defendant's construction in our search for the proper ruling in this case, or, in other words, to the question of infringement. The defendant, however, has introduced two other defenses, which may first be stated. One is in effect that, whatever may be the legal rights of the plaintiff, the conditions of the present case as presented demand that the plaintiff be left to the assertion of his legal rights and of their enforcement through and by his legal remedies, without recourse to equitable remedies or the aid which a chancellor might otherwise accord him.

One basis for this branch of the defense is the averred laches of the plaintiff, both in the bringing of his action and his conduct of the proceeding since the action was brought, particularly in view of the circumstances under which he acquired title to the patent. In the first place, the patent has been a dead letter from the date of its issue; no attempt having been made to manufacture under it. The patent had nearly reached the fifteenth year of its age before any rights under it were asserted. This proceeding, after having been brought, was permitted to drag itself out to such length as that the patent will have expired in all probability before the final ruling in the case is had, if either party resorts to his appellate rights. Moreover, the defendant, although a well-known watchmaker and extensively engaged in the manufacture of watches and putting out well-known and widely distributed makes of watches, made and put out the watch now averred to be an infringement of the plaintiff's patent for more than a third of a score of years before complaint was made by the plaintiff.

Another feature of the defense is that there can in no event be any successful charge of infringement, unless the claims are given a sufficiently wide scope to include the barrel mechanism of the defendant, and that, if the claims are given as broad a meaning as this, the claims are invalid, because the mechanisms embraced therein would themselves be an infringement upon the claims of the prior art. The position of the defendant nearly, if not quite, is that, if the meaning of the claims is such as that the defendant's structure could be found to be an infringement, the claims are invalid, and that if a meaning is given to the claims so as to embrace only special construction of parts and special arrangement or combination of the parts, in order to take away their conflict with the prior art, then the defendant has not trespassed upon the rights of the plaintiff, and, in any event, if the

plaintiff is found to have a legal right upon which the defendant has trespassed, the conduct of the plaintiff has been such that he should be left to the assertion of his legal rights through and by his legal remedies, and should not be accorded the extralegal and extraordinary remedies which a court of equity may in proper cases either give or withhold. The bottom basis for this latter position is the broad fact that the present plaintiff bought this patent along with the flotsam and jetsam of a defunct corporation. By so doing, he bought a lawsuit, and, although it be conceded that he thus succeeded to the legal rights of the patentee and all legal remedies for their enforcement, this only means his right to bring an action at law, and by no means carries with it a claim to the aid of a chancellor.

The prima facie validity of a patent of this general character is strengthened by the fact that the right to a patent was challenged and allowed by the Patent Office on the strength of what may, in the absence of a better term, be called the mechanical merits of plaintiff's construction. The claim of the patentee to inventive merit may therefore be well said to have passed the ordeal of the test of inspection by experts. With this finding we do not disagree, and except in a clear case would yield to the weight of such expert opinion the deference which it commands. In accordance with this attitude, all that remains for consideration is that part of the prior art which was not before the Patent Office examiners. This is reduced substantially to the Potter watch. The Patent Office had before it the Potter patent, but not the form of watch mechanism which some makes of the watch disclose. This latter is said to be an anticipation of the plaintiff's invention. One part of the proofs of such a mechanism being in existence was what is known to this record as the Peaseley watch. This fact and the date of its existence was proven by the deposition of Peaseley. This went into the record by stipulation. Really all he knew and all he would be expected to know was that he had the watch. He did not know the mechanical details of its construction. Plaintiff, after the time limit of his rebuttal proofs had closed, took the deposition of Peaseley (as under cross-examination) to elicit the fact that he did not know the construction of the works of his watch and that it had been repaired.

Defendant refused to re-examine the witness, on the ground that this as rebuttal proof was too late. The admission or rejection of this supplemental deposition was withheld, to be disposed of as a trial question. This was because the court was impressed with the thought that the supplement to the stipulated Peaseley deposition was of no evidentiary value. We find the fact of the prior existence of Potter watches, embodying works construction as shown, with or without this additional evidence. To formally dispose of the point we might reject the Peaseley deposition offered by the plaintiff as too late in time, and as conflicting with the stipulation of what the testimony of this witness was agreed to be; but we admit it in order that the plaintiff may have the benefit of this testimony, but find the fact to be that the watch antedates the invention of the patentee and that it originally was as it now is. The differences between the Potter

exhibit construction and the Potter patented watch are not sufficiently clear, however, to warrant a finding that the former is an anticipation in the face of the Patent Office finding that the latter is not. Moreover, the plaintiff's patent has relation to factory-made watches; the Potter exhibit is a hand-made watch. The plaintiff's patent further relates to watches which may be constructed of the type of thin watches which are now the vogue, while the Potter exhibit is of the clock or chronometer type.

This difference may found a claim to invention. *Globe Knitting Works v. Segal*, 248 Fed. 495, — C. C. A. — (Court of Appeals, Third Circuit). There invention was found in a combination, including an elastic insert in a part of a union garment, as contrasted with one found in a garment not of the union type. By the same token there may be invention in a combination of parts by which a thin or other style of watch, for which a commercial demand exists, is produced, which would not be negated by an essential element being found in another combination which produced a clock, but lacked those elements in the combination which would produce a thin watch.

There was, it is true, in the cited case a feature, hereinafter referred to as having a bearing upon the question of infringement, which probably was controlling there, which is wholly absent from the instant case. There the assertion was made that the patent rights had been sold for a sum which, in view of the character of the invention, was impressively large. This was followed with evidence of large sales, indicating an appreciative reception of the invention by users. If the sale was credited as a real sale at its face value figure, and was not merely a sale by the patentee to himself in the guise of a corporation in which he was largely interested, and if the sales were due to the invention, and were larger in volume than they would have been, had another make of garment been pushed by the same commercial methods, this recognition of the value of the invention and of the merits of the thing invented would turn the scale, if in doubtful balance, in favor of the inventor, and it was in the cited case so held.

Notwithstanding the absence of this feature here, we think the prima facie right accorded by the grant of letters patent is not overcome by the evidence of anticipation or by the attack upon the utility of the patented device. This, so far as concerns this court, disposes of this branch of the defense.

[2] The next feature of the defense is the denial of infringement. The mind untrained to the ready reception of purely mechanical ideas has difficulty in distinguishing between differences in constructions which involve only a choice of equivalent mechanical expedients and real differences in construction. As already indicated, the claims of this patent must be read as combination claims, limited to the construction described, made up of the elements which are enumerated as entering into the combination, and as including in addition only the same elements under the disguise of a different form or where the elements are mechanical equivalents. The mind may hesitate over the determination of the question. When such doubt is present, the fact

that the patent is a mere paper patent may turn the scale against infringement, as it may resolve a like doubt of validity. Viewed each as a specific construction, there would seem to be as strong a likeness between the embodied device of the plaintiff and the Potter watch as there is between the defendant's device and that of the plaintiff. If the elements entering into the construction of the latter, respectively, are mechanical equivalents, the like judgment is suggested by the contrast of the former, and the converse is just as true, that if a differentiation can be made between the former it likewise exists between the latter.

The fact that the defendant was permitted for so long to make use of its device, and that the plaintiff made no use of his own is evidence to found the finding that it was recognized by the plaintiff himself that he had a property right only in his special construction with which the device of the defendant did not conflict, and that the need for his special construction was so slight as to give it no commercial value.

We therefore read the claims of this patent in the light of the prior art and of its experiences in the Patent Office as limited in their scope to a claim to a specific construction which is not infringed by the defendant's barrel. Whatever room there may be for a difference of opinion in respect to the latter finding we think is closed to the plaintiff by the characterization of his right as one not to a patented thing but to a lawsuit. This finding and that which follows has supporting authority in many adjudged cases, to which *General Electric v. Yost* (D. C.) 208 Fed. 719, is a sufficient reference.

[3] We are further of opinion, and make the finding, that even if the claims be so read as that infringement should be found, the extraordinary remedies of injunction and a decree for an accounting should be denied the plaintiff, with leave to bring his action at law. The right of a patentee ordinarily to the equitable remedy of injunction gives nominal chancery jurisdiction in patent cases, and the convenience of the parties and the practical trial advantages afforded have made a resort to equity the almost universal practice. Nevertheless, we should keep in mind that neither in the view of legal nor of equitable principles is any change worked by the mere subject-matter of the litigation. Equitable remedies in patent cases, as in all others, flow from the grace of the chancellor, and are never of right, and these remedies may be denied in proper cases, although the plaintiff has the legal right to that which he claims, including the right to his legal remedies. The refusal of a chancellor to interfere involves no denial of a right. The dismissal is of the bill, and involves neither a decision upon the legal right nor a denial of any legal remedy.

The actions of neither of these parties have been such as to make this phase of the case as clear as it might be. There is proof of the writing and mailing of letters (which is evidence of their receipt) offering this patent for sale, and some evidence that such a letter was sent to the defendant, and also of a reply requesting a model. This was in January or February, 1906. In 1916 the manager of the defendant company testified (among other things) to his opinion that

the plaintiff's barrel was not a practical device. He based this upon actual tests, which he testified he had made of "similar" barrels. These tests were made about eight years before. There is a suspicious significance in these dates. Again, the defendant, in showing how long it had been putting out its make of barrels, fixes a date as early as 1907. Making due allowance for the time required to design and make the necessary tools and other preparations for a commercial output, these dates take on an added significance. Again, there is testimony of the same witness to the care taken to inform himself of the issue of all patents, and to keep in touch with all devices relating to the manufacture of watches. This was to show his familiarity with the art; but, when he came to testify in denial of the charge of having pirated the ideas of the patentee, he was positive he had never seen or heard of the patent until 1914, when formal warning against infringement was served upon the defendant. This, in connection with the features of similarity between the barrel of plaintiff and that of the defendant, also has a significance. The explanation doubtless is that when designing the defendant's barrel, or when considering the purchase of the plaintiff's patent, he did know of the latter, as he had in mind the Hunter, Potter, and other barrels, and that he determined to reject the Thalhofer design as an untried, and, to his mind, an impracticable, construction, and designed and put out his own make of barrel, having, as it does and as it was natural it would have, at least a general resemblance to the barrels of which he knew. Having rejected the Thalhofer device, the fact that he had known of it was not in his mind when testifying.

Notwithstanding this, the plaintiff does not invite criticism for putting his own interpretation upon the facts above stated, even if we do not share his suspicions. When we turn to the acts of the plaintiff, we find things done which may also have significance. Another patentee, who had with the plaintiff an interest in the McIntyre Company, wrote him a highly suggestive letter, mentioning the Thalhofer patent and that the defendant might be found to have infringed it. The defendant answered that he had known for "some time" of the infringement. This correspondence was in 1913. The plaintiff in his testimony gives the "some time" the date of 1912, when he was considering the purchase of the assets of the McIntyre Company, among which was this patent. Late in 1914 a letter was received by the plaintiff from a watchmaker, in which the writer posed as a would-be purchaser of the patent, and mentioned as one of its elements of value that it was being infringed by the defendant, a rival watchmaker. To this the plaintiff replied, thanking the writer for calling plaintiff's "attention" to the infringement, and further stating that he "had investigated" the charge and found it to be well founded. This meant, if it meant anything, that he had not before known of it. This was followed by a formal warning to the defendant to desist. Here again the explanation doubtless is that the thoughts of the plaintiff were on some way of saving something out of his investment in the McIntyre Company, and that his memory was not strongly impressed with anything relating to this patent which was only one among the

assets of the company. Certainly he did not have in mind in 1914, when he wrote the letter, what he testified he had learned in 1912. There is no proof which we have been able to find of the consideration given for the sale of the patent to the McIntyre Company. It was appraised to be of no value as part of the estate of the patentee. This fact was put in evidence by the plaintiff, who further declined to state what he had given for it.

There is, therefore, an absence in this case of the element of sale value which was present in the Globe Knitting Company Case. It is not surprising to find the defendant drawing the inference from these facts that the plaintiff had fished this patent from a rubbish heap, which had come to him along with the real assets of the McIntyre Company, and to view his warning against infringement as purely in *terrorem*, in the hope of inducing the settlement of a prospective lawsuit. Indeed, this purpose is almost, if not fully, avowed by plaintiff in the paper book submitted. Here, again, the real situation doubtless is that the plaintiff, being properly desirous of reducing the loss from his investment in the McIntyre Company, is seeking to test out, as he has the right to do, the value of this patent. The question before us is whether he can claim the aid of a chancellor. We have room for no more than a statement of our conclusion that his appeal should not be regarded, and of one consideration on which this conclusion may be based. The plaintiff made no use of his patented device. The defendant has most industriously promoted the sale of the alleged infringement device by advertising and otherwise, so as to build up a large and valuable trade. To enjoin the defendant (if there was time for an injunction to operate) from an enjoyment of this trade is to turn it over to the plaintiff. He would thus get, along with the proprietary right which belongs to him, a valuable trade which does not. If he had moved promptly to assert his rights, the persistence of defendant in the infringement would most surely not deprive the plaintiff of anything; but no patentee can be permitted, much less encouraged, to lie in ambush, with undisclosed rights, until a valuable trade has been built up in his patented device, and then appropriate the trade.

As has before been observed, there are other elements besides the merit of an invention which give value to a patented device. The owner of one which is untried, and whose practical working and commercial value is unknown and more or less doubtful, cannot wait until a market has been created for it before he moves to protect his patent. Ignorance of the infringement would exculpate him from the charge of laches; but it is to be supposed that a make of watch which had been on the market for years, and which had been put out by a well-known watchmaker, would be known to his competitors. Full credence is given to the statement of the plaintiff that he personally did not know of the infringement until 1912, because he is a lawyer and not a watchmaker; but this by no means proves that his predecessor in title, who was a watchmaker, did not know of it, and he bought only such rights as this predecessor had. The fact that the patent had been offered this defendant adds to the strength of the

expectation that the owner would be on the lookout for any infringement by those to whom the patent was offered. There is that justification for the suspicion entertained by the plaintiff that some use was made by the defendant of the ideas of the patentee as that neither party should recover costs against the other.

The bill is dismissed, without costs.

WESTINGHOUSE ELECTRIC & MFG. CO. v. WAGNER ELECTRIC
MFG. CO.

(District Court, E. D. Missouri. January 21, 1918.)

No: 4457.

1. PATENTS \Leftrightarrow 324(5)—ACCOUNTING FOR PROFITS OF INFRINGEMENT.

The District Court, on exceptions to the report of a master finding the profits made by an infringer, is not bound by the rule that such findings have the weight of the special verdict of a jury, regardless of the substantial equities of the case.

2. PATENTS \Leftrightarrow 322—INFRINGEMENT—ACCOUNTING FOR PROFITS.

The findings of a master as to the profits made by a defendant from infringement disapproved and the amount substantially reduced.

In Equity. Suit by the Westinghouse Electric & Manufacturing Company against the Wagner Electric Manufacturing Company. On defendant's exceptions to report of master on accounting. Sustained in part.

Paul Bakewell, of St. Louis, Mo., and Thos. B. Kerr, of New York City, for complainant.

Melville Church, of Washington, D. C., and Edwin E. Huffman, of St. Louis, Mo., for defendant.

DYER, District Judge. The litigation in this case has extended over a period of more than 15 years, and has been before this court and the appellate courts several times. The original suit brought by the complainant against the defendant was a bill in equity alleging infringement of United States patent No. 366,362, granted to Westinghouse. The particular claim of the patent alleged to have been infringed was claim 4. That claim is as follows:

"4. The combination, substantially as described, of an electric converter constructed with open spaces in its core, an enclosing case, and a nonconducting fluid or gas in said case adapted to circulate through said spaces and about the converter."

The claim having been therefore adjudicated in the Second circuit ([C. C.] 112 Fed. 417, and 117 Fed. 495, 55 C. C. A. 230), a preliminary injunction was consented to by defendant here ([C. C.] 129 Fed. loc. cit. 609). The issue of infringement as to special types of construction, notably the Type M transformer, was vigorously contested upon a contempt proceeding (unreported opinion by Judge Amidon), and upon final hearing in the Circuit Court (129 Fed. 604), and upon

appeal from accounting decree (173 Fed. 361, 97 C. C. A. 621). The case proceeded to an accounting in the Circuit Court, and the complainant electing to take profits in lieu of damages, the master, H. H. Denison, Esq., returned an award of \$132,433.35. That report was disapproved by the court, and a decree for nominal damages and costs entered. That decree was affirmed by the Circuit Court of Appeals. 173 Fed. 361, 97 C. C. A. 621. Upon certiorari the Supreme Court (225 U. S. 604, 32 Sup. Ct. 391, 56 L. Ed. 1222) reversed and remanded the case for a hearing de novo upon accounting. The matter went again to the same master (Denison) who again found the profits to be \$132,433.35. This court reduced the award to \$10,000 (218 Fed. 646), and entered a decree for that amount. This decree was reversed by the Circuit Court of Appeals, as I understand it, for failure of the master to give due weight to the additional evidence offered by the defendant on that (second) accounting, and the case was again remanded for an additional report "showing the basis and constituents of the award which is recommended." This court then appointed James L. Hopkins, Esq., master, who has returned an award of \$182,394.59.

[1] To hold and sustain this report the complainant urges upon the court consideration of the rule that accords to the findings of a master the degree of weight and of conclusiveness which is carried by the special verdict of a jury. The attitude of the complainant in this particular must be somewhat embarrassing to it, in view of the claim made by it on the first accounting. Considering the prior course of this litigation, and the large monetary interests involved, the court will not permit its own judgment to be defeated by blindly adhering to the rule now so strenuously invoked by complainant. If such contention be allowed, it would amount to a positive mandate to judgment, regardless of the substantial equities of the cause. This court is not to be more irrevocably bound by the rule invoked than the appellate tribunals which have heard the same matters, particularly in view of the fact that the present master considered only the printed record, and none of the witnesses testified before him orally.

Finally, and somewhat by way of *reductio ad absurdum*, this court has had presented to it in the course of this very accounting three separate reports of profits. These reports emanate from two different masters; the first two by Mr. Denison, and the last one (now being considered) by Mr. Hopkins. In stating the amount of profits, there is a difference of \$50,000. Such a difference is confusing, when the two results are ascertained from one and the same record.

It may be suggested that the master making the second report avowedly took no real cognizance of the new evidence offered at the time of the second hearing, but that the master (Denison) considered only the proofs of the first reference, and therefore naturally followed his findings made upon the first reference. Assuming this to be true, we are then confronted with a further marvel, namely, that the defendant, being the only party to introduce proofs on the second reference, has, as the fruits of such evidence, plunged itself from an award of \$132,433.35 to an award of \$182,394.59. It therefore de-

volves upon this court to carefully consider the entire record before entering a judgment.

It may be stated that the decisions above referred to conclusively adjudicate the validity of claim 4, and determine the fact of its infringement by oil-filled transformers having core spaces. Obviously, such validity carried with it a determination that the device possesses patentable utility. But the latter phrase may only be taken to imply that the device will function or operate, and is to be distinguished from commercial value; for it will be readily seen that the fact of the device being operable will not necessarily lend its practical commercial value in possible competition with noninfringing, but economically superior, constructions. Nor, upon the finding that the device does possibly possess some commercial value, does it follow that the entire value, and therefore the entire profits, are derived from and to be attributed to the infringement. The Circuit Court of Appeals has determined the scope of the invention to be that of "a limited, detailed claim"; and the opinion of the Supreme Court seems to recognize the probability that the great mechanical desideratum is keeping the coils, not the core, from overheating, and that possibly the commercial value of so narrow a claim as this one has been determined to be is therefore slight.

[2] The issues raised upon the present accounting naturally resolve themselves into three inquiries, viz.: (1) What infringing transformers were sold by the defendant during the accounting period, and their value? (2) What profits were realized by defendant from such sales? (3) What portion of such profits were attributable to the infringement? These inquiries will be briefly considered in the order just stated.

I. It will be remembered that upon the first accounting there was offered in evidence a tabulation of defendant's transformer sales, thereafter known as the "Layman Schedule," and which was prepared by a representative of the master working with one of the clerks of the defendant. Mr. Layman testified that, while he had not done the work himself, he believed it to be correct as a statement, by items, of the infringing transformers sold by the defendant. Subsequently it was discovered that, instead of being a list only of infringing transformers, it was one that included practically all transformers, and embraced many that by reason of their being dry (not oil-filled) or of their having no spacing wedges in the core (no core spaces) were plainly noninfringing within the scope of the claim as construed by the above-mentioned adjudications. The master upon that accounting, and upon the second accounting, held that the defendant was conclusively bound by the "Layman Schedule" as an admission. This view has been disapproved by this court, and, it seems to me, by the reviewing tribunal.

Upon the second accounting the defendant employed a certified public accountant to compile from its books a new schedule, designed purposely to embrace all transformers, so that selection might intelligently be made therefrom of those that were of the infringing construction. This list is known in the record as the "Williams Schedule,"

and it appears from an examination thereof that the defendant was at all times correct in its contention that the "Layman Schedule," while purporting to contain only the offending devices did in fact substantially embrace all. The complainant objected to the "Williams Schedule" as incompetent at the time of its introduction, and now continues to press the point, although seeking to have sustained the report of the present master, who adopts it as a basis for his findings. In the view taken by the court the two schedules seem to verify each other, considering the aims with which and the circumstances under which they were prepared. Since the "Williams Schedule" is somewhat the more comprehensive of the two, and since the finding most favorable to complainant has been drawn therefrom, it would not seem to lie in the mouth of the complainant to protest against its adoption as the basis of the inquiry, especially since complainant's contention that the "Layman Schedule" is infallible and unimpeachable on grounds of estoppel has been dissipated by the opinion of the Circuit Court of Appeals on the second appeal. From the "Williams Schedule" the present master has drawn a statement by machine types of those machines that infringed and those that did not. A discussion of his findings and of the evidence as to the various types would prolong this opinion to many times the length necessary. Suffice it to say that his exclusion of types SG, SH, and SK, for transformers above 15 K. W. capacity is evidently erroneous, and that no satisfactory reason appears for his inclusion as infringers of types M Arc and others ranging below 15 K. W. The same subject was considered by the court upon the same record at the last accounting, and upon re-presentation of the case the court sees no reason to change, but is rather confirmed in the finding then made, to the effect that the net amount received from the sale of infringing transformers did not exceed \$308,128.77.

Since the complainant urges that solemn weight and import be given to the findings of a master, it may not be inappropriate to accord some respect to the findings of the court upon the same record. These matters of inclusion or exclusion of machine types from the category of infringers have necessarily had to be determined from the testimony of witnesses employed at one time or other by defendant, since they alone knew the details of type construction at remote periods, and it is particularly difficult to follow the course of the present master's reasoning when he apparently follows and accepts their testimony for the rejection of certain types, but rejects and discredits like testimony regarding others. The court sees no valid justification for the reflections cast by the master's report upon credibility of Messrs. Layman, Schwedtmann, Selling, and others, called as witnesses for defendant.

II. The question of the method of computing profits, even when the number and selling price of infringing machines had been fixed, has proven the most troublesome and difficult matter in the entire inquiry.

The first master exhaustively analyzed figures bearing on cost of labor, material, and overhead factory expense; but the Supreme Court found the record not in condition for the entry of a decree. The present master has attempted to cut the knot by simply adopting the per-

centage of desired profits, namely, 25 per cent. on factory cost, or its equivalent, 20 per cent. on selling price. It is not clear to the court from the testimony of witness Foster that he was acquainted with the percentage of normal or desired profit throughout the accounting period, nor that the said percentage of "healthy" profit recognized by Mr. Layman as desirable was in fact obtained when the transformers were sold in a competitive market. In fact, this seems quite impossible, when we consider the showing made by Accountant Williams to the effect that, even rejecting unusual losses, the entire profit of the company's business was but \$64,154.72. The complainant has had the opportunity and must surely be in command of the facilities necessary to produce some contradiction or refutation of this expert's analysis of the defendant's financial affairs, and, failing such showing, the court accepts this figure of total profit as correct. Prorating the total profit sought in the same proportion that the total business of the company, \$2,156,770.90, bears to the volume of infringing transformers sales, \$308,128.77, we find the total infringing transformer profit to have been not more than \$9,174.12.

III. If it has proven difficult to determine the total profits made upon sales of infringing transformers, it is certainly not less so to find what part of those profits was due to the infringement. The defendant contends with much earnestness and force that, since infringing and noninfringing transformers of the same type were sold side by side, with equal facility, at the same prices, sometimes to the same customer, without advertisement of the infringing feature, and without the customer knowing or caring whether any machine he bought had core spaces or not, therefore no part of the salability of the transformer was created by the infringement, and no part of the profit is attributable thereto. The defendant concedes, however, that the creation of the core spaces arose from the omission of iron, and that there was a consequent saving in cost of production, not exceeding 1 per cent. or \$3,081.28, on the total infringing sales. Throughout this record the court has been impressed with the view that the cooling feature is due rather to the spaces in the coils, and between the coils and the core, than to the spaces in the core itself. The facility with which the defendant, after the decision of the Carbide Case, closed up the core spaces without crippling the efficiency of the device, as well as the series of Fynn-Langsdorf tests, serves to corroborate this view. The subject is not, however, clear beyond dispute, and certain expressions in the opinion of the Supreme Court appear to accord to the subject-matter of claim 4 a value in the art beyond that just indicated. In view of the fact that the burden of apportionment rests upon the defendant, the court resolves its doubt against that party, and gives complainant a decree for the total profits found to have been realized upon sales of infringing transformers, namely, \$9,174.12.

Touching the question of the allowance of interest, it appears to the court that the contest as to whether complainant was entitled to recover anything more than nominal damages was a matter "in earnest controversy and of uncertain issue" (*Tilghman v. Proctor*, 125 U. S. loc. cit. 161, 8 Sup. Ct. 894, 31 L. Ed. 664), up to December 5, 1914,

the date of entry of decree of this court awarding to complainant substantial profits. The decree will therefore carry interest at 6 per cent. from said date.

The costs incurred prior to said decree of December 5, 1914, were specifically adjudged. Both parties appealed from that decree and were sent to another accounting. Complainant having failed to improve its position, and having likewise suffered no considerable impairment in the amount of its award, the costs since said decree are assessed against the parties. It follows that the defendant's exceptions to the master's report are sustained in part and overruled in part, as indicated in the course of this opinion (but without taxation of costs against either party under equity rule 67 [198 Fed. xxxvii, 115 C. C. A. xxxvii]), and that a decree may be drawn and entered in conformity herewith.

It is so ordered.

JOSEPH LAY CO. v. AMERICAN BRUSH & BROOM CO.

(District Court, N. D. New York. January 21, 1918.)

No. 173.

PATENTS ⇨328—VALIDITY—METAL CASE BROOM.

The Lay patent, No. 946,234, for a metal case broom, the essential feature of which is the use of two-pointed nails or staples having both points beveled on the outer side to fasten the broom straw in the casing, the staples being drawn through one side of the casing against the inner surface of the other side, causing them in most cases to clinch by bending toward each other, and thus more firmly hold the straw, is void for lack of invention, in view of the prior art and analogous arts, in which the use of such staples for a similar purpose had long been known.

In Equity. Suit by the Joseph Lay Company against the American Brush & Broom Company. On final hearing. Decree for defendant.

This is a suit in equity to enjoin alleged infringement of United States letters patent No. 946,234, dated January 11, 1910, on application filed February 21, 1908, issued to Samuel C. Lay for "metal case broom," and for an accounting.

V. H. Lockwood and R. G. Lockwood, both of Indianapolis, Ind., for plaintiff.

Frank C. Curtis, of Troy, N. Y., for defendant.

RAY, District Judge. The patent in suit, No. 946,234, for a metal case broom, applied for February 21, 1908, and issued January 11, 1910, to Samuel C. Lay, has three claims, reading as follows:

"1. A metal case broom, including broom material, a metal cap surrounding the same, and two-point fasteners with each end beveled on one side that extend through one side of the casing and against the other side thereof, with the beveled ends turned and clinching the material.

"2. A metal case broom, including broom material, a metal cap surrounding the same, and two-point fasteners with the ends of each fastener oppositely beveled and extending through one side of the metal cap and against the

other side, with the beveled points of each fastener turned in opposite directions and clinching the material.

"3. A metal case broom, including broom material, a metal cap surrounding the same, and two-point fasteners with each end thereof beveled on one side that extend through one side of the casing and against the other side, with their beveled ends turned and clinching the material, one set of said fasteners extending through one side of the casing and another set extending through the opposite side of the casing, the oppositely located fasteners being similarly arranged and with their bent ends co-operating with each other for clinching the broom material."

The patent is for an improvement merely in the construction of this class of brooms, and the patentee says in the specifications:

"The object of this invention is to improve the construction of metal case brooms in order to strengthen the same, to cheapen their construction, and to make them so there will be no projections on the surface thereof that will catch in fabrics while the broom is being used. The chief feature of this invention consists in combining with a metal cap the broom material therein, and large two-pointed nails so that they form simultaneously both an upper and lower series of fasteners and the points thereof are each beveled on one side, preferably oppositely beveled, whereby said points turn in opposite directions for clinching the broom material. By using a staple and beveling the points thereof, the broom maker is enabled to control the direction of bending and clinching of the ends of the staples or fasteners, which is impossible with nails whether beveled or not, and also impossible with staples unless beveled. Since fasteners will not be effective unless they extend transversely of the fiber broom corn, this characteristic of the action of beveled staples is one of very great importance in the manufacture of factory brooms."

In point of fact the improvement on the prior art in this class of broom making consists in substituting for a single-pointed nail, having a head, a two-pointed wire nail "made by merely cutting ordinary wire slantingly into sections and bending the sections into U-shape." The wire, when thus slantingly and properly cut in sections and bent into shape, forms a two-pointed U-shaped nail, with the points beveled on opposite sides. They may be so cut as to leave both points beveled on the same side.

The broom has a handle projecting into the broom corn forming the broom proper, it may be other material, and this material is surrounded by a metal band, and it may be by a metal cap, and it may be by both, which bands, or band and cap (so called), perform the function of not only holding this material together, but of binding it more or less firmly to the handle. Such a metal case broom would not be durable; that is, the bands will not of themselves grasp and hold, when the broom is put to use, the material with sufficient firmness under differing conditions. This was well known, and in the prior art wire or wrought nails with a head had been used to unite the parts more firmly and durably. These pointed and beveled nails were driven through the band on one side, and on through the material forming the brush part of the broom, until they struck or met the metal band on the opposite side, when, because of the bevel and obstruction thus met, they would bend or curl up, and grasp some of the material with more or less firmness. Several nails could be, and, in the prior art, were, thus driven in from one side, and others from the opposite side. The head of such nails, when thus driven, on meeting

or reaching the metal band, would as a rule form or cause a more or less rough band surface. Another defect, or alleged defect, in the single-nail process, was that, unless firmly held by the fingers or otherwise, it would turn while being driven, and the upward bent or curl was as liable to be on the same line with the direction of the broom material as crosswise or transversely thereto, and consequently there would be no grasping of any part of the material. The patent says:

"Since fasteners [the nails] will not be effective unless they extend transversely of the fiber broom corn, this characteristic of the action of beveled staples [two-pointed U-shaped nails] is one of very great importance in the manufacture of factory brooms."

The patent also asserts:

"These nails [the staples, two-pointed nails] can be driven by machinery, because they can be mechanically handled and inserted with accuracy."

The patent asserts that this gives greater speed to the nailing process and that the staple or two-pointed nail—

"performs the function of two separate nails and in a much better way, for there is no projecting head to tear cloth or other material in a store or textile factory, or to enable the nails to work out, and the two ends of the nails are united, so as to contribute to the strength of the fastening."

It is difficult to see that the staple or two-pointed nail is less liable than the single nail to work out of the broom and band, as that will depend on whether the points reach the metal band on the opposite side of the broom and curl or bend up. If either nail fails in this, it will work out. The chances of getting the bend or curl are greater with the staple nail than with the single nail, as it has two points. Hence the probabilities are that in a given broom made with staples a less number will work out than in the case of the broom being made with single nails. The physical exhibits in the case show that a very large number of the nails, whether single-pointed or staples, fail to reach the band on the opposite side, and fail to clinch, and do or may work out or become loose. But these staples, or two-pointed nails, were old in this and analogous arts, and it seems to me the advantages of their use are perfectly obvious.

The idea of making a brush or broom with a metallic band or ferule surrounding the broom corn, or bristles, and with nails driven in and against an interior metallic clinching plate there placed for the purpose of clinching, or curling, or turning up, the points of the nails, was old, and shown in United States letters patent No. 207,786, issued September 3, 1878, and granted to one Whiting. It is again shown in the brush or broom making art in patent to Bowditch, No. 334,336, issued in 1886, where are described and shown metal bands and nails properly upturned and clinched by striking against a hard surface or obstruction. In patent to Buckley, No. 387,854, dated August 14, 1888, we find staples or two-pointed nails used in manufacturing boots and shoes fully described. These are beveled at the points. The curling or bending is fully described and illustrated. The patentee says:

"My invention relates to improvements in staples, and it consists in forming the same with a crown of greater thickness than the legs, the latter having round inner and flat outer faces, and the faces being doubly beveled in the direction of their length, whereby, when they are clinched, their ends curve around and take increased hold on the leather, so that the staple provides a strong and reliable fastening, and is prevented from being drawn out in either direction. Referring to the drawings, *A* represents a wire staple, which is formed of the legs *a a* and the head or crown *b*. The legs are beveled on their sides from *c* to *c'* and from *c'* to the extreme points *d*; the bevels *d c'* being at a different angle from the bevels *c' c*. When the staple is driven into position, a suitable bed or anvil being provided for causing the deflection of the ends of the legs, said legs turn laterally and upwardly and curve around, forming well-developed eyes, which enter and re-enter the leather or other material to be stapled, the effect of which is to doubly clinch the legs in position, whereby, unless the legs and head break, the staple cannot be withdrawn by strain or power on the same in either direction."

In patent to Culbertson, No. 257,213, issued in 1882, we have a tack with a bar or elongated head, making the tack T-shaped; that is, the head is elongated, and this bending up or curling and binding process and effect is fully described. This is in the nail and nail-fastening art, and the patentee says:

"My tack *A* is made of copper or other malleable metal, and it consists of a round and nearly straight body, with a bar head resembling a letter *T*, and it has a tapered and slightly flattened point, so that, when driven through the leather and into contact with a piece of iron upon the reverse side, this point will be turned back and enter the leather from that side, so as to clinch or rivet it firmly. This tack is especially useful in securing the parts of harness together and in the formation of long heavy loops, the work being done more quickly than by sewing, and it will not rip."

In patent to Dick, No. 261,317, dated July 18, 1882; we have a staple used as a part of a button fastener. In patent to Dion, No. 360,863, dated April 12, 1887, we have a nail with a *rounded* head (so it will not catch cloth or tear it, or form a rough surface) for fastening leather "or other flexible materials" (which would include broom corn), and this is beveled so when driven it will bend or curve. Here the clinching, holding, and fastening functions are fully described. In patent to Dunn and Harris, No. 10,181, issued August 15, 1882, we have a wire staple, or nail, with the points beveled, fully shown and described. In this patent the purpose of beveling these staple nails is fully described.

We now come to an important patent for "broom heads," No. 114,120, dated April 25, 1871, and issued to one Charles Fiscus. It was cited by the examiner in the Patent Office when the patent now in suit was applied for and rejected by the examiner. In this patent the metal cap and band surrounding the broom corn is shown and described, as is the nailing process and curl of the nail and the function of holding and gripping the broom straw. The patentee says:

"The object of my invention is to provide a cheap and durable fastening or head for brooms, etc., more generally employed in breweries, and on other rough floors and places where dirt accumulates rapidly. It consists in a metal cap or head, through which nails are inserted for securing and holding the broom straw, and thus furnishing an improved article for the rough work required. In the drawing, *A* represents the broom head, made of tin, sheet metal, or like material. *B* is the broom straw, and *C* the handle of

the broom. *D* are nails, generally of wrought iron, or copper, or like material. The head *A* is made in two pieces, soldered or secured together in any suitable manner around its edges. This head is opened very wide for the admission of the broom straw, and after this is placed in its proper position the nails *D* are inserted into the holes on each side of the head, and the whole head then put under a presser clamp; and as it is drawn or pressed together, the nails, by coming in contact with the metal of the head on their opposite sides, are bent or curled, as plainly shown in Fig. 1, thereby securely holding or gripping the broom straw, preventing it from slipping out."

In patent to Goodfellow, No. 295,539, dated March 25, 1884, we have a machine for driving and fastening and clinching staples or staple nails. Other machines for the same purpose are in evidence. In patent to Jester, No. 446,523, dated February 17, 1891, we have staples or staple nails, beveled, and the patentee says:

"By having opposite faces of the legs cut away, they tend to hold the body of the staple in an upright position when driven in any object, and also when said legs are clinched in opposite directions (as is usually the case) the smooth exterior surface is presented."

In September, 1888, there was issued to Mandel and Henderson a patent, No. 389,661, for inserting and clinching staples, and the staple and process are fully shown. In patent to Lindt, No. 692,882, issued February 11, 1902, we have a machine for driving and clinching these staple nails, and in Figs. 19, 20, and 21 the beveled staple is shown.

Lay Prior Patents.

July 12, 1882, one Joseph Lay, applied for, and in February, 1883, obtained, a patent, No. 272,890, for a broom which fully shows the metal cap acting as cap and band, and also a metal band lower down, and nails driven in on one side through the cap, and also other nails driven through the band, and curved or bent by coming in contact with the band on the opposite side, so as to grasp the broom corn or splints forming the brush part of the broom. This is quite fully illustrated. The patentee says:

"The head *b* is formed of broom corn, splints, or other suitable material bound together with one or more metallic straps, *d d'*, through which it is secured by nails to the flattened or wedge-shaped lower end of handle *h*. Cap *a a'* formed, as above described, in two parts, placed together with their edges interlocked, may be connected with handle *h* and head *b'*, attached thereto, by passing the cap over the upper end of the handle and sliding it down on the handle to head *b*, which should be firmly pressed into the cap. As cap *a a'* is constructed of thin and pliable sheet iron or other suitable metal, the pressure of handle *h* will readily cause the lower part of the cap to assume a shape to fit the handle. The broom may then be placed with one side of cap *a a'* on an anvil, and nails *c* driven into the upper side of the cap and through head *b*, between straps *d d'*. As the lower side of cap *a a'* rests on the anvil, the nails will not pass through the lower side, but will be turned by it, and clinch against the lower side of the broom head *b*, as shown in Fig. 2. The broom may then be reversed on the anvil, and nails *c* driven in like manner through the opposite side. One or more of the nails driven through the side of cap *a a'* should pass through handle *h*."

Here the driving of nails from opposite sides of the broom is fully described. This patented broom of Joseph Lay does not differ from

the broom of the patent in suit, except that, in the patent in suit, the two-pointed nail or staple is substituted for the single-pointed nail of Joseph Lay; that is, the patentee of the patent in suit has *selected* for use in broom making the two-pointed beveled nail or staple of the prior art, as it gives better results. The arrangement of parts, handle, broom corn, or splints, and band, or band and cap, where both are used, is the same, and the mode and manner of nailing is the same. Fiscus, of the prior art, shows one band, or cap and band, all in one. Bowditch shows one band. It was not invention to add a band, or even abandon the cap and substitute a band, or two bands. The functions were the same. It was no more invention to do this than it would be to tie two strings around a bundle of fagots in place of one.

Twelve years later, March 5, 1900, one Samuel C. Lay applied for, and in June of the same year obtained, a patent, No. 652,542, for a new and useful improvement in brooms, with two bands, one (called a case) at the top of the brush part and the other lower down. This upper band does not extend over the upper end of the broom corn, as shown in the Joseph Lay patent. As a broom properly made flares more or less, being bound together at the top, and again near the top, and not at the bottom, S. C. Lay made his case, or band, flaring; that is, broader or wider at the base than at the top. He very naturally inserted the broom corn filling from below—that is, at the wider mouth—for obvious reasons. The single claim of this S. C. Lay patent of 1900 reads as follows:

“In a broom, a wide flaring case formed by interlocking the ends of the metal in position to come in transverse alignment with the handle, filling inserted upwardly into the casing, a handle inserted downwardly into the filling, nails inserted near the upper edge of the case, and nails inserted near the lower edge of the case, said nails passing through one wall of the case and through the filling and through the handle and clinching against the opposite wall of the case, substantially as specified.”

Here we have: (1) A wide, flaring case, formed by interlocking the ends of the metal in position to come in transverse alignment with the handle. This means simply that the strip of metal had its ends interlocked and passed around the broom. (2) Filling, such as broom corn, inserted upwardly into this casing, and (3) a handle inserted downwardly into this filling. It was much easier to put the filling in at the broadest end of this band or case, and the obvious thing to do, and what any sensible person would have done. So it was the obvious thing to do to push the handle of the broom down into the filling so far as necessary, about six or eight inches, instead of pushing the four or five feet of handle up through the filling unnecessarily. Then, (4) nails inserted near the upper edge of the case and nails inserted near the lower edge of the case, said nails passing through one wall of the case and through the filling and through the handle (not all of them, see drawing) and clinching against the opposite wall of the case. It is obvious that some of the nails were driven through the handle, to hold it in and bind the whole together firmly. The drawings show the clinched nails, the bent-up nails, which clinching or bending was caused by coming in contact on the opposite side, with the casing. The claim says nothing of driving nails from both sides, but Fig. 2

of the drawings show this distinctly. In this patent of 1900, No. 652,542, the patentee expressly says:

"The flaring shape of the case allows the lips of the filling to spread and give the brush a nice shape. The cord binding 10 (lower down on the broom) limits the spread of the filling."

This patent also describes the beveled faces of the nails and the purpose and operation of such beveling. It says:

"The tips of the nails have beveled faces 11, and the nails are driven through one wall of the case and through the filling, and where the tips strike the inner face of the opposite wall the tips turn and clinch in the filling. The direction in which the tip will turn is predetermined by noticing the direction of the beveled face, and the nails are driven so that opposing or opposite clinches will be on opposite sides of the same mass of filling, as shown in Fig. 2, and in this way I secure a firmer grip upon these masses of filling."

Prior Use of Staples or Staple Nails in Broom Making.

As early as December 15, 1879, Charles Schosson and Romonds D. Markham, applied for, and, August 24, 1880, obtained, a patent for "a broom" in the construction of which the use of staples or staple nails is shown in the drawings, described in the specifications, and claimed in the single claim of the patent. Instead of a wide, thin metal band, as shown and described in the prior patents referred to, the patent has a wire band, which is fastened to the broom of usual construction by staples or staple nails; that is, two-pointed nails. As they are driven into wood, it is not necessary that the nails clinch.

When the broom is in shape, and is to be bound so it will stand wear and tear, a wooden brace is driven through the broom corn from side to side of the broom, or side end to side end thereof, at a suitable distance from the top. Through a hole in one end of this brace a wire is passed and looped over the end thereof, and then passed and drawn tightly around the outside of the broom in opposite directions as many times as the maker desires. Then this wire, or metal band, is fastened to the brace by driving staples—that is, two-pointed nails, which straddle the wire band—through the broom corn or other filling on all sides of the broom into this wooden brace so driven into the interior of the broom. The function of these staples, or two-pointed nails, is to bind and hold the band and broom corn firmly together and in place. If driving a staple or two-pointed nail into a broom of this old construction, in place or lieu of a single-pointed nail—the substitution of the former, old in the art and the operation of which was well known, for the latter—was the result of that mental conception, that flash of genius, which is not merely the result of the exercise of the reasoning process from known premises and facts, and which the law sometimes calls invention, then perhaps we can say that invention is disclosed in this substitution.

What *new* result was obtained? None. What *better* result followed the substitution? All that is claimed is that the beveled staple or two-pointed nail, after being driven through the metal band, will not and cannot turn, and hence a bending or upturning of the beveled point transversely of the broom corn can be insured, and the grasping of a portion of the filling of the broom made reasonably certain.

Hence the staple, properly beveled, is better than the beveled single-pointed nail. This was obvious. All the broommaker had to do was to look at the various kinds of nails and merely think—exercise his reason and good judgment—and select the nail that would not turn. If the single-beveled nails, after being driven through the metal band, did turn therein, as round ones might, but square ones would not and could not, unless force for the purpose was used, all the maker of brooms had to do, and all that was necessary to do, was to use either a beveled staple or a beveled square wrought nail. This idea would occur to any mechanic skilled in the art. He was called upon to make a suitable and wise selection and exercise judgment.

In the Patent Office this application for the patent in suit was rejected April 24, 1908, on Fiscus, No. 114,120; Lay, No. 272,890; Lay, No. 788,157, referred to later; Schosson and another, No. 231,500, on the ground the last two patents show the use of double-pointed nails and that there is no invention in using staples in place of the single-pointed nails shown in the other patents. The claims and specifications were then amended, and the application as amended was again rejected by the examiner March 29, 1909. An appeal was taken, and, only two of the three examiners being present, the rejection was reversed, and the patent issued. On this appeal the argument of the applicant stated:

"The chief feature of the invention is the combination with parts of the broom of a two-pointed fastener with the two points thereof beveled on a certain side or with a certain relation to each other, so that, when the staple is driven in through one side of the casing and strikes the other side, the direction of bending of the ends will be predetermined, whereby they will always cross the fiber of the corn, and, if desired, will bend towards each other around the corn. The point is the beveling of the two ends of the fastener, so that the direction of bending can be controlled."

It is seen that the point made and claimed was that by the use of the two-pointed nail, or staple, properly beveled, the direction of the curl or bend could be "predetermined, whereby they will always cross the fiber of the corn, and, if desired, will bend towards each other around the corn." And, said the applicant:

"The point is the beveling of the two ends of the fastener [staple], so that the direction of bending can be controlled."

But the use of beveled staples was well known. The applicant in dilating on this idea said further:

"Applicant's former patent, No. 788,157, refers to a beveled single nail, whereas a double nail with both points beveled performs functions impossible with a single nail. It is impossible for any one driving single beveled nails into a broom to control the direction of bending of the end of any nail, because the nails may turn. If the direction of bending of the ends of single nails cannot be controlled and a broom is driven full of the nails, their ends are liable to turn in any direction, so that many will be parallel with the broom corn and there will be no uniformity, system or method in the bending. The result would be a 'crazy' broom. The two ends of a staple cannot turn, as the staple prevents it, and by beveling the two ends of a staple the direction of bending of the ends of those staples can be controlled and made absolutely certain and systematic. That this is a vital improvement in the art would be admitted by anybody, it would seem, after careful consideration of it. The mere fact that in Fig. 2 of applicant's former patent the ends of the nails all

appear bent transversely of the fiber does not change one's conclusion about the matter. It is easy to bend those nails all alike in making the drawing, whereas it is evidently impossible in making a broom with single nails."

This was not a new idea in the use of staples or two-pointed nails. It is described and also shown in the drawings of the patent to Buckley, No. 387,854; to a degree in patent to Dunn and Harris, No. 10,181; to a degree in patent to Frost, No. 274,418, where the bevel was used for the purpose, says the claim, "in order to enable the legs [of the staple] to separate from each other"—that is, spread apart, the direction of the spread being controlled by the bevel. In this patent the ends were not made to curl, as they did not meet a hard surface; but the principle of control by means of a bevel is shown. The same idea of controlling the direction of the bend or curl by means of the bend in staple nails is again expressed in the patent to Jester, No. 446,523, of February 17, 1891, and in the case of single nails in the S. C. Lay patent, No. 652,542, of June, 1900. What is true of controlling the direction of bend or curl in a single-pointed nail by means of the bevel is also true of the staple nail, and the whole contention is reduced to the single point that by substituting the beveled staple nail for the beveled single pointed nail the danger of the turning movement of the nail is obviated; that is, a staple nail driven through the metal band cannot turn in the broom corn filling as the heads of the two points or pegs are connected and the two entrance points or holes, and hence the two legs are distant from each other in a hard metal surface. S. C. Lay in his patent of 1900, says:

"The direction in which the tip will turn is predetermined by noticing the direction of the beveled face, and the nails are driven so that opposing or opposite clinches will be on opposite sides of the same mass of filling, as shown in Fig. 2, and in this way I secure a firmer grip upon the mass of filling."

The difficulty was in driving the single nail without its turning. No new or improved means were used by the plaintiff here to prevent such turning; but by a wise selection of the proper nail, viz., the staple nail, or two-pointed nail, one was selected and substituted which would or could not turn for the obvious reasons stated. It was not invention to make this selection for this purpose. It was not a discovery. It was common knowledge and obvious that a staple, two-pointed nail, could not turn when driven into a substance hard enough to prevent the whole staple turning therein; that is, one leg from cutting a circular path in the material into which driven. It is claimed, also, that the staple is more desirable, for the reason it can be driven by machinery. Is it invention to select from a number of nails, or two nails, that nail which can be driven by machinery, when the other cannot be? There is no pretense it was a new discovery that staples could be so driven. Machines for driving and clinching staples were old and well known, and several of these are in evidence. If speed in driving nails was desired, this was the obvious thing to do.

Another Lay Patent.

The use of staples and clinching them in making brooms was old, as we see by turning to the patent to Frank R. Lay, applied for Janu-

ary 4, 1904, and granted April 25, 1905, No. 788,157. This patent shows the process of making this class of brooms from the beginning, including assembling the broom corn filling, the insertion of the handle, the surrounding of this filling with metal bands, the compression and shaping of the assembled parts, the driving of "suitable fastening devices through the retaining band and handle and stock (filling) on each side of the handle," and, lastly, staples driven through the fiber on each side of the handle and the metal band and the ends of such staples "clinched," preferably on the opposite side of the band, and also "an auxiliary band having its overlapping ends secured together by nails 15 driven into the pointed end 6 of the handle 7, staples 18 being also driven into the broom head from the opposite sides of the band as shown," and they are shown clinched. This is what the patent says:

"While the broom head is being compressed, nails or similar fastening devices 11 are driven through the retaining band from opposite sides thereof into the handle 7, said fastening devices securing the handle within the fiber and the band in position on the head. In order to hold the retaining band in contact with the cemented end of the stock, and secure the same in position after the broom head has been removed from the compressor, I drive staples 12 through the fiber on each side of the handle, the ends thereof being preferably clenched on the opposite side of the band, as indicated at 13. An auxiliary retaining band 14 encircles the broom head a short distance below the retaining band 8, said auxiliary band having its overlapping ends secured together by nails 15 driven into the pointed end 6 of the handle 7, staples 18 being also driven into the broom head from the opposite sides of the band, as shown."

And further on the patentee says:

"While by using staples, instead of nails, for fastening the band in position, a much larger contact surface is obtained and greater security assured."

In the face of this Frank R. Lay patent, this description, and the drawings of that patent, I fail to discover anything new or novel in the patent in suit. There are some slight, but no material, changes, and the elements of the combination and the principles are the same. The staples are used by being driven into and through each band, and are preferably clinched on the outer side of the band on the opposite side, but not necessarily so. All this is supplemented by the ordinary stitching below the bands "to reinforce the head and give the same the desired degree of stiffness." Plaintiff's broom and this Frank R. Lay patented broom each shows two metal bands, the supplemental stitching and staples driven through both bands and the filling and "clinched," it may be, on the *inside of the band* on the opposite side of the broom, and it may be on the *outer side*, but "preferably" on the outer side. The single claim of this patent reads:

"A broom head having the butt ends of its broom fibers exposed and saturated with pitch, a retaining band encircling the saturated portions of the head and having its overlapping ends interlocked, a handle having a pointed end inserted in the head, fastening devices passing through the interlocking ends of the retaining band and engaging the handle, staples engaging the band and head on each side of the handle, an auxiliary retaining band spaced from the first named band, staples passing through the auxiliary band and engaging the broom head, and fastening devices engaging the auxiliary band and the pointed end of said handle."

This language, so far as the staples are concerned, is quite broad. Staples which "engage" the band and head of the broom (broom corn or filling), and also staples which pass through the auxiliary band and "engage" the broom head, the ends of such staples being "*preferably*" *clinched* on the opposite side of the band, may engage the head by turning and grasping any material part or in any well-known manner. It was well known that staples could be and had been turned and bent, or bent up and curled, by coming in contact with a metal band, as we have seen. This patent to Frank R. Lay contemplated a curling and engagement of the points of the staples with the band or the material on the inner side of the band, but the inventor *prefers* the outside clinching.

The plaintiff's counsel in their brief say:

"Beveled pointed staples were known more than twenty years before Lay's invention (meaning patent in suit), as shown by the patents herein, but it never occurred to any other person during all that time to use staples, instead of nails, in making metal case brooms."

In 1904, about three years before the patent in suit was applied for, it *did occur* to Frank R. Lay to use staples in making metal case brooms. It is evident they were used in place of nails, but not to the exclusion of nails entirely. This Frank R. Lay patent does not say anything about the staples being beveled, but as beveled staples were well known, as was the purpose and action of the beveling, and as his staples when in position are bent systematically inwardly, so far as shown, it is evident that beveled staples were used. But, clearly, it was not invention for the plaintiff, in 1908, to *select* the beveled staple when he desired to control the direction of the bend or curl. It was the obvious thing to do. Plaintiff's counsel also say as to this alleged invention of Samuel C. Lay:

"The idea of driving two nails at once suggested to his mind the use of the staple with the two points, and when he tried that it became manifest that the prongs [legs of the staple] would go in and clinch the material, and the staple would not turn in the casing."

But the idea of two nails (in effect) driven into the object at the same time and by the same means was present with the man who first made or used a staple more than twenty years before, and the idea of clinching was very old, as was the idea of curling or bending up the ends so as to grasp the broom material. It was obvious that if a single beveled nail would curl in a given direction if properly held and grasp the broom corn or broom material, the two legs of a beveled staple would do the same. This is not a case of "wisdom after the fact," but of general wisdom preceding the alleged invention and actually applied in making shoes and other things, and I think in the manufacture of this class of brooms.

In granting the patent and reversing the examiner, the two examiners in chief said:

"The examiner points out that the patents to Lay, No. 788,157, and Schosson et al., show the use of double-pointed nails for the purpose of fastening metal

caps or bands on brooms, and that Lay, No. 652,542, shows the use of beveled nails, so that the points will turn and clinch in the filling. He takes the view that, 'it being old to use beveled nails, no invention is involved in making the nails double-pointed, even if, as claimed by applicant, a better broom results.' But in neither the Lay patent, No. 788,157, nor in the Schosson patent, are the ends of the staples clinched. In the other patents, which show the nails beveled for the purpose of clinching them in the filling, there is nothing to prevent their turning and clinching in any direction; but by using a staple as applicant has done, and beveling its ends, the securing means is prevented from turning, and the direction in which the ends bend can be predetermined in driving the staples, so that the ends bend crosswise to the filling. In the present case applicant seems to secure a new result, and we therefore regard the claims as patentable. 'The decision of the examiner is reversed.'

This assumes that it was Lay's idea to bevel the ends of the staples, which, as we have seen, is not the fact. Again, the beveling has nothing to do with the turning or nonturning of the nail or staple. That is determined wholly, in the case of a staple, by the character of the band into which driven. Again, there is no *new result*. The broom fiber was grasped and held by the clinching—upcurling—of the single nail, when it did not turn, as it is by the curling of the staple. The claim here is that, as the staple *could not turn*, there was a *better result* from its use, as there was more certainty of a clinching in the proper and desired direction. But this was obvious to any mechanic reasonably skilled in the art, or reasonably skilled in the use of nails. The location of the bevel determines, with reasonable certainty, the direction in which the single nail or the prongs of the staple will bend and curl, and hence the only thing necessary or remaining to be done was to *select* that nail which would not turn when driven into and through the band.. Therefore use the beveled staple.

Carnegie v. Cambria, 185 U. S. 403, 22 Sup. Ct. 698, 46 L. Ed. 968, decided five to four, is cited by plaintiff, as is Loom Co. v. Higgins, 105 U. S. 580, 591 (26 L. Ed. 1177). In Loom Co. v. Higgins, Mr. Justice Bradley said:

"It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a *new* and beneficial result, never attained before, it is *evidence* of invention."

But such is not this case. Each and every element of the broom made according to the patent in suit is very old, and there is nothing whatever *new* in the mode of combining the elements. The only new thing claimed in this broom of the patent in suit is the presence of the old and well-known *beveled* staple, or two-pointed nail, driven against the inside face of the band on the opposite side, so as to clinch or grasp a part of the filling. But this is not a *new result*. The same result followed the use of the single-beveled nail, when it did not turn on being driven and had followed its use for years, and this was well known. If that result followed the use of the single-beveled nail, it surely would follow the use of the staple. There was nothing new in the staple not turning when driven into and through the metal band, as it had been used in the broom-making industry as shown in the patent of 1905, to Frank R. Lay, No. 788,157, where it was obvi-

ously shown that the staple would not and could not turn when driven through a hard surface, and also in the shoe-making industry and in general carpentry work. It is impossible for me to discover invention in selecting the beveled staple, when it was desired to use a nail which would not turn when being driven, or after being driven, into and through a hard metal band. The plaintiff is presumed to have known the characteristics of these beveled staples. No change was made in them, or in the construction and assembling of the broom. In place of the single-pointed beveled nail he used the staples. Assume that the plaintiff transferred this beveled staple from other arts into the broom-making art, he knew what it had done and would do, viz., on being clinched, bent, or curled up at the points, it would grasp with more or less firmness the inclosed fabric, or broom corn. Without change it performed the same function it did before, although not in the same structure. In *Standard Caster & Wheel Co. v. Caster Socket Co., Ltd.*, 113 Fed. 162, 51 C. C. A. 109, the Circuit Court of Appeals held:

"The transfer of a device from one art to another does not amount to invention, where it performs the same function in both without any change of form to adapt it to the new use."

This holding was by Lurton, later of the Supreme Court, Day, now a member of that court, and Severens.

In *L. Schreiber & Son Co. v. Grimm*, 72 Fed. 671, 674 (19 C. C. A. 67) the court said:

"It is simply the case of an employment for a new use, and nothing more, and falls within the general doctrine of those cases in which it has been so many times held that the mere extension of a well-known device into another field of usefulness, where the transfer does not involve the faculty of inventive genius, will not support a patent. *Tucker v. Spalding*, 13 Wall. 453, 20 L. Ed. 515; *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200; *Ansonia Brass & Copper Co. v. Electrical Supply Co.*, 144 U. S. 11, 12 Sup. Ct. 601, 36 L. Ed. 327; *Manufacturing Co. v. Cary*, 147 U. S. 623, 13 Sup. Ct. 472, 37 L. Ed. 307, where many of the previous cases are collected."

This use of the staple in broom making, however, did not go so far as to involve the *transfer* of a device from one art to another, but simply the selection of that form of nail from other nails, which were used commonly in many arts and wherever a nail was desired. It involved no change in form or structure, as the prior art teaches, as we have seen, that the beveling was to be on the desired side to regulate the curve. It involved the application of the knowledge the prior art and articles of common use gave. I must not be understood as holding, or as finding as a fact, that the direction of the bend or curl of these staples properly beveled can be predetermined with any certainty, when driven into the broom head through the band or otherwise. The many burnt-out exhibits in evidence, where staples were used in the construction of the broom, demonstrate that a large percentage do not bend or curl at all, while some bend in one direction and some in another, and others in other directions. The efficiency of the single nail seems to be as great as that of the staple. The evi-

dence fails to establish any great or unusual demand for use of the so-called staple-made broom. The public seem to be indifferent.

I think the facts shown and prior art overcome any presumption of patentability. In view of the prior art, I find no invention disclosed, and that the patent in suit is void for want of patentable invention.

ROBINSON et al. v. TUBULAR WOVEN FABRIC CO.

(District Court, D. Rhode Island. March 31, 1917.)

No. 6.

1. PATENTS ⇨328—INFRINGEMENT—FLEXIBLE ELECTRICAL CONDUIT.

The Osburn patent, No. 652,806, for a flexible electrical conduit, covers a structure which shows invention over the prior art only in that it retains a tubular form with sufficient circumferential rigidity to resist collapse under the ordinary conditions of its use, and that this rigidity is due in a substantial sense to the helical member in the woven fabric of which it is composed. So construed, the patent *held* not infringed by a structure of soft woven fabric, easily collapsible, to which rigidity is imparted by passing it through a bath of water-resisting compounds.

2. PATENTS ⇨226—INFRINGEMENT—ABSTRACT CLAIMS.

The right of a patentee to exclude others from the use of old and familiar mechanical combinations and structures must be carefully restricted, and the duty rests upon the courts to guard the rights of the public against that form of unjust monopoly which may result from sustaining highly abstract claims.

3. PATENTS ⇨37—NOVELTY—USE OF OLD ELEMENTS IN NEW COMBINATION.

If a thing is old, and is applied to perform its old functions, it remains in the prior art, and cannot be made novel, in the sense of the patent law, merely because used in new surroundings, that do not affect its character or mode of operation.

4. PATENTS ⇨165—INFRINGEMENT—TERMS OF CLAIM.

The questions of invention and of infringement are not verbal questions, and neither can be determined by the test of the words used in the patent claims.

5. PATENTS ⇨16—INVENTION—REMEDYING OF DEFECTS IN MECHANICAL STRUCTURES.

Mending a known and specific defect, and thereby restoring a part to its intended relation to other parts, or strengthening weakness of construction, does not, except in very unusual cases, entitle one to rank with inventors who have solved some problem peculiar to a special art.

In Equity. Suit by W. C. Robinson and others against the Tubular Woven Fabric Company. On final hearing on supplemental bill. Bill dismissed.

Charles F. Perkins, of Boston, Mass., for plaintiffs.

William Quinby, of Boston, Mass., for defendant.

BROWN, District Judge. [1] The plaintiff, having secured an injunction on the patent to Osburn, No. 652,806, July 3, 1900, for flexible electric conduit, in accordance with the opinion of the Circuit Court of Appeals for this Circuit (227 Fed. 884, 142 C. C. A. 408, reversing [D. C.] 225 Fed. 50), now contends that a new construction

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

made by the defendant is identical in the eye of the patent law with that formerly held an infringement. This the defendant denies, contending that the plaintiff seeks a broader construction of the claims than in the former case, thus opening questions not therein decided.

The defendant's tubing is thus fairly described:

"The uncontradicted evidence shows that defendant's tubing complained of—so-called large weft tubing—is composed entirely of soft woven fabric, which, after weaving, is saturated with compounds required by the Underwriters.

"The yarns of which the fabric is composed are all of cotton and untreated prior to weaving. The twist of the yarns is light, only sufficient to permit weaving. The fabric is purposely loosely woven, and, when woven, is, as a direct and necessary result of the untreated fiber of the yarns, the loose twist of the yarns, and the loose, open weave, soft, flexible, and easily collapsible. The weft has the same characteristics as the warp; it is soft, collapsible, and without capacity to retain a tubelike form, or maintain itself in the plane of, or as, a helix. The tube, after weaving, is not usable as an electric conduit under the Underwriters' rules. * * * Underwriters' Rule 63, Defendant's Exhibit 3-B. The woven tubes satisfy one of the eight requirements of the Underwriters' rule; to wit, C, relating to longitudinal strength.

* * *

"The tube, after it is woven, is passed lengthwise through a hot molten bath or mass of saturating, water-resisting compounds. The speed with which the tube is passed through this bath is regulated, so that the yarns of both warp and weft alike, and at the same time, may be saturated sufficiently to comply with the Underwriters' requirements, without the liquid material running into and thus obstructing the bore of the tube.

"It is important to note that, in the allocation of this water-resisting, saturating compound, the tube, as a whole, is treated—warp and weft alike—and simultaneously. As a result of this first compounding treatment, the tube is not only rendered water-resistant, but is stiffened and given a part of the necessary radial strength. It is then treated with a fireproofing compound."

It becomes necessary to consider the scope of the decision of the Circuit Court of Appeals. It held that the claims of the patent in suit were not anticipated by prior conduits having the same elements combined in the same way, because none of those structures "were suitable to answer the purpose of a flexible electrical conduit"; that the claims, though in terms for "conduits," were limited to "electrical conduits," or "flexible electric conduits"; and also held that:

"By the introduction into this art of means for securely interlocking the turns of the helical members and rendering them incapable of further separation, and by the same means producing a smooth lining for the tubing, the device of the patent performed a new function and accomplished a new and beneficial result."

The terms "electrical" or "electric," as used in the Osburn patent, are somewhat misleading, since they might imply insulating qualities in the members of the combination and the function of insulating the electricity-bearing wires. The art of insulating electric wires, however, is not the art to which the claims of the Osburn patent relate.

It is conceded that the claims are not limited to a conduit which has insulating qualities, but cover broadly a mechanical structure having mechanical properties and functions only. The only significance of the term "electrical" is in its reference to the use of the conduit as a container of conducting wires.

It is true that the Circuit Court of Appeals makes reference in italics to language in the specification which refers to insulating properties of the materials; but this was merely on the question of whether the claims refer to conduits in general (in which case they might be anticipated by prior art conduits for other purposes), or to flexible conduits limited to the purpose of forming a miniature tunnel, raceway, or tube to receive and protect from injury insulated electric lighting conductors within them.

This art into which Osburn's device was introduced was the art of flexible conduits for conductors of electricity, and not the art of insulated or insulating conductors.

The references to additional advantages that might be derived from using mechanical elements which have insulating qualities are merely incidental, and form no part of the patented invention. Steel and wire, as well as materials having insulating qualities, are referred to in the specification. Semiflexible materials, insulating or noninsulating, are expressly made equivalents for performing the mechanical functions of the Osburn mechanical conduit.

In *Locke Insulator Mfg. Co. v. Ley* (C. C.) 143 Fed. 911, 913, affirmed on the opinion of the court below by this Circuit Court of Appeals, 143 Fed. 985, 75 C. C. A. 171, it was said:

"As it is conceded that the claims would be equally infringed, whether the base were composed of high insulating material or of noninsulating material, in determining the question of invention we must consider only those features common to bases of insulating and of noninsulating material, namely, mechanical features."

The purpose of the conduit is to give mechanical protection and to permit mechanical movements, and the art is that of making a structure for that purpose. There is absolutely no electricity in the art of the claims in suit. It is impossible to place any other construction upon the language of the court without assuming that it fell into a grave error. It is true that the summary dismissal by the court of the prior art and of the old "semiflexible helical weft members in seamless woven tubes and flexible warps interwoven with a semiflexible weft," because "none of the structures were suitable to answer the purpose of a flexible electrical conduit," may give rise to some doubt as to the reasons why they were found not suitable. But we cannot entertain the assumption that this was because of any features relating to insulation or to the conduction of electricity, since that would be contrary to the plaintiff's concessions, and a plain error.

We must assume, therefore, that it was because of some unsuitableness to perform the mechanical functions of the conduit.

It would have assisted the District Court, had it received the specific instruction of the Circuit Court of Appeals upon this point; and this court is left to conjecture how the court arrived at this conclusion as a matter of fact, without also arriving at the conclusion that the structure of the broad claims in suit was also unsuitable to answer these purposes and perform the same mechanical functions.

The opinion points out defects in the structure of the Herrick patent, No. 456,271, of 1891, namely, that it did not provide means for

the prevention of the separation of the turns of its spiral lining in case a strain is exerted on the end of the spiral, instead of on the whole conduit, or on the covering. By this must be meant, however, effective means; for Herrick shows means for doing this, namely, a protective strip. The improvement was in weaving together spiral and longitudinal members, thus effectually preventing dismemberment of those two parts. Though Herrick discloses the conception of combining the spiral strip and a protective wrapping, he does not disclose the use of weaving to unite the turns of the spiral lining of his conduit. It is clear, however, that Herrick brought into, or at least used in, the art of constructing flexible conduits for conducting wires, a seamless woven tube, nonextensible in itself, and used it, not only as a nonextensible member, but also to render the whole conduit nonextensible so long as the parts of his conduit remained in their intended relation and were not dismembered by violence.

Nonextensible woven tubes were introduced into or used in this art in the most conspicuous manner. The trade-name by which Herrick's conduit was known was "Circular Loom," and it was sold under this name in large quantities for many years. The circular loom itself was thus brought into the art, as well as its product, for the reason that the product of the circular loom was in its nature and by reason of the principle of operation of the machine which produced it composed of two interwoven and inseparable parts, making it a unitary structure that resisted dismemberment and was nonextensible. The use of the name "Circular Loom" was descriptive of the product.

Upon an attempt to register the name as a trade-mark such registration was denied; the Supreme Court of the District of Columbia saying that, although not the entire product, but only a material part of the construction, was the product of a loom, "to this extent, the words "Circular Loom" are clearly descriptive of one of the chief ingredients or characteristics of the conduits to which they are applied." In *re American Circular Loom Co.*, 28 App. Cas. D. C. 450, 452.

As it is a generic feature of all tubular products of the circular loom that the spiral member or weft, and the longitudinal members, or warps, are interwoven, thus resulting in a nonextensible structure which resists dismemberment, it follows necessarily, whatever may be the differences between warp and weft, and whatever the range for selecting for a particular art old loom products with differences in warp and weft, that the introduction into the art of a woven tube of any kind, having the generic characteristics of all woven tubes, anticipates, so far as these features are concerned, all tubes subsequently used in that art. There may be left some room for invention of a tube suitable in other features, but no room in respect to use of the generic features common to all products of the circular loom.

Osburn, therefore, did not teach the art how to make a tube nonextensible, nor how to prevent dismemberment of a tubular conduit. This was old in the art of flexible electric conduits.

Herrick's patent shows, therefore, that if ever there was such a remoteness between the art of weaving tubular fabrics, or the art of weaving tubes for conduits, and a subart of constructing flexible con-

duits for electric wires, that made it an invention to think that the two arts might be united, Herrick had bridged over whatever gap there was between these arts and advertised the union of these arts by calling his product "Circular Loom"; and it was then too late for Osburn to claim invention by the transfer of an old woven structure to a new art merely as a means of preventing dismemberment of a conduit and of rendering it nonextensible.

As was said in the opinion of the Circuit Court of Appeals for the Sixth Circuit, in *Crown Cork & Seal Co. v. Sterling Cork & Seal Co.*, 217 Fed. 381, 133 C. C. A. 297:

"The conception which lay at the bottom of plaintiff's 1898 patent, viz., that he could go to the yielding plunger art, or to some specific art, and adopt a yielding plunger as an element of a bottle-sealing machine, was a meritorious conception. * * * Having gone into the yielding plunger art, and adopted and adapted the hydraulic cylinder yielding plunger into and for a bottle-sealing machine, and having thus bridged over whatever gap there was between bottle-sealing machines and yielding plungers, and having thus incorporated the two arts together, he could not the next year adopt a mechanical trip-yielding plunger to bottle-sealing machine use and then get a valid patent covering any kind of a mechanical trip-yielding plunger when used in a bottle-sealing machine."

The opinion quotes also Judge Killits' language in (D. C.) 210 Fed. 26:

"But, when Painter patented the mechanism alleged to be infringed in this case, the art of bottle sealing by crowns had already invaded the art of yielding pitman, of which the known forms were many, and had made an appropriation therefrom. * * *

"Whatever may be the merits of his invention we find nothing in the grant which shuts the door of opportunity to some other inventor to go to the yielding plunger art for an old device of this character."

See, also, *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856.

If the same inventor cannot twice bridge the gap between the arts, it follows equally that a subsequent inventor cannot claim invention in this respect after a previous inventor has combined the arts.

It was not an invention for Osburn to think of going to the art of weaving flexible tubes, because Herrick told him in express terms what he would find there.

There remained for Osburn's later patent, not broadly the adoption of weaving from another art, but only the adaptation of weaving to one of the members of Herrick's conduit; i. e., his spiral lining.

But the art of flexible electrical conduits as it existed before Osburn is not confined to Herrick's device, even if it be assumed that Herrick's tube was the only one in actual use. The prior art shown in this case includes also the patented art. An invention is completed, and, in the eye of the law, reduced to practice, when the application is filed. After the issue of a patent it is in the art, and negatives novelty of subsequent devices to the same extent as if the patented invention had been manufactured and used.

This question has been thoroughly discussed by the Circuit Court of Appeals for this circuit in *Automatic Weighing Mach. Co. v. Pneu-*

matic Scale Co., 166 Fed. 288, 293 et seq., 296, 92 C. C. A. 206, in an opinion by Judge Colt (citing the Telephone Cases, 126 U. S. 1, 535, 8 Sup. Ct. 778, 31 L. Ed. 863), and is also considered by that court in *McCreery Eng. Co. v. Mass. Fan Co.*, 195 Fed. 495, 115 C. C. A. 408. The conceptions disclosed in such patents negative novelty in similar conceptions by subsequent inventors.

The Bergman patent, No. 603,230, April 26, 1898, discloses and illustrates by drawings a conduit the foundation of which is a tubular woven tube. The fact that such a tube is thus disclosed cannot be belittled by the fact that he also proposes the use of knitted and braided tubes. He says that the tubes have "warp threads and woof threads, which may be combined in any manner well known in the art."

Woven tubes, when used, will resist separation of the turns of a spiral member and dismemberment of the parts.

The Osburn conduit shows no novelty in the means by which the turns of a spiral member were held together, but only novelty in so uniting the turns of a stiff helical or weft member, for a special use. Does it show novelty in the avoidance of obstructions in the tube such as those peculiar to Herrick's construction? What are those obstructions? The conductor, it is said, when drawn into the Herrick conduit, might catch on the edge of a coil of fiber, and the friction due to this would cause the elongation of the helical member, and thus contraction of its diameter. This, however, as is pointed out, is a peculiarity of Herrick's two-piece construction. It is not a feature of Herrick's outer tube, nor of Bergman's tube, patent No. 603,230, of 1898. It is due to the use of an interior spiral element without weaving the turns together. Osburn mended these defects of Herrick by the use of weaving to unite the turns, thus preventing dismemberment, as well as stretching and consequent reduction of the interior diameter.

But there was another very simple way to avoid these defects, namely, to pull out the spiral entirely and discard it.

This method was practiced extensively—so extensively that the Underwriters, after a number of years, barred the Herrick tube until it was modified by making perforations so that only short lengths of the spiral lining could be pulled out.

By using for a conduit either Herrick's outer tube or Bergman's tube, these defects of dismemberment by violence, and consequent obstruction to the passage of the wires, are avoided; and both of these were in the art of flexible electric conduits before Osburn. The evidence shows beyond question that a tube which remedied both of these defects was well known and was used in the prior practical art long before Osburn.

It was a common practice to use the Herrick outer tube as a flexible electric conduit. This is established by evidence of the plaintiff, as well as by evidence of the defendant. Plaintiff's witness Osburn testified as follows, concerning removal of Herrick's spiral lining:

"Cross-Int. 427. This pulling out of the helical member was ordinarily done before the wire was inserted, was it not? Ans. Yes.

"Cross-Int. 428. And how early was that practice called to your attention? Ans. I would say about 1896 or 1897.

"Cross-Int. 429. That is to say, the construction was such that the con-

tractor could pull out the helix and make a smaller do for a larger one; is that right? Ans. That is correct; that is, I don't mean to infer that it was satisfactory from all viewpoints when that was done."

Plaintiff's witness Corrigan testified:

"Int. 17. In what manner did you find Circular Loom being used at the time you introduced Flexduct? Ans. I met numerous reports that in the installation of the material that the wireman or contractor frequently removed the helical coil or fiber from the interior of the tube.

"Int. 18. And in such instances what use was made of either member of the Circular Loom conduit? Ans. The helical coil or fiber was destroyed or concealed, so that the electrical inspector would not see it, and the remaining canvas cover was installed, admitting of the use of much larger wire than the prescribed size would admit of, if the helical coil had been retained. * * *

"Int. 46. During the period that workmen were removing the helical member from the Circular Loom after the canvas cover, as you call it, was separated, to what size of conduit having the helical member within it did such canvas cover correspond? Ans. The canvas on quarter-inch size could be used for three-eighths inch; three-eighths inch could be used for a half-inch.

"Int. 47. What was the result of such practice as that upon your trade? Ans. It was very much to our disadvantage.

"Int. 48. In what way? Ans. A contractor could buy a quarter-inch Circular Loom listed for six cents a foot and use it for a three-eighths listed at seven cents a foot."

The testimony of William P. Gannett, Jr., defendant's witness, on this point is very convincing. Mr. Gannett is a well-known and reputable citizen, whose testimony is entitled to full credit. He testified that during the period before 1896 he used the cover only of Circular Loom as a conduit for electric wires "a great deal."

"Int. 8. Under what circumstances and for what reason? Ans. The construction of lining itself was too imperfect to employ in the condition in which it was presented for use, and we were compelled to remove the spiral portion, and also for the reason that the matter of size was a worthy consideration at times."

He testifies to the use in this way of lengths of 200 feet in the Providence Athletic Association building.

Theodore P. Driver also says that often workmen would withdraw the inside spiral lining.

This practice is also described in the plaintiff's exhibit patent to Lutz & Sibley, No. 825,227, of 1906, in which reference is made to—"the class of flexible conduits which have an insulating paper tube or lining inclosed within a fabric cover, usually woven or braided thereon.

"In installing such conduits workmen frequently find the wire to be inserted too large to readily enter the bore of the tube or lining, and they remove such paper tube or lining by pulling the same from its fabric cover, which naturally reduces the insulating qualities of the conduit with consequent risk and danger."

We have already pointed out that the feature of insulation is no part of the Osburn patented invention, since both by the specification and claims this is made nonessential.

The plaintiff lays stress upon evidence that the conducting wires were generally introduced into the Herrick cover before the conduit

was placed in the building; but the time or way in which the wires are introduced is a matter outside of the Osburn patent.

Much has been said in the case about "fishing" the wires into the conduit, but this may be done either before or after the conduit is placed in permanent position. A flexible conduit is no better adapted to fishing than a rigid conduit. The flexibility is useful in putting the conduit around curves, when installing it, but does not assist in fishing, once the conduit is installed. This is a feature which has been given undue emphasis, tending to a mystification of the issues. That the wire can be "fished" into the conduit shows merely that there are no objectionable obstructions or contractions in the conduit, whether fishing is done before or after the conduit is installed.

Though the Herrick outer tube does not anticipate the claims of Osburn's patent, yet it is a part of the practical art, well known to Osburn, which does directly anticipate much that is claimed for him by counsel to enlarge his patent and magnify his invention, and destroys what is now on the present hearing asserted to be the essential novelty of the Osburn patent:

"The means whereby the turns were held together and the obstructions of the Herrick conduit were prevented."

Herrick used the flexible woven tube in combination. Practical men used it alone, and not in combination, and when so used it had means for preventing the separation of the turns and any diminution of the size of the conduit due to separation of the turns. If Herrick's outer cover was not stiff enough, and did not have as much radial strength as was desirable, it was still capable of extensive and practical use, and its features cannot be claimed as a novelty brought into the art by Osburn. A single-wall woven tube, stiffened by compounds to such extent as made it of considerable practical use is in the art prior to Osburn, and the use of these features cannot be monopolized by him or claimed as his contribution to the art. A strain exerted upon the end of the spiral of this device will not separate its turns or diminish the size of the interior. This is equally true of the devices illustrated by drawing and described in the Bergman patent, No. 603,230, and in the Johns patent, No. 459,509.

To now ignore these patents would be a great injustice to the defendant. It is true that each discloses, besides woven tubes, braided or knitted tubes. But Herrick had used the woven tube, and Bergman and Johns both pointed out the use of fibrous materials, and a stiffening by compounds for woven as well as braided or knitted tubes.

That the removal of Herrick's spiral removed or lessened the insulation is a matter entirely immaterial to the case before us, in which the function of insulation forms no part of the claims in issue, and is made immaterial by the specification.

A defect of the plaintiff's argument is that it ignores all but Herrick's patent, excluding from the art of flexible electrical conduits all other patents for such conduits, and all practice before Osburn. Gannett and others improved upon Herrick, and obviated his defects when they pulled out his lining and availed themselves only of those qualities of his cover which were not only obvious, but were expressly

pointed out by Herrick. They abandoned, at the same time, a desirable feature of Herrick, namely, the stiffness due to the use of his spiral lining. But before Osburn the art had fully solved the problem of making a one-wall conduit which could not be dismembered nor stretched longitudinally, and with a lining for the tubing sufficiently smooth to permit the ready introduction of wires.

This differs from what the Circuit Court of Appeals considered was introduced into the art by Osburn only in one particular; i. e., in respect to the means for preventing collapse:

"A spiral having sufficient rigidity of structure to maintain a circumferential rigidity to the tube against the conditions of use under which the tube is employed."

This is means for preventing collapse of the tube, which is not due to separation of turns or dismemberment of parts. It is, of course, apparent that every woven tube presents more or less resistance to collapsing, and has a certain degree of radial strength. But it was pointed out by Mr. Gooding, plaintiff's expert, that where the warp and weft possess the same characteristics the invention of the patent in suit is not present. He says:

"Osburn certainly did not intend to try to cover a simple woven structure, such as had been old and well known for years, and in which the longitudinal and helical threads were alike."

As was stated in the plaintiff's brief on the former hearing:

"The essence of the patent in suit is a flexible tubular armor composed of a hard and resilient material like fiber made in helical form, combined with a series of longitudinal threads forming both a lining and cover or sheath, and also filling the spaces between the turns or coils of the fiber, as shown in the Gooding sketch."

After the users of Herrick's conduit had pulled out the helical lining, the art contained a tubular conduit, which was subject to improvement in case it did not have a sufficient degree of stiffness to prevent collapse. It needed no improvement to prevent stretching or dismemberment.

Osburn started with Herrick's spiral, the feature which was known in the art as suitable to prevent collapse of a conduit, and had the problem of preventing the extension of its turns, which he solved by the use of weaving, following Herrick in using weaving as a means for rendering a conduit nonextensible.

The object of producing a conduit that should be both nonextensible and noncollapsible could therefore be approached in three different ways:

A. Flexible conduits made upon circular looms and having these mechanical characteristics were old, and could, if suitable, be applied to protect conducting wires. Such conduits, if sufficiently flexible, nonextensible and noncollapsible, would present the mechanical structure of the claims of Osburn.

Upon the evidence at the former hearing it was found by the Circuit Court of Appeals that none of these structures then presented was suitable to answer the purpose of a flexible electric conduit, and those

were not regarded as sufficient on the question of anticipation. It follows, therefore, that none of these structures, if used for an electrical conduit, would infringe the patent in suit, and that these might be adapted to such use by means other than those covered by Osburn's patent.

B. The Herrick spiral member could be interwoven with flexible warps, thus preserving the old resistance to collapse and giving more resistance to dismemberment. The new result is integrity of the structure, and theoretically, though not in practice, the dispensing with an outer cover, or the use of braiding instead of weaving for an outer member. This was Osburn's way.

C. By using a woven tube having the same characteristics of Herrick's cover in respect to resisting dismemberment and separation of turns, but with both elements so modified and so combined with applied compounds as to render the whole tube sufficiently stiff to resist collapse while retaining sufficient flexibility.

Osburn testified:

"Int. 182. How generally were these compounds used for either rigid or flexible conduits at the time you made your invention? Ans. They were used generally in both rigid and flexible conduits; in fact, in all the conduits that I was familiar with at that time.

"Int. 183. What relation, if any, had the art of fire and garden hose to the art of electrical conduits, so far as you understood it, at the time you made your invention? Ans. I had never heard of fire and garden hose having been used for conduit installations.

"Int. 184. What, if anything, in relation to the art of fire and garden hose, occurred to you at the time you made your invention? Ans. It didn't occur to me that any of these materials you have just mentioned were suitable for this purpose."

This seems to apply to compounds, as well as to woven hose.

It fully appears that the conception of making a flexible and non-collapsible tube for electric wires from woven cotton stiffened by compounds was distinct from Osburn's conception.

The Circuit Court of Appeals has given a very broad construction to the term "semiflexible" used in the Osburn patent. Claims of such breadth rarely have been framed or sustained since the decision of the Supreme Court in the Incandescent Lamp Patent Case, 159 U. S. 465, 16 Sup. Ct. 75, 40 L. Ed. 221. Nevertheless, it has read the claims with some limitation as to the material of the semiflexible element and its function in the completed tube. It must at least have sufficient rigidity of structure to preserve its form under the conditions of use.

I find in the opinion nothing inconsistent with a holding that it must perform the function of preventing radial compression and collapse of the completed tube under ordinary conditions of use.

It is not enough for the plaintiff to show that the defendant has produced a tube which as a whole is stiff enough to resist collapse; it must go further and show that this, in a substantial sense, is due to a helical member composed of material which in its properties substantially resembles the materials referred to in Osburn's specification. It must also show such difference in warp and weft that the function of preventing collapse can be traced to the weft.

The plaintiff recognizes to some extent this requirement, and contends that as a matter of fact the defendant's weft member has sufficient stiffness to give the required rigidity. On this issue it relies principally upon the affidavit of its expert, Gooding, based upon Exhibit A, showing a dissection of parts of defendant's tube. Great stress was laid by plaintiff's counsel upon this dissected tube, and upon the fact that, while the weft members showed an external coating of compound throughout their length, the warp members were only intermittently coated, due to the fact that the compounds did not penetrate to the interior of the tube.

But the fallacy of this argument is apparent. It is in the fact of dissection, which has destroyed the actual combination of parts existing in the defendant's structure. The dissected exhibit does not correspond to anything made, used, or sold by the defendant, and does not represent their actual device, nor the character or function of its elements. It is a "fallacious division of a unitary structure." *Sporting Goods Sales Co. v. Haskell Golf Ball Co.*, 217 Fed. 407, 411, 133 C. C. A. 317. The dissection destroys the structural unity to which its qualities as a whole are due. This is apparent upon a comparison of the dissected portion of the tube with the undissected portion: The whole has a stiffness that is not found in the dissected members.

The plaintiff seeks to prove that the defendant's combination is the same as plaintiff's, by breaking up the defendant's combination and destroying the relation and functions of its parts. But the plaintiff, in my opinion, has failed in its attempt to prove that the stiffness of defendant's tube is in fact due to the rigidity of a helical member, or that its flexibility is due to the difference between the material of the helical member and that of the warps. The defendant has proved as a matter of fact that the stiffness of its conduit is produced by the application of compounds to a tube of soft, absorbent, cotton warps and wefts, which in themselves are not within the claims in suit.

It has also proved that as a matter of fact it is immaterial whether the weft is larger or smaller than the warp, and that the compounds, when applied, give the required radial strength to the entire tube, irrespective of differences in the comparative size of weft and warp, or in the relative amount of stiffening compound absorbed respectively by these two elements. It is also proved that in both types of tubes in evidence, those with a large weft and those with a small weft, the warp strands carry more of the stiffening compounds than the weft strands.

The testimony of J. A. Kennedy, superintendent of defendant's factory, explains this as follows:

"The warp strands cover the weft, and, there being more surface of the warp strand exposed to the compounds, it absorbs the compounds quickly, forming a small arc. The strands lock into the weft, which prevents the compounds from penetrating quickly."

It also appears that the compound was so applied that it should not penetrate into the interior of the tube and thus render it unsuitable for the introduction of a conductor. This is a feature referred to in the opinion of the Circuit Court of Appeals, but in another connection.

The fulfillment of this obvious requirement the plaintiff seeks to distort into a deliberate attempt to give to the warps flexibility through an intermittent application of compounds, while giving the wefts semi-flexibility through the continuous application of compounds. But this is an overingenious extension of the fallacious argument based upon the dissection of the defendant's tube, and in itself is fallacious.

The plaintiff, to support its argument, must show that the stiffness of the defendant's tube is due substantially to the wefts, and to a substantially greater extent than to the warps. It is proved, not only that the greater part of the stiffening compound is carried by the warps, but that each of the warps at the place where the compound is not applied is stuck to the weft, passing up over the side of the weft into the compound, over the weft, and still in the compound, until it reaches the inner face.

Dissection destroys all those connections which in the completed tube prevent freedom of movement of the warps at the places where the compound is missing. Therefore the flexibility of the dissected warp is something that is not found in the completed tube, and the argument, though superficially plausible, is found demonstrably unsound upon very slight examination.

The part of the defendant's warp which is between the turns of the weft is stiffened, and only a portion, which is interwoven with and associated with the weft, is free from the compound. This is the reverse of what is shown in Osburn's patent. In other words, the defendant's warp is stiffened at the points where the Osburn warps must be flexible, and is left unstiffened only at those parts where it is so firmly associated with the weft as to prevent it from performing the function of permitting movements between the adjacent turns of the weft.

The manner in which the stiffening is applied to the defendant's warps, therefore, destroys pliability, and does not assist the whole tube to be, in the language of Osburn's specification (page 1, lines 64-66), "readily flexed, due to the relative movement permitted between the adjacent turns or convolutions," since the compound is applied at just the points where the warp should be flexible, to answer Osburn's requirements.

The plaintiff proposes as a crucial test the question whether, if the bulky weft member of the Plaintiff's Exhibit A should be interwoven with slender and intermittently compounded warp member identical with those exposed to view in Exhibit A, and combined in *precisely the same relation as set forth in the patent in suit*, would the product embody the invention of the patent in suit, as stated in the claims? But this clearly is not a crucial question, since such members are not so combined in defendant's tube. The question is fallacious. In order to combine the members as set forth in the Osburn patent, it would be necessary to reverse the order in which the parts of the warp are disposed in defendant's tube, and to bring the unstiffened portions of the warps between the turns, and not, as in defendant's device, upon the turns of the helical member at places where they are incapable of being bent, and where the walls of the helix obstruct their pliability.

The stiffening of the defendant's tube by immersing it after it is woven, thus making both parts, weft and warp, stiff, and binding both together, does not result in the same relation of parts as in the Osburn patent, because at the very places where Osburn requires a pliable element—i. e., between the turns—the defendant has stiffened the warps as much as, if not more than, the weft.

Furthermore, it is in evidence, from defendant's witness Kennedy, that the use of such a weft, as by dissection is exposed in Plaintiff's Exhibit A, would not render the entire tube stiff enough to meet the requirements of the Underwriters.

There can be no doubt of the right of the defendant to use tubes having the same materials for warp and weft; and, as they are the same before the compounds are applied, so they are the same after they are applied. The argument that the intermittent application of the compounds to the warp is for the purpose of making the warp a flexible, as distinguished from a semiflexible, member, is unsound, since stiffening is omitted only at those parts where the warp would not flex, and is applied and resists flexing at the very places where Osburn required flexibility.

We must therefore reject as fallacious the argument based upon the dissection of Exhibit A. The unity of the structure is destroyed by the dissection, and the so-called flexible warps are erroneously assumed to be flexible in the tube, because flexible when dissected.

The plaintiff's contention that the defendant's tube infringes opens up the question whether the Osburn patent, upon such a construction of its claims, is valid, in view of the special prior art of flexible conduits for electric wires.

It is, of course, still open to the defendant to contend that, if the claims of the Osburn patent are to be construed so broadly as to cover the defendant's new structure, they are invalid. This does not impeach the decision as to the validity of the patent, nor reopen the former question of infringement, but merely seeks to prevent undue extension of that decision to a new subject-matter.

In view of the defendant's proof that the stiffness of its new tubes is due to the compounds, and that this is so irrespective of the comparative size of warps and wefts, the Bergman patent, 603,230, and the Johns patent, 459,509, and the Herrick cover used with the spiral removed, acquire a new significance; for, though it may be held that they lack Osburn's specific element, which performs the function of preventing collapse, they disclose other means for stiffening the whole tube, and thus preventing its collapse. This method is now proved to be effective, even if it be assumed that the warps and wefts of those former structures are of the same size, or that the weft is smaller than the warp.

The plaintiff's expert, Gooding, testified, on the main case, as to the application of compounds to the Defendant's Exhibit Flexduct inner tube:

"That there is no difficulty whatever in applying suitable compounds to the exterior of the structure in such a manner that the same will not penetrate to the interior of the said conduit."

This would seem equally applicable to the tubes of Bergman and Johns. Obviously, in either of these constructions, the necessity of keeping the composition from forming obstructions in the interior would be apparent; and bad workmanship in this particular cannot be attributed to these patentees to minimize the disclosure of means for preventing the collapse of their tubes.

The contention that these devices do not anticipate of course must estop the plaintiff from claiming that these or equivalent structures infringe. Yet it would seem that, if the structure shown in Fig. 1 of the drawings of the Bergman patent were dissected in the same manner that defendant's tube is dissected in Plaintiff's Exhibit A, there would be found a structure having a helix stiffened throughout its length and giving some radial support against collapse. But it must be held that such a helical member is not the equivalent of the helical member of Osburn's patent, even though it gives some degree of resistance to collapse. For the same reason it must be held that the dissected helical element of defendant's tube is not the equivalent of Osburn's semiflexible member. The proofs entirely fail to show that, without that part of the compounds which is applied to the parts other than the helix, the defendant's conduit could resist collapse under ordinary conditions of use. Upon that point the testimony of the plaintiff's expert must be read with great caution, and can be given no liberality of interpretation. It does not squarely come up to proof that defendant's helix can do the full work of Osburn's helix, or that it offers more resistance to collapse than the other portions of the conduit. It might as well be read upon the Bergman's helical member, if that were dissected.

The defendant's expert says that:

"It cannot be said that it alone is stiff enough to furnish the requisite resisting power to collapse."

And defendant's witness Kennedy, the practical manufacturer, testifies that such wefts would not make the tube stiff enough to meet the Underwriters' requirements.

The plaintiff has failed to sustain the burden of proof resting upon it upon this point; on the contrary, the preponderance of the testimony is with the defendant upon this issue of fact.

Furthermore, there is no separate element in the completed tube of the defendant which corresponds to Osburn's separate helix with sufficient space between its turns to permit flexing of the entire tube. All of the Osburn drawings show a spiral with its turns separated to an appreciable extent; the patentee saying of his tube:

"While being readily flexed, due to the relative movement permitted between the adjacent turns or convolutions."

This is an essential feature when a hard helical member is employed. Osburn's spiral is substantially that of Herrick, who says:

"By forming the lining as a spiral the requisite flexibility is secured, and this flexibility is increased by slightly separating the turns of the spiral."

I am of the opinion that the Osburn combination of two elements is a combination distinct in law and practically from that of the de-

defendant's conduit, which is composed of at least three essential elements. Osburn's combination is complete, and must be complete, without the use of waterproofing compounds. Though he may apply them externally, he does not rely upon them to complete the patented combination. The defendant's helical member is designed to co-operate with waterproofing compounds, thus following the prior art as shown in the patents to Bergman and Johns, and thus differing essentially in character and function from Osburn's helix. The weft threads are also designed to co-operate with a waterproofing compound. This waterproofing compound is an essential element, having no counterpart in kind or function in the Osburn patent conduit. It performs the functions of stiffening the whole conduit and of making it water-resisting. Such a combination of similar elements is in the prior art of electrical conduits. It contains absolutely nothing which was brought into the art by Osburn, but only that which unquestionably was in the art before Osburn.

The defendant has the right to improve the stiffness of prior art structures by increasing the bulk of woven tubes and their absorptive qualities, and by varying the character and mode of application of the water and fire resisting compounds because Osburn apparently never thought of doing this, and because he never devised or introduced into the art any novel means of stiffening a tube, but took what was already in that art; it being conceded that his helical element was old in the Herrick patent.

Plaintiff's counsel undertakes, upon his brief, to show that there is the same number of elements in defendant's conduit and Osburn's patented conduit; but the argument in the brief upon this point from such able and ingenious counsel seems a confession of weakness. It does not meet, but disregards, the fact that, without the presence of a third element, which is not in, nor implied in, the claims in suit, as a means for performing the function of rendering the tube noncollapsible, the defendant's tube would be collapsible. It disregards also the function which this element performs in the whole tube, binding the parts firmly together and rendering the whole body of warps, when in place, as stiff and resistant to collapse as the whole body of weft members. It also disregards the fact that, when the compound is so applied that it stops short of penetrating the inner part of the tube, the result is a hard, cylindrical shell, in which the wefts and outer portions of the warps are firmly imbedded, but which shell owes its stiffness, continuity, and integrity to the third element—the compound. If it be said that there is left in the interior a cylindrical portion of unstiffened portions of warps, which does not contribute to the stiffness of the tube, this does not correspond in kind or in function to the flexible elements shown in the Osburn structure; for in that structure the warps are flexible between the turns of the weft, while in the defendant's structure they are at that point stiff, and so bound to the wefts as to destroy their flexibility.

The plain fact of the matter is that the stiffening is an essential element of the defendant's combination, and that for its use it becomes essential to discard a hard, nonabsorptive, helical member, like that

of Osburn, and to employ one of highly absorptive material, like that of Bergman, Johns, or Herrick. The conception is radically unlike Osburn's, and is old in the art. If this element is to be subtracted for the purpose of argument, it must be wholly subtracted, in which case defendant's tube will collapse. If it be theoretically retained upon the weft, and theoretically subtracted from the warp, it will obviously be an impractical structure, which, according to the defendant's testimony, will still collapse, and which is not made or used by the defendant.

But it is useless to follow further this argument, based upon a fallacious division of defendant's unitary structure.

[2] The present hearing illustrates even more fully than the former hearing the necessity of requiring a patentee to reasonably limit his claims, so that they shall embody and specify elements essential to his actual improvement in the art. The right of a patentee to exclude others from the use of old and familiar mechanical combinations and structures must be carefully restricted. The duty rests upon the courts to guard the rights of the public against that form of unjust monopoly which may result from sustaining highly abstract claims. The language of the Supreme Court in *Carlton v. Bokee*, 17 Wall, 463, 471, 21 L. Ed. 517, should be always in mind:

"We think it proper to reiterate our disapprobation of these ingenious attempts to expand a simple invention of a distinct device into an all-embracing claim, calculated by its wide generalizations and ambiguous language to discourage further invention in the same department of industry. * * *"

An attempt to save such claims by a beneficent interpretation is not only contrary to well-established patent law, but a practical mistake. Patent claims are advisedly made by skilled solicitors, and if they choose to claim abstractions or high generalizations they must stand by them.

As was said in *American Bell Tel. Co. v. National Tel. Mfg. Co.* (C. C.) 109 Fed. 1043:

"The patent statutes require the patentee himself to claim and define his invention, so that the public may know its rights, and so that there shall not be imposed upon the courts the burden of constructing upon a hearing new claims from the interpretations that experts may place upon language of the most sweeping and general character."

To defend the use of such language it is not enough to say that nothing that corresponds to the words of this claim was used in a particular art before. It does not follow that everything coming after in the art to which these words may be applicable is an infringement.

An abstraction or a generalization never tells the whole story; it often excludes more of the real qualities of things than it expresses; it selects points of similarity in things which, from every practical point of view, may be dissimilar. The abstract term "pole" is applicable equally to things as remote as possible—the North Pole and the South Pole.

The claims in suit imply only mechanical requirements, but not all that is essential to the construction of a practical, usable conduit.

They should not be saved from anticipation by the rejection of prior devices which are similar in mechanical features, merely because such devices in other respects lack features of a practical conduit.

If the claims include only elements which relate to the same mechanical features as are found in prior devices they are presumptively in the generic art of tube manufacture. Only when modifications to meet requirements peculiar to a sub-art appear in the claims can it be said with any certainty that the invention is in a species art rather than still in the generic art. The genus includes the species, and their common features are in the same art. Only when those modifications necessary to special characteristics of the species are made can it be said that the device leaves the generic art and enters the species art, or sub-art. Rogers on Patents, p. 58.

[3] What is prior art is a matter that cannot be determined arbitrarily, nor merely by a restriction of the claim to a special use.

If the thing is old, and is applied to perform its old functions, it remains in the prior art, and cannot be made novel, in the sense of the patent law, merely because used in new surroundings that do not affect its character or mode of operation.

[4] The questions of invention and of infringement are not verbal questions, and neither can be determined by the test of the words used in the claims.

In *Goodyear Shoe Mchry. Co. v. Spaulding* (C. C.) 101 Fed. 990, it is said:

"Infringement should not be determined by a mere decision that the terms of a claim of a valid patent are applicable to the defendant's device. Two things are not necessarily similar in a practical sense because the same words are applicable to each. The question of infringement involves considerations of practical utility and of substantial identity, and therefore must be quantitative, as well as qualitative."

This language was quoted with approval by the Circuit Court of Appeals of the Second Circuit in *Edison v. American Mutoscope & Biograph Co.*, 151 Fed. 767, 773, 774, 81 C. C. A. 391.

The defendant has met the plaintiff's contention that the stiffness of its tube is due to the use of a large weft rather than a small, by producing two tubes, one of which has a small and the other a large weft. To ordinary inspection they are equally stiff, and defendant's witnesses so testify. This effectually establishes the fact that the stiffness is due to the compounds alone, and not to the particular manner in which the soft cotton components of the tube are placed. The plaintiff does not meet this with evidence to the contrary, though there was full opportunity for it to do so, had it desired; and the omission to controvert this fact indicates that it prefers to take its chances of arguing the case on a theory of operation and as a matter of language rather than upon a comparison of these exhibits in respect to the functions actually performed by the compounds in them.

I find that, if construed so broadly as to include the defendant's device, the patent in suit is anticipated by Bergman. It would not involve invention to make his weft larger than the warps, or vice versa, in view of what was well known in the art of constructing woven

tubes. Furthermore, such differences are now proved to be immaterial.

Assuming the validity of the patent, and following the construction placed upon it by the Circuit Court of Appeals, the defendant's device does not infringe; for it does not contain the same elements as are required by the claims, and also because it is a distinct combination of different elements, which are different in function and in their mode of co-operation, as well as different in number. The patented claims are for two elements; the defendant's structure is of three, all essential, and all co-operating under a principle of combination different from that of Osburn's structure, but similar to that of prior patented devices in this special art. It does not contain a semiflexible, helical element corresponding to any one of the following descriptions thereof by the plaintiff:

"A tubular armor composed of hard and resilient material like fiber made in a helical form like the Herrick conduit."

"Winding a strip of hard and resilient material helically, so as to constitute a practically continuous wall and armor."

"A tubular structure formed by winding a strip so as to constitute a practically continuous wall and armor."

"Helically wound to form a practically continuous wall and armor."

"Primarily an armor to prevent injury to said wires."

"A protecting wall as nearly continuous as is possible and composed of tough, strong material."

"A standard of rigidity had been fixed and established by the Herrick tube and was recognized by persons in the art. It consisted of a continuous, rigid wall or armor."

"No helix or circumferentially extending members would be suitable, *except such as formed essentially a tube, constituting an armor.*"

It does not contain a flexible element corresponding to Osburn's, since defendant's warps contain more stiffening than the helical member, and are most inflexible at the points where Osburn's device requires flexibility.

The stiffness of defendant's combination is no more (if as much) due to the material of the helical member than to the material of the longitudinal members.

And, finally, its third element, entirely absent in Osburn's structure, not only enters into the fibers of the two woven elements to stiffen them, but surrounds and binds them firmly together.

The defendant has presented a very full digest of prior art patents, showing the merger of arts, the interchangeability of conduits for different uses, and the development of the art of constructing conduits for electrical and other purposes from woven fabrics and stiffening compounds; and this should receive careful consideration in determining Osburn's merits as an improver and inventor, and the range of equivalents.

The extraordinary breadth of the plaintiff's present construction of his claims is shown by the fact that he seeks to exclude from an appropriate use, not only those products of the circular loom in which the weft member is stiffer than the warps, but also the products of those inventors who are seeking to construct tubing for mechanical uses, and for insulating and waterproofing purposes, by the use of com-

pounds. Plaintiff in turn directs its claims at the use of weaving, and at the use of compounds, though both the art of weaving and the art of compounding had been combined in the flexible conduit art before his invention, and though he invented nothing in compounds. His mechanical claims are relied upon to include materials suitable because of fire or water resisting qualities, or because of economy in construction.

All this seems to me in the nature of a raid upon the proper territory of the manufacturers and users of circular looms, and of the manufacturers of tubings stiffened by compounds. It may not be inappropriate to suggest that letters patent for inventions are not intended to perform the function of letter of marque.

There still remains a word to say about the merits and scope of Osburn's invention, though this requires some repetition. A conduit which, if well made, answered the requirements of the art in all respects except resistance to violent dismemberment, was in the art—Herrick's conduit. Osburn's tube performs no function and answers no general requirement of the art that a well-constructed Herrick tube did not answer. This was flexible enough, and noncollapsible enough. Bergman's patent discloses a conduit which, if its drawings are followed, will resist dismemberment, and which, as is now proved, may be made stiff enough to resist collapse. There was no novel conception as to what was required or what would be useful. There was only a mechanical defect or weakness of structure to be mended or obviated.

The effective prevention of separation of the turns of a spiral by weaving was shown both in Herrick and in Bergman, and was fundamental to the product of the circular loom; and, what is of special importance, it was equally effective to this end, whatever the differences of warp and weft. What was accomplished by Osburn was not effective resistance to dismemberment broadly, since that was old in Bergman's illustrated woven tube and in Herrick's cover, but effective resistance to displacement of the turns of a spiral like Herrick's, an element that was itself to form a rigid, practically continuous wall or armor.

[5] Now it seems to me that it is hardly proper to consider the problem of preventing the separation of the turns of a special form of helix, and the mending of a defective construction of a device which is defective only in strength of construction, as a problem peculiar to the art of electrical conductors. That is the kind of a problem which a skilled mechanic is expected to meet rather as a detail of construction than as a problem peculiar to a particular art. Many defects in details of construction are remedied by mechanics who have only general mechanical skill, and who have had no part in the invention of the machine whose defective construction they remedy. For example, a mechanic who prevents the 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. In *Felt & Tarrant Mfg. Co. v. Mechanical Accountant Co.* (C. C.) 129 Fed. 386, it was held that, to prevent the excessive rota-

tion of a wheel by a stop, either positive or frictional, and to remove the stop to permit the further operation of the wheel, were features so common in mechanical construction that they cannot be monopolized for the purposes of any particular art, even though one is first to use them in that particular art. See, also, *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 485, 492, 493, 20 Sup. Ct. 708, 44 L. Ed. 856; *Lovell Mfg. Co. v. Cary*, 147 U. S. 623, 13 Sup. Ct. 472, 37 L. Ed. 307. Mending a known and specific defect and thereby restoring a part to its intended relation to other parts, and strengthening weakness of construction, do not, except in very unusual cases, entitle one to rank with inventors who have solved some problem peculiar to a special art.

One who was first to use in a flying machine a sailor's knot or a weaver's knot, or any other known means for more securely fastening together separate parts, or one who was first to use wood or brass in the art of flying machines, cannot by claiming that he was first to introduce these into the art of flying machines exclude subsequent inventors of flying machines from their birthright in ordinary materials and ordinary mechanical modes of construction.

Yet in this case we have claims to exclude manufacturers and owners of circular looms from an important part of the field of use to which their known products are applicable, by reason of the mechanical qualities of the products. The circular loom is the result of the work of many inventors, and tubular weaving, like flat weaving, produces many products, all having the essential characteristics of interwoven warps and wefts, and longitudinal strength.

Tubular woven fabrics with a stiff weft, resisting collapse, being old, it is in my opinion entirely against the whole course of former decisions to exclude manufacturers of flexible tubular conduits from selling them for the use of inclosing conducting wires. It is unreasonable.

While I am of the opinion that justice to this defendant requires a reconsideration of the main case, this, of course, can be done only by the Circuit Court of Appeals. I must accept the decision of the Circuit Court of Appeals that the Osburn patent is valid, when its claims are so construed as to cover defendant's former combination. But this clearly does not conclude the questions of infringement raised in this case; neither does it conclude the defendant's contention that, if the claims are so broadly construed as to cover defendant's present device, they are invalid.

Certain objections to testimony were made, but do not require detailed discussion.

The Underwriters' rules are quite as admissible now as upon the main hearing. They are business facts, and establish practical standards affecting practical use. The plaintiff should be consistent; and, having relied upon them, the defendant has the same right.

The defendant's small weft construction is clearly admissible in contradiction of plaintiff's contention that the resistance to collapse is due to the stiffness of the weft rather than to the stiffness of the entire tube, or to the stiffness of the warps, and as showing that, ir-

respective of the features upon which plaintiff relies, the two tubes of different construction are practically the same.

The defendant's witnesses were before me with their exhibits. They were intelligent and competent in their testimony as to the character of defendant's products, much of which is practically uncontradicted, though plaintiff had full opportunity to offer witnesses in contradiction, had it desired to do so.

The supplemental bill will be dismissed upon the ground of non-infringement.

A draft decree may be presented accordingly.

THE ROYAL ARROW.

(District Court, N. D. California, First Division. February 23, 1918.)

No. 16320.

SEAMEN 12—CONTRACTS—CONSTRUCTION.

Where the shipping articles did not define the duties of a mess boy, and he was hired through a union, whose rules prescribed the hours as from 6 a. m. to 7 p. m., the master, in the absence of proof of any clear custom to the contrary, may not discharge the mess boy because he declined to serve coffee to the men at an earlier hour.

In admiralty. Libel by H. W. Peterson against the American steamship Royal Arrow. Decree for libelant.

F. R. Wall, of San Francisco, Cal., for libelant.

Pillsbury, Madison & Sutro, of San Francisco, Cal., for respondent.

DOOLING, District Judge. Libelant shipped on board the Royal Arrow as mess boy for a voyage from San Francisco to Taku Bar, China, and return. He was discharged by the master before the United States consul at Cebu, Philippine Islands, and brings this action for expense of his maintenance and transportation to Manila, whence he was sent home on a government transport, and for his wages up to the date of his arrival in San Francisco, because, as claimed by him, he was wrongfully discharged.

The reason for his discharge was his refusal to serve coffee to the men at 5:30 a. m. He had served the men at this hour on the voyage between San Francisco and Shanghai, in the expectation that he would, as was the custom, be paid by the men for such service. The men failing to pay him, he declined to render further service to them before 6 a. m. The master ordered him to do so on three several days, and, upon his refusal, fined him four days' wages, or \$6, for each refusal. At Cebu he discharged him and left him without means, except the sum of \$18.40. The consul upheld the fine of \$6 and the discharge.

The master claims that the men were becoming troublesome and mutinous, because of their failure to receive coffee at 5:30 a. m., and that libelant's discharge was necessary for the welfare of the ship.

The shipping articles do not define the duties of a mess boy, but it

is in evidence that their hours of service are, by the rules of their union, from 6 a. m. to 7 p. m. In the absence of any specific contract, as libelant was employed through his union, it must be taken that, when respondent went to the union for a mess boy, it was a part of the contract of employment that he should, except always in cases of emergency, work regularly at the union hours. If, with some understanding with the men, he worked longer hours, to be paid by them for the overtime, he could not ordinarily be compelled by the master to perform this extra work.

It is not permissible for the master to dissolve the contract with the seaman and discharge him for trivial reasons. The master has the power of fining for disobedience, and he exercised that power; whether rightly or not need not be determined. But in view of the implied contract as to hours arising out of the employment of libelant through his union, and the silence of the shipping articles on the subject, and the absence of proof of any clear custom to the contrary, the court must find that the regular working hours of libelant were from 6 a. m. to 7 p. m., and that the master was not authorized to discharge the libelant for failure, in the absence of any emergency, to go to work earlier.

A decree will be entered for the libelant for the sum of \$123.50, the amount claimed, and for costs.

In re INDEPENDENT SEWER PIPE CO.

(District Court, S. D. California, S. D. March 4, 1918.)

No. 2173.

1. CARRIERS ⇨12(1)—RATES AND CHARGES—STATUTORY REGULATIONS.

Under Public Utility Act (St. Cal. 1915, p. 115 et seq.) § 14, requiring carriers to file schedules of rates and charges, section 15, prohibiting changes of rates, except after 30 days' notice, unless permitted by the Railroad Commission, and section 17(a), subd. 2, prohibiting the collection or receipt of a greater, less, or different compensation than that specified in the schedules, a rate, when reasonable and adopted, announced and published with the consent of the Commission, becomes fixed, certain, and exclusively applicable, and no other rate may be charged and collected for a particular commodity than that specified in the schedules.

2. CARRIERS ⇨18(1)—RATES AND CHARGES—OVERCHARGES AND UNDERCHARGES.

Under the California Public Utility Act, if a different rate be charged or collected than the one published in the carrier's schedules for that commodity, a refund may be had in the case of an excess, or a recovery of the difference in case of an undercharge.

3. CARRIERS ⇨12(1)—RATES AND CHARGES—STATUTORY REGULATIONS.

Under the California Public Utilities Act, no mistake of fact, or special practice, engagement, or understanding of the parties, can render a different rate applicable to a commodity than that specified in the carrier's schedules.

4. CARRIERS ⇨196—ACTION FOR CHARGES—WEIGHT OF EVIDENCE.

In a proceeding on a claim for unpaid freight charges, evidence held to show that the commodity transported was clay, and not sand, to which a different rate applied.

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

5. CARRIERS ⇨12(1)—REGULATIONS—DETERMINATION BY RAILROAD COMMISSION—CONCLUSIVENESS.

A proceeding before a Railroad Commission, in which it refused to eliminate a rate on sand between certain points because there was material to be shipped which was incontrovertibly sand, was not conclusive as to whether material transported between those points was sand or clay.

6. CARRIERS ⇨12(1)—REGULATIONS—LEGISLATIVE AND JUDICIAL QUESTIONS.

What rate should be established for hauling a specified commodity is an administrative or legal question, properly determinable by a Railroad Commission; but what a given commodity is is a judicial question, over which the Commission has no jurisdiction.

In Bankruptcy. In the matter of the Independent Sewer Pipe Company, bankrupt. On review of an order of the referee disallowing a claim. Order annulled, and matter re-referred to the referee, with directions.

A. L. Abrahams, of Los Angeles, Cal., for trustee.

W. I. Gilbert and F. S. Sisk, both of Los Angeles, Cal., for claimants.

BLEDSOE, District Judge. Review is sought of an order of the referee disallowing in full a claim of the Southern Pacific Company against the bankrupt in the sum of \$1,749.09, representing alleged unpaid freight charges upon a certain commodity transported over claimant's lines from Lone, Amador county, to Tropic, Los Angeles county, and also for the transportation of a similar commodity from Alberhill and Prado, Riverside county, to Tropic.

California has a Public Utility Act (Stats. Cal. 1915, p. 115 et seq.) modeled, at least with respect to railroad companies, after, and therefore to be construed similarly to, the federal Interstate Commerce Act. Section 14 of the act (p. 122) provides that the carrier shall file with the Railroad Commission and keep open for public inspection schedules showing the rates, fares, charges, and classifications for the transportation between termini within this state of persons and property from each point upon its route to all other points thereon, etc. Section 15, p. 124, provides that, unless otherwise permitted by the Railroad Commission, no change shall be made by any public utility in any rate, fare, charge, or classification, except after 30 days' notice, etc. Section 17a (2), p. 124, provides that:

"No common carrier shall charge, demand, collect or receive a greater or less or different compensation for the transportation of persons or property, or for any service in connection therewith, than the rates, fares and charges applicable to such transportation as specified in its schedules filed and in effect at the time; nor shall any such carrier refund or remit in any manner or by any device, any portion of the rates, fares, or charges so specified, except upon order of the Commission," etc.

The same inhibition is reiterated as to public utilities generally in section 17b, p. 127. Appropriate penalties (sections 76 and 77, p. 167), being not less than \$500 nor more than \$2,000 fine for each violation of the provisions of the act, as against the public utility guilty thereof, and by both fine and imprisonment against any officer, agent, or employé thereof, are provided.

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

In this case it appears, without question, that the commodity which was hauled from Lone to Tropic, a distance of over 500 miles, consisting of about 25 carloads, was hauled, waybilled, and paid for by the bankrupt as "sand," the rate on which under the published schedules at all times in question was \$2.20 per ton. (One of claimant's briefs contains a statement, coming from one of its general officers, that the classification in the schedules was "common sand"; but I do not find this sustained by anything in the record. It would seem "important, if true," although, perhaps, the term "sand," as used in the schedules, would import "common sand.") At the same times the rate on "crude clay (except china clay or kaolin)" was \$3 per ton. The commodity shipped from Alberhill and Prado to Tropic, amounting to 13 carloads, was waybilled as "clay," although, as hereinafter referred to, it also seems to have been considered by the referee as having been shipped as "sand."

The question in the case is whether the substance actually transported by claimant was sand or clay. If sand, at least with respect to the Lone shipments, the carriage charges have been fully paid. If clay, under the law as repeatedly determined, the carriage charges with respect to such shipments having been paid only in part, it is not only claimant's right, but its duty, to present its claim, and, if possible, effect a recovery as for the balance due. Loath as I am to disagree with a referee upon a question of fact presented upon review, I am constrained to believe that in this case the referee has arrived at erroneous conclusions with respect both to the fact and the law involved, and that in consequence his order should be annulled. The referee in his certificate, *inter alia*, says:

"It also appears from uncontradicted evidence adduced that the commodity, the character and proper classification of which is at issue here, had been shipped over claimant's lines for a number of years prior to the shipments in question, and had been received by the claimant for shipment, under the classification of sand and at the sand rate. The commodity is, and at all times has been, used commercially as what is called a grog or filler in the making of clay products, and is commonly and usually designated as what is known as 'lone sand.'"

He then refers to the testimony of an expert geologist, offered by claimant, and, after admitting some inability thoroughly to understand just exactly what the expert intended to testify to—an inability which is shared by the court after reading his testimony carefully—the referee proceeds to quote the definitions of clay and sand as given in Webster's Dictionary, and then says:

"An examination and inspection of the samples offered in evidence brings the substance within the definition of sand, rather than within the definition of clay. Taking all the evidence into consideration, the referee finds that this substance, viz. the commodity involved in this controversy, is geologically as well as commercially to be classified as sand."

Some attention is then paid by the referee to a suggestion that had been made that the Railroad Commission had never classified this commodity either as clay or sand, and that in a proceeding had before the Commission, intended, as it is said, to effectuate that purpose, no action was taken. The referee then proceeds:

"The referee finds that it was at the time of the shipments in question, and for a long time prior thereto had been, the practice of the claimant to carry the commodity in question at the sand rate, and that the claimant has not obtained from the Railroad Commission of the state of California permission to change the classification, so as to increase the rate on the commodity in question; nor has the claimant obtained permission to change its practice of carrying this commodity at the sand rate. The referee finds that the Railroad Commission of the state of California has made no findings or order permitting the claimant to change its said practice or classification, nor has said Commission made any findings that the increase in the rate is justified."

[1-3] The statement last expressed by the referee leads the court to indulge in the inference that it was the opinion of the referee that, since the Railroad Commission had not authorized an increase in the rate affecting the particular commodity hauled by claimant, in consequence, claimant's claim for unpaid transportation charges should be denied. My understanding of the situation, however, is that a rate becomes fixed, certain, and exclusively applicable because of the fact that, being reasonable, it is adopted, announced, and published with the consent of the Railroad Commission as the rate to be charged; that for the particular commodity which may be specified in the rate, and between the termini stated, no other rate for the carriage of that commodity may be charged or collected; and that, if a different rate than the one published in the schedules for that commodity be charged or collected, as for an excess a refund may be had, and as for an undercharge suit may be brought for the recovery of the difference. This is upon the principle that definite rates for definite commodities between definite points are to be established, subject to such governmental regulation as may be provided, and that, when so established and until lawfully changed, they may not be departed from, in order that equality and justice and no discrimination may be had as among shippers. All shippers, as well as the carrier, are required to live up to and in completest fashion abide by the rates thus announced and adopted; for an infraction of these requirements appropriate penalties are provided, and indubitable authority exists on the civil side of the courts to effect such a readjustment as will make the charges fixed and the charges paid, or to be paid, accord. *Louisville & Nashville Rd. Co. v. Maxwell*, 237 U. S. 94, p. 97, 35 Sup. Ct. 494, 59 L. Ed. 853, L. R. A. 1915E, 665; *Central of Georgia Rd. v. Curtis*, 14 Ga. App. 716, 82 S. E. 318; *Ill. Cent. Ry. Co. v. Separi* (D. C.) 205 Fed. 998; *South Ry. Co. v. Harrison*, 119 Ala. 539, 24 South. 552, 43 L. R. A. 385, 72 Am. St. Rep. 936; *Pecos Valley Ry. Co. v. Harris*, 14 N. M. 410, 94 Pac. 951; *Davis v. Sou. Pac. Co.* (D. C.) 235 Fed. 731, in which case this court had occasion to consider the general subject-matter here involved and announced conclusions which seem to be fortified by authorities apposite herein. No mistake of fact, or special practice, engagement, or understanding of the parties, will suffice to change the general rule hereinabove announced. The only question open to debate is: What is the particular rate established for the commodity actually hauled, and has it been paid? *Texas & Pacific Ry. v. Mugg*, 202 U. S. 242, p. 245, 26 Sup. Ct. 628, 50 L. Ed. 1011.

So, the question in the case, irrespective of what the parties may have thought, done, or said in the matter of transporting this com-

modity, is: What was the commodity? Was it "crude clay (except china clay or kaolin)," or was it "sand"? This is a fact, to be determined as any other fact in litigation, but in which the conduct or admission of the parties is to have no weight. The public are interested in seeing, as they are determined, that specified commodities shall pay the specified charges; nothing more, nothing less.

[4] The conclusions of the referee seem to be based partly upon a personal inspection of the commodity, samples of which were received by him in evidence, and which samples have been transmitted to and examined by this court, and partly upon the evidence of the experts above referred to. In so far as the evidence of the experts is concerned, in my judgment, the conclusions of the referee stand without support. In spite of the confessed inability to determine all that the expert was intending to testify to, it does appear that he stated, without qualification, that the commodity, physically considered, was made up of 22.36 per cent. of sand and 77.64 per cent. of clay. His chemical analysis of the commodity showed the following ingredients: Silica, 66.50 per cent.; iron oxide, 2.71 per cent.; alumina, 21.65 per cent.; lime, .20 per cent.; magnesia, .47 per cent.; alkalis, 1.61 per cent. It also exhibited an ignition loss—that is, dehydration—of 6.86 per cent. This analysis corresponds markedly with analyses of different clays, as shown in the Americana and New International Encyclopædias, title "Clay." Accompanying his chemical analysis in the statement transmitted by him, the expert says:

"The material of the specimen is a sandy white clay or kaolin. * * * This clay, like all other clays, is a mixture of decomposed rock materials. In this clay the substance appears to be almost entirely kaolin, the essential substance of the high-grade clays. A considerable part of the material is granular decomposed feldspar, which is clay and can be pulverized between the fingers. Some of the granules are fine quartz sand."

One of the witnesses offered by the trustee, an employé of the bankrupt at its sewer pipe factory, testified that the commodity in question was used as "grog." He also said that he had never seen a sample of the commodity tested, to see whether it was plastic or not, and he did not think that it was plastic. The eleventh edition of the Encyclopædia Britannica, sub nom. "Clay," says that clay is:

"A fine-grained, almost impalpable substance, soft, more or less coherent when dry, plastic and retentive of water when wet. * * * It consists essentially of hydrous aluminum silicate, with various impurities. * * * Sands are more coarse-grained than clays. * * * A little clay, stirred up with water in a glass, takes hours to settle, and even after two or three days some remains in suspension. * * * Their [pure clays] silica ranges from about 60 to 45 per cent., varying in accordance with the amount of quartz and feldspar present. Alumina is high in the finer clays (18 to 30 per cent.). Magnesia is never absent."

Under the title "Sand" the same authority says:

"When rocks or minerals are pulverized by any agencies, natural or artificial, the products may be classed as gravels, sands, and muds or clays, according to the size of the individual particles. If the grains are so fine as to be impalpable (about 1/1000 in. in diameter), the deposit may be regarded as mud or clay."

The Standard Dictionary defines clay as:

"A common earth of various colors, compact and brittle when dry, but plastic and tenacious when wet. * * * A hydrous aluminum silicate."

It defines sand as:

"A grain or particle of rock material large enough to be easily visible to the naked eye, but not so large as to be regarded as a stone or pebble, forming an incoherent aggregate."

The Century Dictionary says of clay:

"The material resulting from the decomposition and consequent hydration of the feldspathic rocks. * * * As thus formed it almost always contains more or less sand, or silicious material, mechanically intermixed. After this has been separated, the clay itself is found to consist of a hydrated silicate of aluminum; but it is not yet positively made out that there is one definite combination of this kind, constituting the essential basis of all the substances to which the name clay is applied. All clays contain hygroscopic water which may be expelled by heating to 212° F.; but they also contain water in chemical combination, and when this is driven off by ignition the clay loses its plasticity, which cannot be restored. Ordinary clay contains more or less lime and other impurities, which render it to a certain extent fusible. The purer varieties are refractory, and are known as fire clay. The plasticity of clay is of great importance, as without this quality it could not be easily worked into the various shapes for which it is used."

Geikie, a world-accepted authority on Geology, says of clay (volume 2, New Science Library, p. 158, J. A. Hill & Co., 1904):

"When wet, it can be kneaded between the fingers; when dry, it is soft and friable" (easily pulverized).

Dana, in his text-book on Geology, p. 34, says:

"Pure clay, or kaolin, is white and feels greasy."

I find the term "grog" defined by Webster as:

"The refractory materials, such as pulverized pottery and fire bricks, fire clay, etc., which are used in the manufacture of crucibles, fire bricks and the like."

By the Century Dictionary it is defined, and this is the only definition I find therein:

"The vitrifying ingredients usually added to the terra cotta clays are pure white sand, old pottery and fire bricks finely pulverized, and clay previously burned, termed 'grog.' C. T. Davis, Bricks & Tiles, p. 313."

"Clay and Pottery Industries," Lippincott, 1914, p. 385, note, says:

"Grog is a technical term applied to a granular mass of fired clay which is used for tempering clays. The grog may be prepared either by firing and 'subsequently grinding raw clay, or by simply grinding fire clay goods.'"

From these authorities, as I read them, clay is frequently used as a refractory material, and seems to be the only material which is used as "grog." I find no suggestion anywhere that sand is ever used as a "grog," and if it be that a material has been used as grog, seemingly, according to the definitions obtaining in the art, it must have been a clay—no instance of sand being used as a grog being given or considered.

In addition, from a very careful inspection of the material received in evidence and transmitted by the referee, I can come to no conclusion other than that it is clay, instead of sand. True it is, as the physical analysis and as the definitions would seem to indicate, there is a little sand present in it. This, however, would not serve to give the entire commodity the quality of, or subject it to classification as, "sand." If the material be rubbed in the hand for a few moments, it is found to be composed of a very fine impalpable flourlike powder; it imparts a peculiar soapy or greasy feeling, and it leaves a distinct and not easily removable white chalk-like mark upon the hand or surface upon which it is rubbed. The sample in evidence is as large as one's fist. It is perfectly dry, and yet is firmly coherent, so much so that it cannot be crushed between one's two hands, although it will break apart when struck a sharp blow. A parcel of sand, I apprehend, in a similar dry state, would almost fall apart of its own weight, and assuredly could be easily crushed into its individual particles. A piece as large as the end of one's thumb was pulverized in the palm of my hand, and I could feel two or three small grains of sand. The balance seemed to be so finely pulverized that individual grains could not be discerned. In spite of the suggestion of the witness who worked at the bankrupt plant, upon being wetted the substance becomes plastic, and was by me moulded as clay usually is. It possesses the usual tenacious character or quality of clay. A small portion being dissolved in a glass of water, as suggested by the Britannica, it remained in solution for a number of hours, and while there was a conspicuous deposit of clayey material at the bottom of the glass, nevertheless a considerable portion of the material seemingly remained in suspension. Magnesia is present, in keeping with the asserted constant character of clay. The loss of water by ignition is demonstrated by the analyses made, and the percentages of silica and alumina found in the samples are fairly corroborative of the statements of the authorities quoted. I think an examination of the substance itself shows that it is clay, and that in consequence the referee was wrong in his conclusion to the contrary.

The commodity entered only into the manufacture of sewer pipe. No suggestion is made anywhere that it is true "china clay or kaolin." Its want of purity, together with its marked discoloration (bluish in color when fractured), due to impurities, renders it apparently unfit for the manufacture of porcelain, and therefore takes it out of the excepting clause found in the published schedules and noted hereinabove. Geikie, *supra*, p. 158; Dana, *supra*, 1, 84; Americana, title "Kaolin." The "crude clay" rate, therefore, controls.

Due to the disputed construction of a stipulation in the record, there seems to be some question presented as to whether or not the transportation charge of the material shipped from Alberhill to Tropic was entirely paid for, or paid for as "sand," when it should have been paid for as "clay." As suggested hereinabove, the waybills show it was shipped as "clay." Presumably, therefore, it could hardly have been paid for as sand, and I am rather led to the belief, as contended for by claimant, that the stipulation entered into by it was not intended

in any wise to cover the shipment from Alberhill, and that no payment of any part of that transportation charge has been made.

For this reason, the matter will be re-referred to the referee, with directions to take evidence on this last-mentioned feature of the case, and then take such action respecting the allowance of the entire claim as may not be inconsistent with the views hereinabove announced.

[5, 6] Some reference is made to an action of the state Railroad Commission. It is apparent from the report of the decision of that body that it is in no wise relevant to the controversy here. Obviously the proceeding there concerned an effort made by claimant to eliminate entirely the "sand" rate from Ione to Tropic. There was some testimony as to whether certain materials were sand or clay, but relief was denied by the Commission because it appeared, on objection to the application, that there was material at Ione, incontrovertibly sand, demanding shipment, and in consequence a sand rate was still necessary. There was no finding by the Commission, and there could have been none, that the material in controversy here was either sand or clay; no order by the Commission, as there could have been none, that the material actually hauled by claimant should be paid for at a rate different from that established by the published schedules. What rate shall be established for the hauling of a specified commodity is an administrative or legislative question, and therefore properly determinable by the Commission; what a given commodity is is a judicial question, over which, obviously, the Commission has no jurisdiction.

The order of the referee is annulled, and the matter is re-referred to him, with directions to proceed as indicated hereinabove.

UNITED TIMBER CORP. v. BIVENS.

(District Court, E. D. South Carolina. February 20, 1918.)

No. 189.

1. INJUNCTION ⇐26(6)—ACTIONS AT LAW—RIGHT TO ENJOIN.

Where a landowner, admitting that the grantee or successor of the grantee named in timber deeds had a right of way over the premises, but asserting that any right to enter and remove timber had expired, began an action at law for damages on account of an alleged trespass by the grantee in entering upon and cutting timber on lands not embraced in the right of way, maintenance thereof will not be enjoined, for proof of the grantee's title to the timber and right of entry would be a complete defense, available as well at law as in equity, and equity will not restrain a legal action or judgment when the controversy would be decided by a court of equity upon a ground equally available at law.

2. LOGS AND LOGGING ⇐3(11)—TIMBER DEEDS—VESTED TITLE.

Where timber deed, providing limited time for removal, declared that on expiration of that time it would be extended on the grantee's demand for an extension and payment of annual interest on the original purchase price, the grantee, upon demanding the extension and tendering the payment of interest, obtains a vested legal title to the timber, which can be set up in an action at law, notwithstanding the original period for removal had expired.

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

3. LOGS AND LOGGING ⇨3(15)—TIMBER DEEDS—EXTENSION.

While the grantee in a timber deed, which provided for an extension after expiration of the period prescribed, upon payment of interest on the original purchase price, is entitled on demanding the same and tendering the interest to a reasonable extension after expiration of the period limited, the question of what is a reasonable extension is one of fact for the jury.

4. INJUNCTION ⇨52—EQUITY—JURISDICTION.

Standing timber, purchased from the owner of land, with a license to cut and remove it, so far partakes of the nature of real property that the right of removal will be protected by injunction, where the landowner's continuous interference might prevent removal within the time limited, for an action for damages would be inadequate.

5. INJUNCTION ⇨26(6)—SCOPE OF RELIEF—EQUITABLE RELIEF.

Complainant claimed under timber deeds which authorized an extension of the period of removal on payment of annual interest on the original purchase price. Defendant, the owner of the premises, denied complainant's claim for the extension demanded on the ground that it was unreasonable, and, complainant having entered and cut timber, instituted an action at law for damages on account of the trespass. Judicial Code (Act March 3, 1915, c. 90) § 274b, 38 Stat. 956 (Comp. St. 1916, § 1251b), declares 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, and that defendant shall have the same rights in such cases as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. *Held* that, while a court of equity would protect complainant and prevent his loss of right of removal by reason of the expiration of the period of extension during the pendency of litigation, for an action for damages would be inadequate relief, yet, as such relief could be granted in the law action, the statute contemplating the granting of affirmative relief, the maintenance of such action should not be enjoined.

6. INJUNCTION ⇨26(4)—SCOPE OF RELIEF—MULTIPLICITY OF SUITS.

In such case, where complainant asserted title under many different deeds, and a determination of the rights of the parties thereunder could not be had in the single action of trespass, it is proper, to prevent a multiplicity of suits, to enjoin defendant from instituting further actions at law, or interfering with complainant's right of entry pending a hearing, although, as it might first be heard, proceedings in the original action of trespass will not be enjoined.

In Equity. Bill by the United Timber Corporation against Joseph Bivens, Sr. On rule to show cause why a restraining order or preliminary injunction should not issue until hearing. Injunction denied in regard to pending action at law, but defendant enjoined until hearing from bringing other actions, or from interfering with complainant's alleged right to enter upon the lands for the purpose of enjoying easements granted by deeds set forth in the bill.

Legare Walker, of Summerville, S. C., and L. D. Lide, of Marion, S. C., for plaintiff.

Bryan & Bryan, of Charleston, S. C., and Holman & Boulware, of Barnwell, S. C., for defendant.

CONNOR, District Judge. Plaintiff alleges: That defendant is the owner of several tracts of land, some of which are contiguous, situate in Dorchester and Colleton counties, South Carolina, aggre-

gating several thousand acres. That by virtue of the deeds, attached to the bill, plaintiff corporation is the owner of the standing and growing timber on said tracts of land, with rights of way and other easements on and over said lands. That in the several deeds, under which plaintiff derails its title to the timber, are grants of a license to enter upon said lands at any time, during the period of 10 years from the dates thereof, and to cut and remove said timber, and a license, in fee, to construct tram roads, railroads, etc., on and over said tracts of land, for the purposes set forth in the deeds. That, in addition to the license extending over the period of 10 years, granted to the owners of the timber, the deeds contain the following provision:

"In case the said timber is not cut and removed before the expiration of said period, then that the said second party, his heirs, or assigns, shall have such additional time thereafter as he or they may desire, but in the last-mentioned event the said second party, his heirs, or assigns, shall, during the extended period, pay interest on the original purchase price, above mentioned, year by year, in advance, at the rate of 6 per cent. per annum."

That the period of 10 years expired several years since. That, in accordance with the provisions of the extension clause, in the deeds, and within the time required thereby, plaintiff or its grantors, tendered to the owners of the lands, the interest on the purchase price of the timber and, at the time of doing so, notified them that, under the right conferred by the deed, the full period of 15 years was desired to cut and remove the timber. That defendant refused to accept the interest so tendered, or to grant the extension of the license for the period named, or for any other time. That the interest so tendered was deposited, subject to the call of the said owners, and that, year by year, and each year, up to and including 1917, the tender of the interest had been made and in all respects kept good. That on September 10, 1917, plaintiff, "by virtue of its right and title to the timber, timber rights, and other property rights, entered upon one of the tracts of land, to wit, the 'Blue House' tract," containing 1,579 acres, for the purpose of clearing out a right of way for the location and construction of a tram road to be used in connection with the cutting and removing of the said timber from the said tract of land, and all the other tracts of land upon which it owned timber, and for the purpose of doing other work preparatory to the cutting and removing the timber from the said tract of land, and all the other tracts of land upon which it owned timber, and for the purpose of doing other work preparatory to the cutting and removing of timber from the said land, and in the proper and legitimate prosecution and exercise of its rights. That defendant, in willful and wanton violation of the complainant's rights, and with intent to hinder and delay, harass, and impede the complainant in the exercise of its said rights, forbade complainant's agents from entering upon the said land for the purposes aforesaid, and took the names of its laborers, agents, or employes, and warned them to keep off said lands, thereby intimidating its laborers, agents, or employes, and interfering with its lawful pursuits and acts. That defendant, on or about the 29th day of September, 1917, instituted an action at law in this court against the complainant herein, alleging and

pretending a willful trespass, by complainant, upon the said Blue House tract, by reason of the acts of complainant's servants and employés, and alleging that he had sustained damage thereby to the amount of \$500 and that, by reason of complainant's declared intention to cut and carry away the timber from said tract of land, he was damaged to the extent of \$50,000. A certified copy of the record in the action at law is attached to and made a part of the bill.

Complainant further alleges that it is informed and believes that defendant intends to continue to molest, hinder, and interfere with the complainant in the exercise of its right to cut and remove said timber from all of the lands referred to and described in its bill, and in the enjoyment of its right to use and enjoy its aforesaid timber rights and other property, and to institute other actions at law, against complainant as soon as complainant re-enters upon said Blue House tract and upon any other of the said tracts of land described in its bill, etc. The bill contains other averments material to be considered on the final hearing, but not relevant to the question presented upon the motion, for a preliminary restraining order. Complainant asks for a decree, enjoining defendant from prosecuting the action at law, now pending, from instituting other actions at law against complainant relating to the timber and other rights of complainant in respect to the said lands, enjoining defendant from interfering with, hindering, delaying, or harassing complainant in the exercise of its rights and property in, or in regard to, the timber on said land, or other rights in, or relating to, said lands, etc.

Defendant, answering the bill, admits that he is the owner of the Blue House and other tracts of land referred to and described therein; that the deeds conveying the standing timber on said lands, and the rights of way and other easements described, were executed as alleged; that such timber, privileges, easements, etc., as were conveyed and granted by said deeds, have by assignment and conveyance vested in complainant; that complainant tendered the amounts alleged, on the days and at the dates alleged, and that complainant, at time of making such tender demanded an extension of 15 years, from the expiration of the period of 10 years named in said deeds, to cut and remove the timber from said lands; that defendant refused to accept the amounts tendered, or to grant the extension of time demanded for cutting and removing such timber, as alleged in the bill.

In regard to the alleged trespass on the Blue House tract, on September 10, 1917, defendant avers that, on said date—

"complainant, through its agents and servants, entered upon one of the tracts of land described in the bill of complaint, to wit, the Blue House tract, and knowingly, willfully, wantonly, maliciously, and with a high hand cut down, carried away, and converted to its own use a large quantity of timber from said land, outside of said permanent rights of way, admitted to be the property of said complainants, and blazed trees and cut paths outside of the said rights of way, and that defendant thereupon, with the intent and for the sole purpose of protecting his property from this unlawful invasion by the complainant, did inquire who the said trespassers were, and at whose direction and by what authority they were so trespassing, and thereupon took their names and forbade them from entering upon any of the lands of the defendant outside of the said rights of way for any purpose whatsoever."

Defendant admits that, on the 29th day of September, 1917, he instituted an action at law for trespass against complainant, on account of the entry on said land by complainant's servants and agents, in which he claimed the amount of damages alleged. He denies that he has interfered, or has any intention to interfere with, complainant, in the lawful use of its permanent rights of way. He avers that he is the lawful owner of the land in fee simple, and was and is in the actual exclusive possession of all of the said tracts of land, described in the bill of complaint, excepting the said rights of way, and that his acts, intents, and purposes thereabout have been in good faith and without intent to molest or interfere with the lawful rights of complainant, etc. He further alleges:

"That the additional period of 15 years, claimed by the complainant in said notice, herein set forth, for cutting and removing the timber from any and all of the said tracts of land, was and is unreasonably excessive."

Complainant obtained a rule on defendant requiring him to show cause why a restraining order, or preliminary injunction, should not issue until the hearing. This motion was argued upon defendant's return to the rule, and is now to be disposed of. The arguments and briefs of counsel were chiefly directed to the prayer for an order restraining defendant from prosecuting his action at law pending in this court, and from bringing other actions at law against complainant, respecting its claim to the timber and the exercise of its rights of way and other easements over the lands upon which said timber is standing.

[1] Defendant resists this motion, insisting that complainant has a complete and adequate legal defense, if its contentions be valid, to the action at law now pending. He challenges the power of the court, upon the facts set forth in the bill, to enjoin the prosecution of said action. As other questions arise upon the motion to restrain defendant from bringing other actions, it will be postponed until the question regarding the pending action is disposed of. Reference to the pleadings in the action at law discloses that the plaintiff therein, defendant herein, alleges that he is the owner and in possession of the tract of land described in his complaint and known as "Blue House"; that on the 10th day of September, 1917, defendant, complainant herein, by its agents and servants, "knowingly, willfully, wantonly, and maliciously, and with a high hand, entered upon the said land outside of a railroad right of way through said land, cut down and carried away and converted to their own use a large quantity of timber from said land, and blazed trees and cut paths, and against the warning of this plaintiff knowingly, willfully, and maliciously have continued to cut and carry away and convert to their own use timber from the said land, blaze trees, and cut paths, outside of a railroad right of way through said land," to his damage, etc. Defendant, in that action, answers the complaint, admitting that plaintiff therein, is the owner and in possession of the tract of land described, but "denies that plaintiff was, at the times mentioned in the complaint, or now is, the owner of or in possession of, the timber upon the tract of land therein described, or the rights of way, privileges, and easements connected with the said

timber, or of a permanent railroad and tram road right of way." It denies the allegations in regard to the alleged trespass, but "admits that it has cut certain timber upon said land described in the complaint, and that it has cut out a railroad right of way through a portion thereof, and it alleges that, in doing so, it was exercising its legal rights."

For a second defense it sets up title to the timber and certain rights of way and easements on and over the land by virtue of a deed, a copy whereof is attached, being the same deed referred to and set up in the bill for the timber on the Blue House tract. It avers that it has, in all respects, complied with the terms, provisions, and conditions contained in said deed, and is by virtue thereof the owner of the timber, timber rights, ways, privileges, and easements conveyed and granted in and by said deed; that in respect to the acts and conduct of its agents and servants in entering upon said land it was exercising its legal rights. While it would seem that the real, substantial ground of the action for damages for the trespass is confined to the entry, and other acts of complainants, agents, and servants, outside the right of way, conceded to belong to complainant, it is manifest that the subject-matter intended to be brought into litigation, includes the right of complainant to cut and remove the standing timber, by virtue of the right and title, acquired by the deeds, and the course pursued since the expiration of the 10-year period, fixed for cutting, etc. To confine the litigation to the question whether complainant's servants exceeded the limits of the right of way, without regard to its larger claim, to own, and have the right to cut and remove, the timber outside the right of way would not meet the real contentions of the parties, and would narrow the scope of the controversy. If nothing more than the claim of complainant that it owns the timber standing on the Blue House tract, and defendant's denial of such claim is considered, it would seem that, upon well-settled principles of equity jurisprudence, the court would find no ground for interfering, by injunction, with the prosecution of the action at law. In that action, the owner, the defendant herein, being in possession of the land, sues complainant, the defendant therein, for trespass, laying his damage at \$50,000. Complainant admits the entry as alleged, and justifies by averring that it is the owner of the standing timber, with a license to enter upon the land for the purpose of cutting and removing it, and, further, that it owns certain rights of way and easements in and over said land, and that the acts complained of were done in strict pursuance of its legal title and right. If, as insisted, the tender of the interest on the original purchase price of the timber, with the demand for an extension of the period for cutting and removing, with the license to enter for that purpose, for 15 years, vests a perfect legal title in the defendant, it is difficult to perceive any reason for invoking the injunctive power of a court of equity. It is a complete defense to the action at law. If it fails to convince the court of law that it has a perfect legal title to the timber and license to enter upon the land, plaintiff is entitled in that action to recover such damages as he has sustained by the unauthorized entry. The principle upon which, from this viewpoint, courts of equity enjoin actions at law, are quite elementary:

"Equity will not restrain a legal action, or judgment, when the controversy would be decided by the court of equity upon a ground equally available at law, unless the party invoking the aid of equity can show some special equitable feature, or ground of relief; and in the case assumed this special feature or ground must necessarily be something connected with the mode of trying and deciding the legal action, and not with the cause of action, or the defense themselves. * * * The principle is well established, and is universal in application that when a cause belongs to the jurisdiction of the law, courts of equity will never interfere or restrain the prosecution of the action, nor stay proceedings on the judgment, or execution, upon any mere legal grounds," etc. 4 Pom. Eq. (3d Ed.) § 1361.

[2] To the suggestion that, after the expiration of the original period fixed for cutting and removing the timber, the title reverted to the owner of the land, leaving in the purchaser only an option to purchase by paying the interest on the original price, with an extension fixed either by the terms of the option, or the will of the purchaser, and therefore only an equitable title in him, it is sufficient to say that whatever views were expressed in *Crown Orchard Co. v. Dennis* (D. C.) 220 Fed. 516, must give way to the contrary holding by the Circuit Court of Appeals on the appeal in 229 Fed. 652, 144 C. C. A. 62. It is held by many courts of eminent respectability that a deed for standing and growing timber of fixed dimension, with a period fixed for cutting and removing containing an extension clause, in the deeds under which complainant claims, conveys a base or qualified fee to the timber, which expires with the period fixed for cutting, with an option to purchase, carrying an extension of the period for cutting and removing the timber. Hoke, Judge, in *Carolina Timber Co. v. Wells*, 171 N. C. 262, 88 S. E. 327, says:

"The cases on the subject are to the effect, further, that a stipulation of the kind now presented * * * for an extension of the time within which the timber must be cut, is in the nature of an option, and it is held by the great weight of authority that contracts of this character do not of themselves create any interest in the property, but only amount to an offer to create, or convey, such an interest when the conditions are performed and working a forfeiture when not * * * complied with." *Hawkins v. Lumber Co.*, 139 N. C. 161, 51 S. E. 855; *Ives v. Railroad*, 142 N. C. 131, 55 S. E. 74, 115 Am. St. Rep. 739, 9 Ann. Cas. 188.

If this is the correct interpretation of the deed conveying the timber, under which complainant claims, it had no present vested legal title to the standing timber after the period of 10 years from the date of the deed elapsed, but was entitled to apply to a court of equity to compel specific performance of the option, upon payment, or tender, of the interest; hence it would have no adequate legal defense to the action at law. The Court of Appeals, however, in dealing with a deed containing the exact language as the one under which complainant claims, in *Crown Orchard Co. v. Dennis*, supra, was of the opinion, upon its interpretation of what was said in *Guffey v. Smith*, 237 U. S. 101, 35 Sup. Ct. 526, 59 L. Ed. 856, that the purchaser of the timber under conditions substantially like those found in this case had a vested legal title to the timber upon making the tender, notwithstanding that the period fixed for cutting had passed; that the tender preserved the legal title to the timber, with its incidents, conveyed by the

deed. If the complainant had no legal title to the timber, but only an equity to sue for specific performance of the executory contract, an interesting question would be presented upon the recent act of Congress. Judicial Code, § 274b, Fed. Stat. Anno. (2d Ed.) 1061, 2 U. S. Comp. Stat. Anno. (1916) 2023. Accepting the view adopted by the Circuit Court of Appeals, it would seem that complainant may set up, and, if established, have, a perfect legal defense to the action at law. Mr. Justice Clifford, in *Insurance Co. v. Bailey*, 13 Wall. 616, 20 L. Ed. 501, says:

"Whenever a court of law in such a case is competent to take cognizance of a right and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must, in general, proceed at law, because the defendant, under such circumstances, has a right to a trial by jury." *Grand Chute v. Winegar*, 15 Wall. 373, 21 L. Ed. 170; *Scottish Union & Nat. Ins. Co. v. Bowland*, 196 U. S. 611, 25 Sup. Ct. 345, 49 L. Ed. 619; *Du Pont v. Gardiner*, 238 Fed. 755, 151 C. C. A. 605; *Kirkland v. Knox*, 238 Fed. 806, 145 C. C. A. 116.

[3] Counsel for complainant insists that it appears, upon the pleadings, that no question of fact is in controversy; that under decisions of the Supreme Court of South Carolina, and of the federal court, in the *Crown Orchard Co. Case*, the complainant is entitled, upon tendering the interest, after the expiration of the period fixed by the deed for cutting and removing the timber, to a reasonable time within which to do so. This may be conceded. Defendant's counsel insists that what is a reasonable time is a question of fact, which he is entitled to have submitted to a jury. In the *Crown Orchard Co. Case*, supra, the court says:

"Manifestly, in this view the additional time which may be allowed becomes a question of fact, to be determined by a consideration of all the circumstances and the application of the rule of reason."

The courts now generally hold that what is reasonable time, within which a right may be asserted, or for the performance of a contract, when no time is fixed, is a mixed question of law and fact. In *Ould v. Spartanburg R. R. Co.*, 94 S. C. 184, 77 S. E. 866, it is said:

"What is a reasonable time depends upon * * * each particular case, and no definite rule has yet been laid down," or indeed can be laid down, "to govern all cases. The question is a question [of fact] for the jury to decide."

[4] Complainant's counsel insist that the purpose of the bill is not only to enjoin the further prosecution of the pending action at law, but to prevent defendant's interference with complainant, in making other and further entries upon the Blue House tract, or any other of the tracts upon which, under the same conditions, it owns the standing timber and rights of way; that if subjected to actions at law for each entry it makes, in the exercise of its rights, by such multiplicity of actions it will be deprived of its legal rights; that the time which it has demanded for cutting and removing the timber will pass while the litigation at law is pending, and that the remedy which is afforded by actions at law for damages, or by way of defense in actions by the defendant, would be inadequate to protect its legal rights, and secure

the use and enjoyment of its property—the timber. It is settled by many decisions that standing timber purchased from the owner of the land, with a license to cut and remove it, so far partakes of, and constitutes, real property, that its possession, use, and right to remove will be protected by injunction; that an action for damages for withholding it, and depriving the owner thereof, does not afford an adequate remedy. Courts of equity, therefore, take jurisdiction, and by injunction protect such property from destruction and its owner from interference with the exercise of his contractual right to appropriate and bring it into his actual possession and control, although the title is legal. Cases of this character fall within the third class enumerated by Prof. Pomeroy:

“When the primary right of interest of the complaining party is legal, one which is created by the law, and cognizable by the law courts, and his remedial right and the remedies which he procures are entirely equitable.” 1 Pom. Eq. § 227.

The jurisdiction is exercised because the legal remedies are inadequate to secure complete justice, owing partly to the form of such remedies, and partly to the imperfection of the legal mode of procedure. 2 Pom. Eq. 1364. In such cases the court of equity required the legal right to be established in an action at law, in which controverted issues of fact could be settled by the jury.

[5] It is urged by defendant's counsel here that because of the provisions of the act of 1915 (Fed. Stat. Anno. [2d Ed.] 1061, 2 U. S. Comp. Stat. Anno. [1916] 2023), which provides 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.” Judicial Code, § 274b.

An interesting question of practical importance will be presented for the decision of the federal courts, whether the defendant, in an action at law will be confined, in the use of his equitable defense, to a bar of recovery, or may, by way of equitable counterclaim, demand affirmative equitable relief. In those states in which equitable rights and remedies may be enforced in the civil action, the distinction as to method of procedure having been abolished, it is generally held that the “equitable defense” may be used not only to defeat plaintiff's action, but by way of counterclaim as the basis for affirmative relief. The subject is discussed and authorities cited by Prof. Pomeroy. 4 Equity (3d Ed.) 1366–1374. The federal statute would seem to be sufficiently broad to permit the use of equitable rights, as the basis of affirmative relief. It contemplates the prayer for “affirmative relief” in the answer or plea. It would seem, therefore, that in the pending action the complainant may, in addition to the judgment that “plaintiff take nothing,” etc., have an affirmative adjudication of its title to the timber, and easements over the land, with a permanent injunction against interference with its use and enjoyment of them according to its right, both legal and equitable. The result to which legislation per-

mitting equitable rights and remedies to be enforced by defendants, in actions at law, has brought the courts, is stated by Prof. Pomeroy:

"When the jurisdiction is concurrent, or, in other words, when the interests and primary rights of the parties are legal, and the only question between the two courts relates to the adequacy of their respective remedies, as a general rule, the tribunal which first exercises jurisdiction is entitled, or at least permitted, to retain an exclusive control of the issues. It is therefore a well-settled doctrine that, in cases of this kind, where the primary rights of both parties are legal, and courts of law will grant their remedies and courts of equity may also grant their peculiar remedies, equity will not interfere to restrain the action or judgment at law, provided the legal remedy will be adequate; that is, provided the judgment at law will do full justice between the parties and will afford a complete relief, the adequacy or inadequacy of the legal remedy is the sole test. On the other hand, in cases of this general class, equity will enjoin the action at law and will determine the whole case, whenever the legal remedy is inadequate; and the legal remedy is deemed to be inadequate if the ends of justice will not be satisfied by a mere judgment for the defendant in the action at law, but would require that some distinctly equitable relief, such as a cancellation or reformation of the instrument sued upon be conferred upon him. If any affirmative equitable relief is necessary to a full settlement of the controversy, and to a complete protection of the defendant's rights, a court of equity will interfere, entertain a suit for such relief and enjoin the action at law." 4 Pom. Eq. § 1363.

It would seem that, if the complainant in the action at law may have full and adequate relief and all of its legal and equitable rights protected and enforced, no injunction should issue, at this time, enjoining the defendant from prosecuting it. The case is pending on the law side of this court. If, at any time before the final hearing, it appears that any necessity arises for the interference of the court by the exercise of its equitable power the motion may be renewed upon notice.

[6] Complainant further asks that defendant be enjoined, until the hearing, from interfering with its servants, employes, and agents in exercising their alleged rights in respect to the timber standing upon portions of the Blue House other than that upon which the entry was made and the other tracts of land described in the bill, upon which it claims to own the timber and rights of way. This prayer is based upon the allegation that, unless restrained, defendant will either prevent complainant from exercising its legal rights, or subject it to actions at law for each entry upon every tract of land upon which it claims and he denies its title to the timber and right of entry, thereby compelling it to surrender its property or be called upon to defend a multiplicity of actions. While defendant does not admit that he intends to pursue the course alleged, it is manifest that such is his purpose. Being in possession of the land, the timber standing upon it, constituting an essential part of it, he is not called upon to take affirmative action for its protection. As the right of complainant to cut and remove the timber is, by the terms of the contract and its tender of the interest, restricted for 15 years from the date of the tender, April 14, 1912, unless by some appropriate procedure, it may have its rights declared and protected, they will be lost by lapse of time—6 years having passed. While the timber and timber rights, and rights of way, are claimed by complainant, under separate deeds, several of the tracts of land are contiguous, defendant owns all of them, having

acquired title subsequent to the execution of the deeds, under which complainant claims the timber.

The ultimate facts upon which the rights of the parties depend are practically the same. It would seem that there should be some procedure, by which, in one suit or action, the rights of the parties may be adjudged and enforced, or protected. It may be that a bill in equity will be sustained to remove the cloud from the title to the timber, with an injunction against the owner of the land, restraining him from interfering with, or preventing the complainant from cutting and removing it. It is difficult to see how, by one action at law for trespass, the title to the entire timber on all of the tracts could be adjudged. Complainant could not maintain an action in the nature of ejectment. It would seem that the power vested in, and exercised by, courts of equity to protect the owners of easements by injunction against interference with their enjoyment may be invoked by complainant. This is substantially the purpose of the bill in this case. Defendant insists that the application for an injunction to prevent a multiplicity of actions cannot be maintained because only two parties are interested; that action could be brought only by the owner of all of the lands against the complainant alleged owner of all the timber. This is not always the test or ground upon which the court exercises its injunctive power. It is frequently so. Cases are found in the books in which the number of actions and inclusive character of the judgment to which the court of law is restricted, upon the property rights involved, constitutes ground for relief in equity, although the same persons are parties in each case. An injunction will issue—

“when the dispute is between two individuals, A. and B., and B. institutes, or is about to institute, a number of actions, either successively or simultaneously, against A., all depending upon the same legal questions and similar issues of fact; and A. by a similar equitable suit seeks to bring them all within the scope and effect of one judicial determination.” 1 Pom. Eq. 252.

In such cases the court will not enjoin the actions at law until the complainant has established his legal right or defense. As no good reason appears why both the pending action at law and the suit in equity may not be speedily determined, and as the former may be heard first in order of time, I am of the opinion that the rights of both parties will be conserved by permitting the defendant to proceed with the trial of the action pending and enjoining further actions at law or interference with the entry of complainant on the lands upon which it claims to own the timber, until the hearing. If the status of the parties should, in the meantime, undergo any material change, endangering their rights, motions may be made in the cause for the purpose of protecting such rights.

An interlocutory decree will be drawn, refusing the injunction in regard to the pending action; that defendant be enjoined, until the hearing, from interfering with the exercise of the alleged right of the complainant to enter upon the lands for the purpose of enjoying the easements granted by the deeds set forth in the bill, or bringing other actions against complainant for trespass in entering upon such lands for the said purpose. The complainant will file a bond, with se-

curity to be approved by the clerk of this court, in the sum of \$2,000, conditioned to pay the defendant such damages as he may sustain by reason of the granting of the injunction if, upon the final hearing, it shall be determined that it was not entitled thereto. The cost of this motion will abide the final decree.

In re FACKELMAN.

(District Court, S. D. California, S. D. February 18, 1918.)

No. 2755.

1. PARTNERSHIP ⇨95—SALES OF INTEREST—INSOLVENCY.

A member of a partnership may despite the insolvency of the firm in good faith and for a valuable consideration sell his interest to a copartner.

2. PARTNERSHIP ⇨226—DISSOLUTION—SALE—EFFECT.

Where one of two members of a partnership sells his interest to the sole copartner, the firm is thereby dissolved, and, though partnership creditors cannot be deprived of their right to proceed against either member of the previous copartnership, they proceed against them individually and not as copartners.

3. PARTNERSHIP ⇨183(3)—DEBTS—PRIORITIES.

The rule requiring partnership property to be applied in satisfaction of partnership debts in preference to the individual debts of the respective parties depends upon the partnership being maintained intact, and if before interposition of the court is asked, the property has ceased to belong to the partnership, and by a bona fide transfer has become the several property either of one partner, or of a third person, the priority of the partnership creditors is lost.

4. BANKRUPTCY ⇨67—DEATH OF INSOLVENT—EFFECT.

On death of an insolvent, creditors cannot resort to proceedings in bankruptcy, but are under the necessity of submitting to the jurisdiction and judgment of the probate court.

5. PARTNERSHIP ⇨258(2)—JURISDICTION—SURVIVING PARTNER.

Where one member of a partnership doing business in California sold his interest to his copartner and removed to Nebraska, and thereafter the purchaser did business in his own name until his death, former creditors of the partnership cannot institute in the District Court for California proceedings against the seller on the theory that he was a surviving partner, for the partnership was dissolved, and there is no firm entity which would entitle the creditors to maintain such proceedings.

6. BANKRUPTCY ⇨14—JURISDICTION—RESIDENCE.

Where a member of a California partnership sold his interest and removed to Nebraska, establishing his residence there and carrying on no business in California for more than three months prior to the initiation of proceedings, the District Court for California is, notwithstanding his insolvency, without jurisdiction under Bankruptcy Act July 1, 1898, c. 541, § 2, subd. 1, 30 Stat. 545 (Comp. St. 1916, § 9586), to adjudicate him a bankrupt as an individual.

In Bankruptcy. In the matter of the bankruptcy of H. C. Fackelman, as surviving partner of Pomeroy & Fackelman, a copartnership, and H. C. Fackelman, individually. On exceptions to the findings and conclusions of the special master that Fackelman, as surviving part-

ner and individually, should be adjudged a bankrupt, and also on motion to dismiss the proceedings on the ground that the court is without jurisdiction because Fackelman had not had his principal place of business or resided within the territorial jurisdiction of the court for the greater part of six months next preceding the filing of the petition. Report of master disapproved, and motion to dismiss proceeding in its entirety, for want of jurisdiction, granted.

H. C. Fackelman and J. R. Pomeroy, for some time prior to the 18th of April, 1916, owned and conducted a partnership grocery store in San Diego. On that date the firm was probably insolvent, owing debts to the amount of about \$5,000. Fackelman entered into an agreement with Pomeroy to sell to him his entire interest in the firm, for the sum of \$2,500. The deal being consummated, \$2,400 of that sum was applied by Fackelman in satisfaction of certain indebtednesses of the firm. Thereupon Fackelman left San Diego, returning to Nebraska, to make it his permanent place of residence; there he has continuously resided since the middle of May, 1916. A bill of sale evidencing the transaction was given by Fackelman to Pomeroy, notice of the sale as required by state statute was recorded, and the understanding seems to have been that a complete transfer of all of Fackelman's interest was conveyed to Pomeroy, and that Fackelman was no longer concerned or connected in any way with the business or management of the store.

Immediately after this transfer of interest the account of the firm at the bank was changed from "Pomeroy & Fackelman" to "J. R. Pomeroy," and the latter seems to have assumed immediate personal and exclusive control of the business. He died, however, on the 1st of June, 1916, and in due course his father, H. R. Pomeroy, was appointed administrator of his estate in probate proceedings regularly had in San Diego county, and as such administrator continued to carry on the business and to administer the estate. In consequence, apparently, of certain steps taken in the probate proceedings whereby a family allowance was granted to the widow, etc., and because of nonpayment of certain partnership debts hereinabove referred to, an involuntary petition in bankruptcy was filed by creditors on the 19th of October, 1916, showing the existence of certain debts and alleging that Fackelman, as the surviving partner of the partnership, had neglected to close up its affairs and that it was still unsettled. An adjudication as to the partnership and as to Fackelman as an individual was asked. Service was had upon him in Nebraska.

Jas. G. Pfanstiel, of San Diego, Cal., and Harry Archbald, of Los Angeles, Cal., for petitioning creditors.

F. L. Richardson, of San Diego, Cal., for respondent.

BLEDSOE, District Judge (after stating the facts as above). The case is before the court on exceptions to the findings and conclusions of the special master to the effect that Fackelman, as surviving partner of Pomeroy & Fackelman, a copartnership, and individually, is and should be adjudged a bankrupt, and also on motion to dismiss the proceedings on the ground that the court is without jurisdiction to entertain the same, because Fackelman has not had his principal place of business, resided, or had his domicile within the territorial jurisdiction of the court for the greater portion of six months next preceding the filing of the petition, as required by Bankruptcy Act, § 2.

[1-5] Under the law, there seems to be no doubt but that a member of a partnership may, in good faith, and for a valuable consideration, sell and transfer his interest in the partnership to a copartner. The insolvency of the partnership does not work a denial of this right. 30 Cyc. 540; Sargent v. Blake, 160 Fed. 57, 87 C. C. A. 213, 17 L.

R. A. (N. S.) 1040, 15 Ann. Cas. 58; Mechem. Elements of Partnership, § 298; Remington on Bankruptcy, § 2269. If such sale be to a sole copartner, the partnership is thereby dissolved, and, though the partnership creditors may not thereby be deprived of their right to proceed against either member of the previous copartnership, yet they proceed against them individually, and not in any sense as copartners.

The rule of administration (*Sargent v. Blake*, supra) requiring the partnership property to be applied in satisfaction of the partnership debts in preference to the individual debts of the respective partners depends, however, upon the partnership being maintained intact; but "if, before the interposition of the court is asked, the property has ceased to belong to the partnership, if by a bona fide transfer it has become the several property either of one partner or of a third person, the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end. It is therefore always essential to any preferential right of the creditors that there shall be property owned by the partnership when the claim for preference is sought to be enforced. * * * The joint estate is converted into the separate estate of the assignee by force of the contract of assignment." *Case v. Beauregard*, 99 U. S. 119, 125, 25 L. Ed. 370. In *Fitzpatrick v. Flannagan*, 106 U. S. 648, 655, 1 Sup. Ct. 369, page 375 (27 L. Ed. 211), in speaking of the case just cited, the court said:

"In that case it was held, in respect to a firm admitted to be insolvent, that transfers made by the individual partners of their interest in the partnership property converted that property into individual property, terminated the equity of any partner to require the application thereof to the payment of the joint debts, and constituted a bar to a bill in equity filed by a partnership creditor to subject it to the payment of his debt; the relief prayed for being grounded on the claim that these transfers were in fraud of his rights as a creditor of the firm."

That these rules have not been modified by the provisions of the Bankruptcy Act, in view of the decisions, seems clear. The Circuit Court of Appeals of the Fourth Circuit, in *Dalton v. Humphreys*, 242 Fed. 777, 781, 155 C. C. A. 365, said:

"The doctrine of a separate partnership entity has been declared, more or less positively, in a number of cases, though with a refinement of reasoning, as it seems to us, that the ordinary mind does not follow with satisfaction. The Supreme Court, however, in *Francis v. McNeal*, 228 U. S. 695 [33 Sup. Ct. 701, 57 L. Ed. 1029, L. R. A. 1915E, 706], has pointed out the unsubstantial nature of this doctrine, and held, moreover, that the Bankruptcy Act * * * establishes no principles at variance with the common-law rules respecting partnership relations."

It follows, therefore, in my judgment, that after the sale of Fackelman's interest and the consequent dissolution of the partnership, the only remedy of the creditors was to proceed in some form of action against Fackelman and Pomeroy as individuals, or, perhaps, within the four months period provided by the Bankruptcy Act (section 3a, 3b [Comp. St. 1916, § 9587]), to have proceeded against the partnership, setting up the transfer of Fackelman's interest as being in fraud of their rights, etc. This they failed to do. Pomeroy, who retained

ownership and control of the business, died some weeks thereafter. After his decease, as to his estate, no proceedings in bankruptcy could be had, and the creditors labored under the necessity of submitting to the jurisdiction and judgments of the probate court. *Collier on Bankruptcy* (11th Ed.) pp. 146, 147, 175.

[6] Fackelman, having departed the state and established his residence in another jurisdiction more than three months prior to initiation of bankruptcy proceedings (Bankruptcy Act, § 2 [1]), even if he be a bankrupt individually, is not subject to the jurisdiction of this court, and, in consequence, neither as to him can an adjudication be had.

I have not overlooked the decision of the Circuit Court of Appeals of this circuit in *Holmes v. Baker & Hamilton*, 160 Fed. 922, 88 C. C. A. 104, which may seem opposed to the conclusion announced herein. That decision does not cite or refer to *Case v. Beauregard* or *Fitzpatrick v. Flannagan*, supra, and it was written before the decision of the United States Supreme Court in *Francis v. McNeal*, supra, in which, as shown in *Dalton v. Humphreys*, supra, the entity doctrine was given substantial and compelling limitation. In addition, two facts of controlling force are present in the instant case, which seem to distinguish it from the one cited, viz., the death of the partner to whom the entire business was conveyed, and the departure of the other partner from the jurisdiction of the court, both long before the inception of the bankruptcy proceedings.

It follows that the report of the special master should be disapproved, and the motion to dismiss the proceeding in its entirety for want of jurisdiction should be granted.

Costs will be taxed against the petitioning creditors.

NORTHWESTERN MUT. LIFE INS. CO. v. FINK, Collector.

(District Court, E. D. Wisconsin. November 7, 1917.)

1. INTERNAL REVENUE — CORPORATION TAX — MUTUAL INSURANCE COMPANY — "INCOME."

Corporation Tax Act Aug. 5, 1909, c. 6, 36 Stat. 112, § 38, imposes an excise tax on insurance companies equivalent to 1 per cent. on the entire net income above \$5,000 received by such a company from all sources during the year, exclusive of amounts received as dividends on stock of other corporations, etc., subject to the tax, such income to be ascertained by deducting all losses not compensated by insurance or otherwise, including a reasonable allowance for depreciation, and sums other than dividends paid within the year on policy and annuity contracts, and the net addition, if any, required by law to be made within the year to reserve funds. *Held*, that so-called dividends of a mutual life insurance company doing business on the level premium plan, consisting merely of the portion of the premium charged in excess of the cost of insurance, returned annually to the policy holders after the first year, so far as they were used to reduce subsequent premiums, were not "income received," and were not subject to taxation.

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

2. INTERNAL REVENUE ☞9—CORPORATION TAX—MUTUAL INSURANCE COMPANY—TAX ON INCOME.

The fact that in the ascertainment and apportionment of dividends to its policy holders a mutual life insurance company acted obediently to St. Wis. 1915, § 1952, requiring mutual life insurance surpluses to be apportioned annually to policies, does not estop it as against the collector of internal revenue, or avail against its contention that such dividends were not income within Corporation Tax Act, § 38, imposing a tax of 1 per cent. on the entire net income of insurance companies above \$5,000.

3. INTERNAL REVENUE ☞9—CORPORATION TAX—MUTUAL LIFE INSURANCE COMPANY—PREMIUMS AND INTEREST NOT RECEIVED—INCOME.

A mutual life insurance company's tax return under Corporation Tax Act, § 38, imposing an excise tax on insurance companies of 1 per cent. on entire net income above \$5,000, should not include premium and interest items accrued and due, but not actually collected and received.

4. INTERNAL REVENUE ☞9—CORPORATION TAX—MUTUAL LIFE INSURANCE COMPANY—SUPPLEMENTARY CONTRACT

Where a mutual life insurance company had obligations on policies termed supplementary contracts, presenting the feature that, when a policy holder died, the beneficiary exercised an option to take the avails of the policy in installments, the general reserve fund was charged with a fixed liability, and the sum withdrawn therefrom and set aside to take care of the liability according to the deferred term covered by the option, the inclusion of such contracts, as exhibiting a reserve liability, in the calculation of the annual "net addition to reserve" which might be deducted from the gross income, was warranted under Corporation Tax Act, § 38.

5. INTERNAL REVENUE ☞9—CORPORATION TAX—MUTUAL LIFE INSURANCE COMPANY—INTEREST ON POLICY LOANS—INCOME.

A mutual life insurance company is not under necessity to return as part of its gross income under Corporation Tax Act, § 38, imposing an excise tax on insurance companies of 1 per cent. of net income above \$5,000, interest accruing on policy loans, as such loans and the interest are not obligations which the policy holder is bound personally to liquidate with interest.

6. INTERNAL REVENUE ☞38—CORPORATION TAX—RECOVERY OF EXCESS TAX—FAILURE TO INCLUDE ITEM IN RETURN.

Under Rev. St. § 3225 (Comp. St. 1916, § 5948), brought into the Corporation Tax Act, and providing that, when a second assessment is made in case of any return which in the opinion of the collector was false or fraudulent, or contained any undervaluation, no tax collected under such assessment shall be recovered by any suit, unless it is proved that the return was not false or fraudulent, and did not contain any undervaluation, a mutual life insurance company's omission in good faith of an item from the income side of its corporation tax return, on account of treating such item as a suspense item, which upon later ascertainment would go into the return for the ensuing year, did not bar the company's failure to maintain action to recover back excessive taxes paid.

At Law. Action by the Northwestern Mutual Life Insurance Company against Henry Fink, Collector, etc. Judgment for plaintiff.

John Barnes and Sam T. Swansen, both of Milwaukee, Wis., for plaintiff.

H. A. Sawyer, U. S. Atty., of Milwaukee, Wis., for defendant.

GEIGER, District Judge. Plaintiff has brought this action for recovery of taxes alleged to have been illegally assessed and exacted

under Corporation Excise Law Aug. 5, 1909, c. 6, § 38, 36 Stat. 112. The facts are not controverted, and such as give rise to the controversy may be thus summarized:

The plaintiff, in its attempt to comply with law, made return of its gross income for the years 1909 and 1910, making therein such deductions as it conceived were permitted. The Commissioner of Internal Revenue made a reassessment for each of the years, and added to the gross income on each of the returns certain items which he asserted—and which defendant now asserts—were and are items of taxable income, and he disallowed, on the other side of each return, items which were, and now are, asserted not to be proper items of deduction, under the law. Stated in greater detail, this may be said:

In its return for the year 1909, plaintiff stated its gross income at \$43,297,167.27, ascertaining it, so the defendant claims, by deducting from the gross income return made for that year to the Wisconsin and New York insurance commissioners, viz. \$49,445,142.94, the following items:

| | |
|--|----------------|
| (1) Dividends applied to purchase paid-up additions to policies held by members..... | \$1,215,878.56 |
| (2) Dividends applied to pay renewal premiums of policies held by members | 4,896,319.72 |
| (3) Dividends left with company..... | 1,999.78 |
| (4) Adjustment of assets..... | 33,777.61 |

Making a total of.....\$6,147,975.87

—which, when deducted from the insurance commissioner's return above noted, leaves the revenue return of \$43,297,167.27 returned as stated. From this latter the company made deductions as follows:

| | |
|---|-----------------|
| (1) For expenses..... | \$ 5,253,153.46 |
| (2) For losses | 2,308.92 |
| (3) For payments on policy and annuity contracts..... | 18,637,141.76 |
| (4) Addition to reserve..... | 14,156,093.96 |
| (5) Taxes paid..... | 870,490.77 |

—making a total of deductions claimed in such return, \$38,919,188.87, which, being deducted from the gross return of \$43,297,167.27, left \$4,377,978.40 as the net income, and upon which (less \$5,000 exempted) the plaintiff paid the statutory 1 per cent. tax.

Thereafter the Commissioner of Internal Revenue proceeded to make a revision of the return and a reassessment of taxable income for the year 1909. It resulted in his adding to the gross income returned by the plaintiff the items of dividends paid for additions and renewal premiums, the amount of accrual of discount, two items, "interest income" and "premium income," due and accrued but not actually received, respectively. This brought the gross income to approximately the figure contained in the insurance commissioner's return for that year. Against this were allowed the items of expense, losses, payments on policy and annuity contracts, taxes, claimed by plaintiff; also an item, "depreciation" (covering in fact the annual reduction necessitated against securities purchased at a premium). He reduced the amount of "net addition to reserve funds," basing it upon disallowing funds set aside to meet contracts having deferred pay-

ments after death. He also disallowed the dividend disbursement; and hence, without giving the figures in detail, he cast as a balance a taxable net income of \$10,795,118.58—an excess of \$6,381,140.18 over the plaintiff's return. Upon this he levied, and plaintiff, under protest, paid, a tax of 1 per cent.—\$63,811.40.

For the year 1910, plaintiff company's return was made in a similar manner. This, too, was revised, and, excepting in certain minor respects, the revision and reassessment of income thereon presents the same questions as arise respecting the 1909 income and assessment. The excess upon such 1910 return and reassessment, found by the Commissioner of Internal Revenue, was \$8,153,134, the 1 per cent. tax whereon was paid by plaintiff under protest.

This suit seeks recovery of the amounts so paid upon such reassessment for both years. A summary of items involved appears to be:

On the charge side of the return:

| | |
|---|-----------------|
| (1) The dividends for both years aggregate..... | \$12,827,602.38 |
| (2) The addition to premium income (accrued, but not paid).... | 395,284.46 |
| (3) The addition to interest income (accrued, but not paid) for the year 1910 only..... | 169,649.54 |
| (4) Interest on policy loans to members (paid out of reserve) for the year 1910..... | 111,819.02 |

On the credit side of the return:

| | |
|---|------------|
| (1) Deductions made by Commissioner from the reserve claimed permissible on account of deferred or supplementary contracts, also on account of lapsed or canceled policies..... | 958,220.94 |
| This covers both years. | |
| (2) Difference between plaintiff's and Commissioner's valuation of policies (1908)..... | 38,687.38 |

And the case presents the controversy over the action of the Commissioner in adding to the one side, and disallowing as proper deductions from the other side, of the return, these items respectively.

The plaintiff is a mutual life insurance company, conducting its business upon what is known as the level premium plan; and with respect to its character, its plan of doing business, the practice relating to the fixing and collection of premiums, the origin and character of its income, the method and means of securing a fund applicable to its maturing obligations from year to year, the testimony in this case is in close accord with the facts stipulated in the case of Mutual Benefit Life Ins. Co. v. Herold (D.C.) reported in 198 Fed. 199 (pages 202, 203 and 204). It will conduce to brevity to permit a reference to that case to stand for a narration of the pertinent facts.

[1] The act under which the taxes in question were levied contains as specific provision the following:

“ * * * Every insurance company now or hereafter organized under the laws of the United States, or of any state or territory of the United States, * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such * * * insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed.

"Such net income shall be ascertained by deducting from the gross amount of the income of such * * * insurance company received within the year from all sources (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; * * * (third) interest actually paid within the year on its bonded or other indebtedness, etc.; * * * all sums paid by it within the year for taxes, etc.; (fifth) all amounts received by it within the year as dividends upon stock or other corporations, joint stock companies, or associations, or insurance companies, subject to the tax hereby imposed. * * *"

Obviously, in the pecuniary aspects of the case the important question, both to the government and to the plaintiff company, is that arising on the Commissioner's inclusion of dividends as income. On behalf of plaintiff, the general contention is that they are not in any sense dividends arising as a profit in a business venture, but are in truth, obediently to the plan which is at the foundation of its business, an abatement to the policy holder of the excess premium as it may develop in the company's experience during the life of the policy; and the fact that they are carried upon the books of the plaintiff company and are disbursed as an ordinary dividend may be carried and disbursed is not at all relevant in determining their status, in view of the character of plaintiff's business and its legal and contractual relations with its members.

The question thus presented has been so thoroughly considered and determined in the case above referred to, as well as the other cases now to be cited, that it would savor of affectation to restate it, or attempt a consideration or elucidation productive either of greater clearness or any different result than that reached in such cases. *Mutual Ben. L. Ass'n v. Commonwealth*, 128 Ky. 174, 107 S. W. 802; *Commonwealth v. Penn. M. L. I. Co.*, 252 Pa. 512, 97 Atl. 677; *Commonwealth v. Metropolitan L. I. Co.*, 254 Pa. 510, 98 Atl. 1072; *N. Y. Life Ins. Co. v. Chaves*, 21 N. M. 264, 153 Pac. 303; *Mutual Ben. L. Ins. Co. v. Herold*, supra, 201 Fed. 918, 120 C. C. A. 256; *Id.*, 231 U. S. 755; 34 Sup. Ct. 323, 58 L. Ed. 468; *Conn. M. L. Ins. Co. v. Eaton* (D. C.) 218 Fed. 206; *Id.* (D. C.) 218 Fed. 188 (two cases); *Eaton v. Conn. General Life Ins. Co.*, 223 Fed. 1022, 138 C. C. A. 663.

Indeed, I feel that the question, having been considered by the federal courts in two different circuits, and a review thereof upon certiorari having been refused by the United States Supreme Court, should no longer be considered open. It may be observed, however, that in determining whether these "dividends" apportioned to policy holders, for application at their election to partial payment of renewal premiums or for the purchase of paid-up additions, are "income," considerations urged by the government are not relevant. Thus the suggestion that the great organization of the plaintiff, the expensive and costly attendants in the way of buildings and

the like, in fact the mere magnitude of figures exhibiting monetary and investment transactions, forbid classing it as an eleemosynary institution, is true. So, too, the similarity of method respecting receipt, holding, investment, and disbursement of money, with methods pursued by ordinary and other large business institutions, is patent. The maintenance of bank accounts, book accounts representing general funds, both made up through mingling receipts from various sources, the investment of funds regardless of their origin as premiums on policies or interest on existing loans, the payment of expenses, disbursements on policy contracts, dividends, out of a general fund or bank account, are referred to by defendant, and a summary of these matters is thus given by counsel:

"It appears without dispute that the company does not segregate its premium receipts, and that the excess or loaded portion thereof, out of which it claims to pay its dividends, is not segregated, either in the funds or the accounts of the company. As stated, the funds are mingled promiscuously; they are invested as chance offers, the returns all go into one fund, dividends are declared from all of its investments and returns from different sources, and, when paid, are paid out of this same general fund, not out of any fund set aside as a segregated 'excess cost' fund. At the end of the year, if business of the company has been managed with * * * sagacity, if its investments and loans have been wise, if it has been fortunate in experiencing a low death rate, it will have a profit or surplus. Like other corporations, it is then in a position to declare a dividend. If the business of the corporation for the years in question has not resulted in a profit or surplus, clearly the corporation could not have declared a dividend; the policy holder would have been entitled to none, but would have been obliged to pay his premium in full, or lapse his policy."

Now, when it is once conceded that the plan of insurance involves stipulation of a premium, which in turn involves assumptions, such as expectation of life, interest returns upon investment, expense or "loading," and also involves the undertaking ultimately to exact an actual premium which shall always approximate actual cost, it becomes quite immaterial by what name the difference between latter and such stipulated premium—if experience shall develop it—shall be called. The plan contemplates its return to the contributing policy holder.

If, therefore, in the working out of the plan, investments are made, funds received and disbursed, accounts created and kept, and a business organization is built up, all similar to those found in other large business ventures—if all this be done without evidencing from day to day, in precise terms of dollars and cents, each policy member's pro rata share of the difference or excess, the plan is none the less in existence, and the obligation to furnish insurance at cost is none the less in force, and with it follows the obligation, at some time, to remit any excess. Therefore, no matter how much the disbursement or application of this excess may, as between plaintiff and its members, resemble ordinary dividend disbursements, its real status is not thereby disclosed to be gain or profit in the sense that it is an increment upon the amount intended to be invested to secure insurance—for that intention was *cost*—and the obligation rests upon the insurance company at all times, not to endeavor to obtain returns upon a profit earn-

ing bases, but only such as assure the indemnity, and to abate the excess above indemnity cost.

[2] So, too, the fact that, in the ascertainment and apportionment of these dividends, the plaintiff acted obediently to section 1952 of the Statutes of Wisconsin, does not, in my judgment, either estop it, or avail against its contention. This statute, whatever change it may have wrought in respect of the elements to be considered and the method of proceeding in making up a balance sheet of insurance transactions, did not and does not, either create or modify the character or status of these disbursements on policies. And it is a matter of general knowledge that one of the main purposes of the section was, not to provide a rule or method theretofore unknown or unpracticed by insurance companies, but rather to withdraw from them the practically unlimited and unrestrained discretion which they had asserted with respect to the time when these apportionments were to be made. It is not only consistent with the plaintiff's contention respecting its plan of insurance, but from the standpoint of the policy holder it furthers such plan, by making ascertainment and remission of the excess mandatory, annually. It withdraws from the companies a discretion, which formerly was entertained and exercised, to withhold such ascertainment and disbursement or remission for long periods—during the whole policy period. But it declares nothing as to these dividends which gives them a character or status different from what they had prior to its enactment, or what they would now have, in its absence.

If, as frequently happens in corporate or partnership affairs, the case presented the question whether profits had been earned, the acts of the governing body or of the partners, in making application of funds as dividends to shareholders, as profits to partners, might be persuasive in determining the debated question; and in the present case, if the sole question were the right to deduct these dividends from the income, as the company contends it should be returned, it obviously would require a negative answer, for the statute precludes deduction of dividends out of income; but the burden resting upon the government is greater than this. It involves the proposition that these dividends must be treated as income not subject to deduction. And when it is shown that they are derived from interest and premium receipts already included in a return for a preceding year, it is but a duplication, pro tanto, of the taxable income, to include them on the debit side of the return, and, if deduction be not permitted, the tax is really imposed on a disbursement.

[3] The contention of the government that the return should include, for purposes of taxation, premium and interest items accrued and due, but not actually collected and received, cannot be better answered than in the language of the Herold Case, where, in quoting the act, it is said:

"This language seems clearly to indicate that the net income, which is the measure of taxation, means what has actually been received, and not that which, although due, has not been received, but its payment for some reason deferred or postponed. Furthermore, an examination of the act shows that the net income is to be ascertained by deducting from the gross income:

(1) 'All the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties.' (2) 'All losses actually sustained within the year,' etc.; 'also the sums other than dividends paid within the year on policy and annuity contracts, and the net addition, if any, required by law to be made within the year to reserve funds.' (3) 'Interest actually paid within the year on its bonded and other indebtedness,' etc., 'and in the case of a bank, banking association or trust company, all interest actually paid by it within the year on deposit.' (4) 'Also all sums paid by it within the year for taxes,' etc. (5) 'All amounts received by it within the year as dividends upon stock of other corporations, joint-stock companies, or associations, or insurance companies, subject to the tax hereby imposed.' Since, then, the language of the act is explicit in permitting only such deductions from the gross income as were actually paid during the current year, it would be strange, indeed, if on the opposite side of the account the company were charged with what it had not received during the current year. No reason appears or has been suggested for so radical and unwarranted a departure. Furthermore, the word 'income' means, as already shown, that which has come in, and not that which might have come in, but did not. If expenditures means what has been paid out, or outgoes, then income means what has come in, or receipts."

In other words, the evident purpose of the act is to impose the tax, or to measure it, by a reference to benefits on the one and burdens on the other side, but such only as have been actually enjoyed or sustained, respectively. And, when this view is entertained, the suggestion that the law aims to impose an excise rather than an income tax is quite immaterial; for, conceding that, the ascertainment of "net," as against "gross," "income," as the measure of the excise, is still necessary; and the sense in which these terms are used is not more readily nor accurately determined by calling the imposition an excise, instead of an income, tax.

[4] A further controverted item arises out of the rejection by the commissioner of \$958,220.94, claimed by plaintiff as a deduction. The facts are: The parties are not in disagreement respecting the deductions or the reserve liability of plaintiff in policies valued by the state insurance commissioner, which he conceives it his duty to value under the Wisconsin law. They are policies said to involve "life contingencies." But plaintiff has obligations on policies which are termed "supplementary contracts." They present this feature: When a policy holder dies, and the beneficiary exercises an option to take the avails of the policy in installments, the general reserve fund is charged with the fixed liability—the sum is withdrawn therefrom and set aside to take care of the liability according to the deferred term covered by the option.

Now the government contends that because the state insurance commissioner does not include these supplementary contracts in his "valuation" of outstanding policies, they can form no basis of a "reserve" carried for their security and deferred liquidation. The Wisconsin statute requires plaintiff to "hold funds properly and safely secured to provide for its reserve liability over and above all its other liabilities, which reserve liability shall be determined by the state as follows." St. 1915, § 1950. The act gives specifications for valuation of various kinds of policies, and casts upon the insurance commissioner the duty of making annually "valuations of all outstanding policies, additions

thereto, and other obligations of every such company mentioned in subsection 1 (supra)."

If there were no testimony disclosing the uniform practice of insurance companies, the plaintiff included, of carrying reserves to protect these supplementary contracts, of treating such contracts as exhibiting a reserve liability, the statute still indicates a quite clear intent to embrace all policy liabilities whose period of liquidation is deferred until the contingency of death or until the expiration of such time thereafter as the policy may, at the option of some one, fix. The mere fact that, by the contingency of death, the policy liability is removed from the range of valuation by one of the methods, or upon one of the bases, fixed by the statute, does not justify the conclusion that there can be or is no reserve liability, as that is known in the insurance business, in or on these supplementary obligations. Granting that section 1950 of Wisconsin Statutes lends plausibility to the contention of the government by reason of its failure to mention specific policies whereon the liability has become fixed, and therefore beyond the necessity for resort, in "valuation," to a mortality table, "assumed" interest rate, or "expense" item, yet the fact that the commissioner of insurance is by the same statute required to "value" "all outstanding policies, additions thereto, and other obligations" of mutual companies; further, the deferred character of the obligation found in these supplementary contracts; and, lastly, the uniform concurrence of practice among insurance companies in treating them as subject to the reserve protection—these, clearly, justify a finding accordingly, and warrant the inclusion of these contracts as embodying reserve liability in the calculation of the annual "net additions to reserve" which may be deducted from gross income.

[5] With respect to the necessity of returning as part of the gross income, such interest as accrues on "policy loans," the settled view that such loans and the interest are in no just sense obligations which the policy holder is bound personally to liquidate, with interest, must prevail. In *Assessors v. N. Y. Ins. Co.*, 216 U. S. 517, 30 Sup. Ct. 385, 54 L. Ed. 597, it is thus expressed:

"When the plaintiff's [the insurance company's] policies have run a certain length of time and the premiums have been paid as due, the plaintiff becomes bound ultimately to pay what is called their reserve value, whether the payment of premiums is kept up or not, and this reserve value increases as the payments of premiums go on. A policy holder, desiring to keep his policy on foot and yet to profit by the reserve value that it has acquired, may be allowed at the plaintiff's discretion to receive a sum not exceeding that present value, on the terms that on the settlement of any claim under the policy the sum so received shall be deducted with interest (the interest representing what it is estimated that the sum would have earned if retained by the plaintiff), and that on failure to pay any premium or the above-mentioned interest, the sum received shall be deducted from the reserve value at once."

"This is called a loan. It is represented by what is called a note, which contains a promise to pay the money. But as the plaintiff never advances more than it already is absolutely bound for under the policy, it has no interest in creating a personal liability, and therefore the contract on the face of the note goes on to provide that, if the note is not paid when due, it shall be extinguished automatically by the counter credit for what we have called the reserve value of the policy. In short, the claim of the policy holder on the one side and of the company on the other are brought into an account current

by the very act which creates the latter. The so-called liability of the policy holder never exists as a personal liability, it never is a debt, but is merely a deduction in account from the sum that the plaintiffs ultimately must pay. In settling that account interest will be computed on the item for the reason that we have [above] mentioned, but the item never could be sued for, any more than any other single item of a mutual account that always shows a balance against the would-be plaintiff. In form it subsists as an item until the settlement, because interest must be charged on it. In substance it is extinct from the beginning, because, as was said by the judge below, it is a payment, not a loan."

A Wisconsin statute, although dealing with the matter of compulsory conversion of defaulted premiums into policy "loans," appears to give signal recognition, if not emphasis, to this characterization of such transactions, when it provides that such "loan" shall become due and payable "only when the total of all loans and interest shall be equal the reserve." Section 1948m, Wis. Stat.

[6] A final question, one not suggested in the pleadings, briefly referred to in oral argument, but later elaborately discussed in briefs, arises on these facts: In making its return for the year 1910, plaintiff omitted an item of \$77,000 from the income side. It is an aggregate of receipts from agencies, omitted because information respecting the accounts to which individual items were distributable was not at hand at the time of making the return, and, apparently, was in good faith treated as a "suspense" item which would naturally, upon later ascertainment, go into the return for the ensuing year. There is no suggestion that the facts are not consistent with perfect good faith. The record attests fully that the omission, if it involved delinquency at all, arose as stated—it was an erroneous failure to include the items.

The government urges that such failure bars the right to maintain the action, and bases its contention upon section 3225, R. S. U. S. (Comp. St. 1916, § 5948), which is asserted to be incorporated into the excise law in question:

"When a second assessment is made in case of any list, statement, or return, which in the opinion of the collector or any deputy collector was false or fraudulent, or contained any understatement or undervaluation, no tax collected under such assessment shall be recovered by any suit unless it is proved that the said list, statement, or return was not false nor fraudulent, and did not contain any understatement or undervaluation."

The broad proposition is that any and every error of understatement or undervaluation, howsoever innocently made, bars relief against a reassessment, howsoever inaccurate, or unjust it may be. It may be said, confidently, that so drastic a rule should not be accepted unless unmistakably clear language, disclosing a legislative purpose and intent viewed in the light of history and results to be achieved, leaves no alternative.

I shall assume that section 3225 is brought into the tax law in question; and it necessitates consideration of that section as part of a chapter, dealing generally with practice, procedure, rights and remedies awarded to both government and taxpayer or citizen, in the matter of assessment, collection, remission, and refund of public dues. These laws are not of recent enactment. The times and conditions at

and under which they came into being to further the raising of revenue to meet a situation of great national stress, the administrative recognition and application accorded them for over 50 years, may safely aid in throwing light upon the just interpretation to be given. Without narrating historically the advent and amendment of this particular section 3225 and allied provisos, it suffices to say that they had their beginnings in the Civil War Revenue Act of June 30, 1864 (13 U. S. Stat. p. 223, c. 173), as amended by the Act of July 13, 1866 (14 U. S. Stat. 98, c. 184). They exhibit the early recognition by the government of the necessity of ways and means for revising, both in the interest of the government and the taxpayer, the returns or assessments made or levied, and for refunding or recovery of taxes actually paid; and from the earliest occasions when interpretation of these statutes was called for the courts here have uniformly given to the results accomplished by legislation on the general subject, this broad characterization:

"The revenue measures of every civilized government constitute a system which provides for its enforcement by officers commissioned for that purpose. In this country, the system for each state, or for the federal government, provides safeguards of its own against mistake, injustice, or oppression, in the administration of its revenue laws. Such appeals are allowed to specified tribunals as the lawmakers deem expedient. Such remedies, also, for recovering back taxes illegally exacted, as may seem wise are provided. In these respects, the United States have, as was said by the court in *Nichols v. United States*, 7 Wall. 122 [19 L. Ed. 125], enacted a system of corrective justice, as well as a system of taxation in both its customs and internal revenue branches. That system is intended to be complete. * * * So also in the internal revenue department, the statute allows appeals to the assessor to the Commissioner of Internal Revenue; and, if dissatisfied with his decision, on paying the tax the party can sue the collector; and if the money was wrongfully exacted, the courts will give him relief by a judgment, which the United States pledges herself to pay." Per Miller, Justice, *Cheatham v. U. S.*, 92 U. S. 88, 23 L. Ed. 561.

A careful reading of adjudicated cases—indeed, all legislation upon the varied phases of public revenues—suggests that at no time has there been a purpose to cut off or to impair, either as against the government or the citizen, this "system of corrective justice" attending the administration of revenue laws.

At the outset, the proposition advanced by the defense is repugnant, utterly, to this view, and the broad purpose disclosed. If it is not obviously, it is easily demonstrably so. A few considerations of a practical nature—which a court may entertain—will be helpful. When property is assessed for taxation upon an ad valorem basis, the taxing officers frequently must, initially, determine values. Even in such cases, the taxpayer is not left wholly remediless to review or revise the finding of the assessing or taxing officer. In very rare situations is it possible, justly, to ascribe to any individual, whether he be the interested taxpayer or the public assessor, the power or the duty to make an initial valuation to be accepted by the one adversely interested, as indubitably fair; and, as indicated, there have arisen of necessity, in the interest of just dealing, the varying methods of revision and correction. Coming to the particular case before us,

where assessments are based upon returns exhibiting great magnitude and complexity of business operations, the possibility and the probability of errors—without a suggestion of attendant bad faith—is increasingly present. It may safely be said that the great majority of returns under these excise and income tax laws contain items involving for their fixing and determination, judgment, honestly and conscientiously exercised; and it is equally true that, no matter how conscientiously one man may fix and determine an item, another, with equal probity and integrity, may fix it at a substantially higher or lower figure. The very purpose is to enable revision, to correct the mistake, of omission or commission, or to prevent frauds; and it would be anomalous to assume infallibility on the part of the government in its efforts at revision, wherefore mistakes of the citizens only are to be corrected. This is said because, in my judgment, the drastic construction of section 3225, now insisted upon, will, if adopted, lead to that result as a matter of practical administration and application. It means that the taxpayer cannot prevail unless he succeeds in reinstating his own return, item for item, against the revision or reassessment. Naturally, suits to recover can rarely be brought when the reassessment is more favorable than the original return, though even such result can conceivably come through an entire rearrangement of the return through the exclusion of items admitted and the inclusion of items contested by the taxpayer. But this is true as a practical matter: Every reassessment, which results in an increased tax, must involve, expressly or by necessary implication, the opinion or conviction of the reviewing officer that the original return contained, somewhere or somehow, an understatement or undervaluation, a false (erroneous, or fraudulent) item or items. Therefore, unless the taxpayer can establish that his original return was right, and hence that the reassessment, in its attempted revision or additions, is wrong, in every particular, he must fail in his action. If this is possible, and it must follow so strict an interpretation of the statute (section 3225), then there is little left that can commend itself—to the citizen or taxpayer—of any so-called system of “corrective justice.”

The present case furnishes a good illustration: Assuming that the exaction of 1 per cent. on the millions of dividends treated as income is illegal and unjust, a remedy would have to be denied because of an honest error respecting an item, by comparison, trifling. I am unwilling to give to the section in question any such interpretation; and, no matter how drastic an application may be compelled in cases of actual fraud—whether the items fraudulently withheld or misstated be large or small—the view that the section aims to furnish a rule of proof, to give to the finding of executive officers a status or dignity *prima facie* good, to cast upon the citizen the burden of overthrowing it, thereby giving the section a distinct place and function in the corrective and revisory “system” of the revenue laws, is far more reasonable and commendable. It furthers the accomplishment, by the government or by the taxpayer, of the general purpose of enabling just revision or recovery; whereas, the view urged by the defendant makes the statute highly penal, and, in its application, one-sided, re-

sulting, as indicated, in foreclosure of recovery in every case where the original return cannot be established, item for item, in opposition to the government revision.

The views thus expressed entitle plaintiff to judgment, and the findings proposed on its behalf will be signed, whereupon judgment in its favor may be entered.

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In re EDELEN.

In re MOORE et al.

(District Court, W. D. Kentucky. February 12, 1918.)

1. BANKRUPTCY Ⓒ—328—TIME FOR FILING CLAIMS—CLAIMS LIQUIDATED BY LITIGATION.

In Bankruptcy Act July 1, 1898, c. 541, § 57n, 30 Stat. 560 (Comp. St. 1916, § 9641), which provides that "claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication, or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment," the provision extending the time in cases of claims liquidated by litigation applies only to cases in which judgment is rendered within 30 days before or within 30 days after the expiration of 1 year, and the clause in no case authorizes the filing of claims later than 1 year and 90 days after the adjudication.

2. BANKRUPTCY Ⓒ—328—TIME FOR FILING CLAIMS—CLAIMS LIQUIDATED BY LITIGATION.

Such clause applies only to unliquidated claims, which are liquidated pursuant to directions of the bankruptcy court, as provided in Bankruptcy Act, § 63b (Comp. St. 1916, § 9647).

3. BANKRUPTCY Ⓒ—328—TIME FOR FILING CLAIMS—STATUTORY LIMITATION.

Bankrupt and others executed a joint contract of guaranty to a bank to secure any indebtedness which might be made to the bank by note or otherwise by a corporation of which they were stockholders and officers; one of them, as treasurer, being authorized to sign notes in behalf of the corporation. The contract clearly stated that as between themselves each of the guarantors should be liable in proportion to the stock held by him. Two years and a half after the bankruptcy the bank brought suit on notes of the corporation against all the guarantors, except bankrupt, and recovered judgment, which was paid by the defendants, who then filed claims against the estate for the bankrupt's share under the contract. No claim had been filed by the bank, nor by the guarantors, which might have been done, at least provisionally, under Bankruptcy Act, § 57i (Comp. St. 1916, § 9641). *Held*, that the suit by the bank was not one to liquidate a claim against the estate, but that, even if so, the claims were filed too late, and were not provable under section 57n.

In Bankruptcy. In the matter of R. H. Edelen, bankrupt. On review of order of referee sustaining objections to claims of Thomas S. Moore and others. Order affirmed.

J. D. Wickliffe, of Bardstown, Ky., and A. E. Willson, of Louisville, Ky., for claimants.

J. S. McElroy and J. Van Dyke Norman, both of Louisville, Ky., for trustee.

WALTER EVANS, District Judge. The Distillers' Cooperage Company was a corporation doing business at Bardstown, Ky. Certain stockholders therein and persons otherwise interested in it executed to the People's Bank of Bardstown a contract in writing in the following terms:

"Whereas, the Distillers' Cooperage Company, of Bardstown, Nelson county, Kentucky, a corporation duly created under and by virtue of the laws of the commonwealth of Kentucky, keeps its accounts and deposits with the People's Bank of Bardstown, Nelson county, and state of Kentucky, and in the conduct and operation of its business and affairs, it is necessary for said Distillers' Cooperage Company to obtain loans, and to create debts and obligations and to execute notes therefor, and to secure the payment of same:

"Now, therefore, we, the undersigned, stockholders and officers of said Distillers' Cooperage Company, stockholders in distillery corporations having an interest in said Distillers' Cooperage Company, do hereby agree, covenant, and bind ourselves with and to the said People's Bank that we will be responsible for and guarantee the payment of all sums of money advanced to or paid for the said Distillers' Cooperage Company by said People's Bank, and will guarantee and pay to said bank all notes, bills, or other demands executed to the said People's Bank by or in the name of said Distillers' Cooperage Company, by L. B. Samuels, treasurer of said Distillers' Cooperage Company, as fully and to have the same effect as if we were personally present and signed each and every note, bill, or demand of said Distillers' Cooperage Company to said People's Bank. This agreement and guaranty on our part to continue and to apply to all indebtedness that may be incurred by said Distillers' Cooperage Company, and to all notes, demands, or bills that may be executed or made by said Distillers' Cooperage Company to said People's Bank from time to time in the future until the respective signers hereto shall have given notice in writing to said People's Bank that they withdraw therefrom, or will not be bound upon any debts or obligations thereafter created, or note or bill or other demands made or executed to said People's Bank.

"It is further agreed that, while each and every person signing this is bound to said bank for the whole amount of each and every debt and obligation, note, bill, or other demand incurred or executed to said bank through L. B. Samuels, Treasurer, the signers hereto as between themselves, are liable only in proportion to the amount of stock held by them, respectively, in the said Distillers' Cooperage Company, the liability of James L. Hackett and Graeme McGowan, being in proportion to the stock held by the Greenbrier Distillery Company, of which they are the owners.

"Witness our hands this March 7, 1912.

Graeme McGowan,
 "R. H. Edelen,
 "Thos. S. Moore,
 "L. B. Samuels,
 "Jas. L. Hackett."

In the course of the business of the Cooperage Company with the People's Bank a number of notes were executed to the latter which came within the provisions of the contract. These notes in the aggregate amounted to a great sum. While parts of this indebtedness were discharged by the company a large amount was left to be paid by the guarantors.

Upon some of the notes suits were brought in a state court on September 11, 1917, against all the guarantors except the bankrupt. After demurrers to the answers filed in these cases had been sustained, the defendants declined to plead further, and judgments were rendered in October, 1917, for the amounts sued for. These judgments and the other outstanding notes were paid off by the guarantors other

than the bankrupt. The latter's proportionate part of the joint liability thus met by the other guarantors amounted to the sum of \$10,-467.41. The guarantors other than the bankrupt tendered their proof of debt against his estate for that amount. This was done on November 12, 1917, which was over two years and six months after the adjudication was made on April 3, 1915. The trustee objected to the allowance of this claim, and on January 8, 1918, the referee entered an order sustaining the objections and disallowing the claim. It is that order which the court is now asked to review.

[1] The questions to be determined are important and possibly not entirely free from doubt. The objection to the order most strenuously pressed at the argument was based upon section 57n of the act, which reads:

"Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication, or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, and then within sixty days after the rendition of such judgment: Provided, that the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer."

It was contended by the trustee that the order was correct because the proof of debt was not tendered within one year after the adjudication. On the other hand, it was strenuously urged that good grounds existed for the delay, in that it was caused by an effort to liquidate by litigation the liability of the guarantors, though it is conceded that there was no litigation whatever during the entire period from April 3, 1915, when the adjudication was made, until September 11, 1917, when the suits above referred to were begun upon some of the notes given to the People's Bank. To the suggestion that the litigation referred to was neither by the trustee nor by any of the guarantors seeking to liquidate the liability of the bankrupt to either of them, but was by the holders against the makers and guarantors of the notes, the response was made, first, that the guarantors did not know anything about the notes until about the time they were sued upon; and, second, that the provisions of the act were broad enough to cover any sort of litigation thereon. Upon this state of fact it was insisted that there arose a situation to which the ruling of the Circuit Court of Appeals of the First Circuit in *Powell v. Leavitt*, 150 Fed. 89, 80 C. C. A. 43, fully applied, and that the ruling in this case should be governed by it.

Powell v. Leavitt was decided January 24, 1907. It held that, though a proof of debt was not made within a year and 60 days after the adjudication, yet as a mortgage given to a creditor by the bankrupt had, in a litigation, been held to have been a voidable preference, the creditor should thereafter be allowed to prove his debt, notwithstanding the lapse of time, and especially as the litigation which had resulted in the annulment of the mortgage had been commenced within a year after the adjudication. Undoubtedly the actual result in that case was in perfect harmony with the decisions of the Supreme Court in *Keppel v. Tiffin Savings Bank*, 197 U. S. 356, 25 Sup. Ct. 443, 49

L. Ed. 790, decided in April, 1905, and *Hutchinson v. Otis*, 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179, decided in June, 1903. In *Page v. Rogers*, 211 U. S. 575, 581, 29 Sup. Ct. 159, 53 L. Ed. 332, decided in January, 1909, the court even more clearly settled the doctrine. In neither of these cases did the Supreme Court mention or construe section 57n of the act, though in the *Keppel Case*, 197 U. S. at page 360, 25 Sup. Ct. 444 (49 L. Ed. 790), it did make an important reference to section 57g. The rule which was finally established in these cases was based entirely upon considerations other than such as might arise under section 57n, and we suppose the decision in *Powell v. Leavitt* might well have been based upon the two first of those cases without allusion to section 57n. However, the Circuit Court of Appeals, while citing the first two of those cases (the other of them not then having been decided), went further and seemed to prefer to rest its decision upon the ground that the words in section 57n, that "if * * * the final judgment therein is rendered within thirty days before or after the expiration of such time then within sixty days after the rendition of such judgment," should be so construed as to mean "if the final judgment therein is rendered thirty days before the expiration of such time or at any time thereafter," thus expunging altogether from the act the words "then within sixty days after the rendition of such judgment" and substituting therefor the words "or at any time thereafter."

Surely this was contrary to the almost, if not quite, universally established rule to the contrary. Innumerable cases decided after as well as before that ruling might be cited to show this, but the following may suffice. A few from Circuit Courts of Appeals are: In *re Ingalls Bros.*, 137 Fed. 517, 70 C. C. A. 101, In *re Hawk*, 114 Fed. 916, 52 C. C. A. 536, and In *re Sampter*, 170 Fed. 938, 96 C. C. A. 98. See, also, In *re Peck*, 168 Fed. 48, 93 C. C. A. 470. Of cases in the District Courts the following may be noted: In *re Sanderson*, 160 Fed. 278, 20 Am. Bankr. Rep. 396; In *re Knosco*, 208 Fed. 202, 31 Am. Bankr. Rep. 238; In *re Meyer*, 181 Fed. 940-906; In *re Trion Manufg. Co.*, 224 Fed. 521, 35 Am. Bankr. Rep. 480; In *re Muskoka Lumber Co.*, 127 Fed. 886; In *re Blond*, 188 Fed. 452; In *re Kemper*, 142 Fed. 210, 212; In *re Rhodes*, 105 Fed. 231; In *re Moebius*, 116 Fed. 47, 8 Am. Bankr. Rep. 590; *Bray v. Cobb*, 100 Fed. 270, 3 Am. Bankr. Rep. 788; In *re Leibowitz*, 108 Fed. 617. Added to these, in *In re Paine*, 127 Fed. 250, we also had occasion to construe section 57n, and expressed views as follows:

"It may well be that Congress could with wisdom have put into the clause an exception covering cases where there had been a fraudulent concealment of assets; but that was a matter exclusively for Congress to determine, and not for the courts to remedy. This court at least assumes no power to interpolate an exception, and thus put into the statute what Congress declined to embrace therein. The language of the clause is plain and unequivocal. There is no ambiguity about it, and it admits of no construction. The decisions are equally clear to the effect that no proof of debt can be made after the expiration of one year after the adjudication, except in those instances where the period is extended by the act to not exceeding one year and six months. Either period would effectively bar the making of any proofs of debt in this case by any creditor whatever."

It may be said, therefore, with all respect that, as the rule established by the Supreme Court in the cases we have cited fully justified the result in *Powell v. Leavitt* upon grounds entirely different from those stated in the opinion in that case, the ruling which would expunge the words we have referred to was not necessary to a correct decision of it and therefore possibly was obiter. Other courts, for these reasons, are not bound by that exceptional ruling as a final adjudication of the proper construction of section 57n. Under these circumstances we find ourselves unable to change our former ruling. It may emphasize it to add that we should always have in mind that provision of the Constitution which gives to Congress the power "to establish uniform laws on the subject of bankruptcy throughout the United States." Except as it is subject to other provisions in the Constitution itself, the power, thus bestowed, is without limitation, and the doctrine is elementary (because established by many decisions of the Supreme Court), that Congress may exercise the power thus given within its reasonable discretion. And Congress having in plain terms enacted section 57n of the Bankruptcy Law, the courts have no power to strike out any part of it, and much less to substitute other provisions in lieu of those thus stricken out. Otherwise the courts, and not the Congress, would do the work of legislation in bankruptcy matters.

[2] But even if we suppose to be correct the construction given section 57n in *Powell v. Leavitt*, we nevertheless think the instant case is clearly distinguishable, because, first, the litigation in that case was begun within a year after the adjudication, and therefore it was possible to have the final judgment rendered within 1 year and 30 days thereafter, while here the litigation was not begun until 2½ years after the adjudication; second, because in this case there was no attempt at giving a preference to any creditor; third, because the fact here is that the litigation in this instance was not a means of liquidating a claim of uncertain amount within the sense of the act, but was the means used by the People's Bank to collect an indebtedness from its debtors other than the bankrupt; and, fourth, nothing was done or attempted to be done under section 63b of the act to bring about the liquidation of claims in dispute between the trustee or the bankrupt and any of the creditors. Section 57n is to the plain effect that claims against a bankrupt shall not be proved subsequent to one year after the adjudication, or if they are liquidated by litigation and the final judgment is rendered within 30 days before or after the expiration of the one year, then the proof may be made within 60 days after the rendition of such judgment. Section 63b provides:

"Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

Strict—indeed proper—ruling might demand that these two provisions should be considered in *pari materia* in an effort to ascertain what was the intention of Congress, for it could hardly be that Congress did not have one of these sections in view when it finally settled the language of the other, and hence it would logically seem that the "liquidation by litigation" provided for in section 57n was intended to

be achieved through the medium of an application to the bankruptcy court which, under the act, would direct the manner of obtaining that result. Doubtless such directions might include any litigation the court supposed was advisable. In *Dunbar v. Dunbar*, 190 U. S. at page 350, 23 Sup. Ct. at page 761, 47 L. Ed. 1084, the Supreme Court said:

"In section 63b provision is made for unliquidated claims against the bankrupt, which may be liquidated upon application to the court in such manner as it shall direct, and may thereafter be proved and allowed against his estate. This paragraph 'b,' however, adds nothing to the class of debts which might be proved under paragraph 'a' of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of section 63a, to be liquidated as the court should direct."

Indeed, it is not too much to conclude that Congress meant to make the provision controlling, and so the following cases hold: *In re Heim Milk Product Co.* (D. C.) 183 Fed. 787, 25 Am. Bankr. Rep. 746 ; *In re Silverman* (D. C.) 101 Fed. 219, 223.

[3] No application had been made to the bankruptcy court to direct a liquidation of this claim. If there had been an application, the court (usually the referee) might have directed any admissible proceeding in any court having jurisdiction, or might have withheld direction if it appeared that the application was made more than a year after the adjudication. Upon the case as now presented much doubt is thrown upon the question whether the suits in the state court by the People's Bank against persons other than the bankrupt or his trustee upon promissory notes for exact sums and upon a written guaranty plainly expressed, were upon "unliquidated claims" within the meaning of section 63. *In re E. O. Thompson & Sons* (D. C.) 123 Fed. 174, 176.

Besides, speaking generally, if we may depart from strict construction, the idea runs through all applicable cases that any litigation, in which liquidation is sought or can be obtained, must have begun either before the bankruptcy proceeding commenced or within a year after the adjudication—all agreeing that if the litigation had thus begun the form or forum of it would not be very material, and all further agreeing that the form of making proof or the assertion of a claim in a bankruptcy proceeding might, in the meantime, be quite informal. To accomplish equitable results there have been relaxations held to be admissible in respect to liquidation. The relaxations, within certain limits, to which we have referred, and the manifest fact that the one year subsequent to the adjudication had long previously elapsed, suggested the necessity for some explanation by claimants of their delay, and in the proof of debt sworn to and filed November 12, 1917, this was attempted, when they said:

"The claimants state that until the present time they have been unable to properly prove up and present their said claim, owing to the fact that the amount thereof had not been fixed and determined; but now that the Nelson circuit court has construed said written guaranty and adjudged and determined the party's liability thereon and thereunder, said claim is provable, and becomes and is a just claim for allowance against the said estate of the bankrupt."

While mainly this statement covers mere legal conclusions, it does allege the fact to be that up to the date referred to the claimants had been unable to properly prove and present their claim. This, we think, on its face is a mistake for two reasons:

First. They or either of them could, within the year, have proved or asserted their claims, informally or otherwise, in this proceeding. Section 57i of the act reads as follows:

"Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor."

We may, we think, safely conclude that the writing hereinbefore copied should be construed as constituting an obligation to secure "the individual undertaking" of another person, to wit, the Distillers' Cooperage Company, and whether the obligation of those who signed the paper should be regarded as that of guarantors or as that of sureties is not very material in view of this statutory provision. The People's Bank could have proved, but did not prove, any of the debts. This being true, the record shows no legal obstacle in the way of any of the guarantors (except the bankrupt) making proofs of all the debts, at least provisionally, and in such form as to save all their rights.

Second. An examination of the record shows that the bankrupt's schedule of debts does not include the names of any of the guarantors of the notes of the Distillers' Cooperage Company to the People's Bank, though the name of the bank appears in the schedule as a creditor of the bankrupt for large sums. It will be remembered, however, that the claimants only guaranteed debts of the Distillers' Cooperage Company to the People's Bank, and that they did this jointly with the bankrupt; but they had paid no part of those debts at the time of the adjudication. Possibly a frank and full disclosure of all the liabilities, absolute and conditional, of the bankrupt, might have included his liability to the People's Bank on the notes described in the proof of debt; but there is no suggestion that the omission to include it in the schedule was either fraudulent or intentional. Presumably as reasonably prudent men the claimants knew, or could by inquiry have ascertained, all the facts as to all liabilities under the guaranty as fully as could their coguarantor, the bankrupt, for it must be recalled that one of the claimants, who, of course, is one of the guarantors, is L. B. Samuels, who, on behalf of the Distillers' Cooperage Company, and by himself as its treasurer, signed each of the notes on which the proof of debt is founded. He is one of the claimants who joined in that proof, and it is not reasonable to suppose that the perfect knowledge he had on the subject of the execution of the notes was not at all times open and available to the other guarantors. Besides, as will also be remembered, the contract with the People's Bank plainly showed that the guarantors were the owners of the Cooperage Company. So that it is manifest that all of the claimants knew all about the notes at all times, and that if they forgot them or overlooked their right to make proof at an earlier date it was a misfortune which could not now

increase their rights. In re Rhodes (D. C.) 105 Fed. 231; In re Baird & Co. (D. C.) 154 Fed. 215, 18 Am. Bankr. Rep. 228; In re Daly (D. C.) 205 Fed. 1002.

The claimants have tendered and have asked leave to file an amendment to the proof of their claim. Most of the averments of the proposed amendment refer to the merits or demerits of the judgment rendered in the litigation in the state court, over which we can exercise no control. The other part of the proposed amendment renews the statement that the claimants did not know of the existence of the notes given under the guaranty. What we have already said on that subject clearly indicates that we should overrule the application to amend the proof of debt.

Upon the whole case, we are constrained to the conclusion that the referee was right, and his order of January 8, 1918, will be approved and affirmed. A decree accordingly may be entered.

In re CANISTER CO.

(District Court, D. New Jersey. February 13, 1918.)

1. BANKRUPTCY ⇨226—ORDERS OF REFEREE—FINDING OF FACTS.

An order of a referee in a matter in which there is a dispute of fact must be supported by a finding of the ultimate facts; the specific facts to be found depending upon the particular case.

2. BANKRUPTCY ⇨250(1)—CORPORATIONS—ASSESSMENT OF STOCKHOLDERS.

To authorize an assessment upon stockholders of a bankrupt corporation it is necessary for the referee, inter alia, to find (1) that the assets of the company are insufficient to pay its debts; (2) that the stock, or some of it, was not paid for in full, and that the holders thereof had, or are chargeable with, knowledge of that fact in the acquirement of the stock; and (3) the pro rata share that the holders of such stock must pay, up to the par value thereof, in order to liquidate the indebtedness of the company and pay the expenses of the proceeding. When such findings have been made, the referee may order an assessment upon the holders of such unpaid stock for any amount of the unpaid portion found to be necessary, and for such amount only.

3. BANKRUPTCY ⇨225—REFEREES—NECESSITY OF FINDING FACTS.

If a trustee, in support of a petition filed by him, fails to produce sufficient evidence to enable the referee to find the facts to sustain the order prayed for, the petition should be dismissed.

In Bankruptcy. In the matter of the Canister Company, bankrupt. On review of order of referee assessing stockholders of the bankrupt company to the extent of the par value of their stock. Reversed.

Edward L. Katzenbach, of Trenton, N. J., and George M. Shipman, of Belvidere, N. J., for trustee.

Malcolm G. Buchanan, of Trenton, N. J., for respondent stockholders.

Joseph A. Seidman and A. C. Cohen, both of New York City, for creditors' protective committee and Hudson Brass Works.

DAVIS, District Judge. It appears from the proofs submitted in the above-stated cause that in July, 1909, and for some time prior thereto, the Canister Manufacturing Company was and had been in financial difficulties. There seems to have been an understanding between the officers and stockholders, or some of them, of the said company, and the creditors thereof, that a reorganization of the company should take place, and that the creditors of the company should receive stock in the new and reorganized company, called the Canister Company, for and on account of their claims against the old company. A written instrument, purporting to contain the terms of the said agreement, was introduced in evidence before the referee; but the same was unsigned, and just who were the parties to the alleged agreement, embracing the reorganization, is not quite clear. A reorganization was, however, effected. All the personal property was sold for a nominal sum under execution sale, upon judgments secured by the Phillipsburg Investment Company, to which certain creditors of the old company had assigned their claims, and the real estate of the old company was sold under foreclosure proceedings, likewise for a nominal sum. All the property, both real and personal, purchased at the said sale, was conveyed to the newly organized Canister Company. An inventory and appraisal were made of this property, which amounted to \$299,098.58. It is charged, however, that the inventory and appraisal were made by persons who were interested in both companies, the old and the new, and whose interest caused them to make the appraisal much in excess of the value of the articles appraised. Stock was issued by the new company to creditors of the old company on account of their claims against the old company.

The trustee contends: (1) That the creditors of the old company had no legal claim against the new company, and that their only claim was against the proceeds of the said sales of the personal property and real estate of the old company; and (2) that if the agreement, tacit or otherwise, is taken into account as binding in the case, because it was acquiesced in and ratified for six or seven years by the creditors of the old company and officers of the new, the stock issued to the present stockholders of the new company, creditors of the old company, was in excess of the property received by the new company, in return for which it issued its stock to the present holders.

Passing over the first contention presented in the brief of counsel for the trustee, the order of the referee seems to have been based upon the second proposition. He finds as facts, *inter alia*:

(1) "That there is substantial doubt about the full payment of any of the stock, and that the weight of evidence, as the proofs now stand, is that some of the shares are only partly paid, and some are entirely paid."

(2) "The Phillipsburg Investment Company proceeded to purchase at sheriff's sale the property of the Canister Manufacturing Company, and the proofs indicate that that property did go over into the possession of the present bankrupt company, and said bankrupt company did issue to numerous creditors of the Canister Manufacturing Company capital stock, in varying amounts, aggregating \$91,300 in par value, and having acquired title to the real estate, it gave to previous bondholders of the company, in lieu of their bonds, which had been foreclosed, bonds to the amount of \$79,800."

(3) "I am therefore constrained by the present proofs to find that there

is very considerable doubt concerning the payment in full of all the capital stock outstanding. It is true undoubtedly that the property did go over from the Canister Manufacturing Company to the Canister Company, and that it is payment on stock, but to what extent and on what shares it applies cannot be determined by the present proofs. In my judgment that can only be determined by the trustee bringing a plenary suit against a stockholder in which the issues can be narrowed down to his particular dealings which resulted in his holding the stock."

Upon said facts, inter alia, as found by him, the referee made an order assessing all stockholders of the Canister Company "to an amount equal to the par value of the stock issued to and held by said stockholders," and directed the trustee "to enforce payment of such assessments and calls, if necessary, by an action or actions at law or in equity in any court of competent jurisdiction in this or in any other state or country against the stockholders of the Canister Company both common and preferred."

[1] The jurisdiction of the referee was challenged to make such an order, but this objection is without merit. The referee, however, must find the facts, "the ultimate facts of the dispute." As Judge McPherson, in the case of *In re Turetz* (D. C.) 205 Fed. 400, said:

"We need to know the facts, not merely the evidence about the facts; and this is emphasized by the mass of testimony that has been taken, and by the fact that the referee heard and saw the witnesses, and is much better able to find the facts than we can possibly be."

The definite, specific facts to be found depend upon the particular case being considered, but they should be found, and wherever practicable separated from the findings of law.

[2] In order to make an assessment upon stockholders for the payment of the debts and administrative expenses of the bankrupt company, it is necessary for the referee, inter alia, to find: (1) That the assets of the bankrupt company are insufficient to pay its debts; (2) that the stock, or some of it, was not paid for in full and that the holders thereof had, or are chargeable with, knowledge of that fact in the acquirement of said stock; (3) the pro rata share that the holders of such stock must pay, up to the par value thereof, in order to liquidate the indebtedness of the bankrupt company. When this has been done, the referee may order an assessment upon such holders of unpaid stock for any amount of the unpaid portion thereof found to be necessary for the payment of the debts and expenses of the bankrupt company and for such amount only. General Order in Bankruptcy No. 27 (89 Fed. xi, 32 C. C. A. xxvii); Bankruptcy Rule No. 33 of this court; *Kirkpatrick v. American Alkali Co.* (C. C.) 140 Fed. 186; *In re Newfoundland Syndicate* (D. C.) 196 Fed. 443; *Id.*, 201 Fed. 917, 120 C. C. A. 255; *Enright v. Heckscher*, 240 Fed. 863, 153 C. C. A. 549; *In re Turetz*, supra; *Cumberland Lumber Co. v. Clinton Hill Mfg. Co.*, 57 N. J. Eq. 628, 42 Atl. 585; *See v. Heppenheimer*, 69 N. J. Eq. 36, 61 Atl. 843; *Holcombe v. Trenton White City Co.*, 80 N. J. Eq. 122; ¹ *McDermott v. Woodhouse* (N. J.) 101 Atl. 375; *J. W. Cooney v. Arlington Hotel Co.* (Del. Ch.) 101 Atl. 879; *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184; *Furnald v. Glenn*

¹ 82 Atl. 618.

(C. C.) 56 Fed. 372; *In re Remington Automobile Co.* (D. C.) 139 Fed. 766; *Rosoff v. Gilbert Transp. Co.* (D. C.) 204 Fed. 349.

[3] The referee has manifestly not found the facts necessary to support his order. He finds "that some of the shares are only partly paid, and some are entirely paid." It would be unfair to any stockholder whose stock is full paid to compel him to go to the trouble and expense of defending a suit which could have but one result. It would also be unfair to the creditors to waste the assets of the estate in bankruptcy in such fruitless litigation. The law, therefore, imposes upon the referee the duty of finding, as best he can, the stock which was not full paid before he levies an assessment upon the holder thereof. The holder of such unpaid stock, may, however, in a plenary suit for the collection of the assessment, make any defense that may relieve him of individual liability, but he may "not attack the administrative action of the referee in making the assessment or in determining the rate thereof, or in levying the same." *In re Newfoundland Syndicate*, supra. If the referee could not, with "the present proofs before him," determine the necessary facts, he should either have taken further testimony, or, if no other proof could be secured, he should have dismissed the petition. The trustee must bear the burden and present such proof as will enable the referee to find, with reasonable certainty, the facts necessary to support his order. If he does not do so, the petition must be dismissed.

The order will therefore be reversed and set aside, and the case sent back to the referee, with instructions to take further testimony and determine the facts, as above set forth, necessary to support an order making the assessment, or to dismiss the petition, if such proofs are not produced before him, if he cannot find the facts from the present proofs.

Order for Correction of Opinion.

After the above opinion had been filed, it was brought to the attention of the court that the last word in finding (1), as set out above, of the referee in his filed memorandum was "paid," instead of "unpaid," as intended by him. Upon stipulation of counsel the correction was ordered. This, however, does not necessitate any change in the conclusions above reached.

HEWITT v. SPEYER et al.

(District Court, S. D. New York. August 24, 1917.)

No. 319.

1. CONTRACTS ⇌ 2—LAW GOVERNING—CONTRACTS OF NATION.

Contracts by which a sovereign nation agrees to apply its revenues to the payment of indebtedness created thereby are governed, and their validity and effect must be determined, by the laws of that nation.

2. INTERNATIONAL LAW ⇌ 12—CLAIMS AGAINST STATES BY FOREIGN CITIZENS—JURISDICTION OF COURTS.

Contracts by which the republic of Ecuador acquired 49 per cent. of the stock of an American railroad company, which was to build a road

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

in that country, and agreed to "guarantee with its customs revenues" payment of the principal and interest of the company's bonds, *held*, under the law of Ecuador, to be no more than an agreement or engagement to apply such revenues to that purpose, and not to create a lien in favor of the bondholders, which would prevent the government from using any part of the same for necessary governmental purposes, or which could be enforced by a court of the United States against customs funds paid by the government of Ecuador to a New York bank in repayment of money borrowed for war purposes.

In Equity. Suit by Erskine Hewitt against James Speyer, Henry Ruhlender, Richard Schuster, and Eduard Beit Von Speyer, individually and as copartners composing the firm of Speyer & Co., and the United States Mortgage & Trust Company, as trustee under the mortgage of the Guayaquil & Quito Railway Company. Bill dismissed.

Masten & Nichols, of New York City (E. Henry Lacombe, Arthur H. Masten, and H. Bartow Farr, all of New York City, of counsel), for complainant.

Cadwalader, Wickersham & Taft, of New York City (Henry W. Taft, Benoni Lockwood, and George Coggill, all of New York City, of counsel), for defendants Speyer & Co.

Harmon, Patterson, Eagle, Greenough & Day, of New York City, for defendant United States Mortgage & Trust Co., as trustee.

AUGUSTUS N. HAND, District Judge. This suit was brought to impress a lien upon moneys in the hands of Speyer & Co. The complainant sues on his own behalf and that of all other bondholders of the Guayaquil & Quito Railway Company under the mortgage dated January 2, 1899, who may join in the prosecution of the cause. The government of Ecuador on June 14, 1897, entered into a contract with Archer Harman for the construction of a railroad from the port of Guayaquil to Quito. By the terms of this contract an American corporation was to be formed. The government of Ecuador was to hold 49 per cent. of the common stock and Harman and his associates 51 per cent. The cost of the road was estimated at \$17,532,000, which was to be provided by the issue of \$12,282,000 6 per cent. first mortgage bonds and \$5,250,000 7 per cent. preferred stock. The common stock was to represent a par value of \$7,032,000. The security for the bonds was a first mortgage on the property of the railway and a guaranty by the government of Ecuador which was expressed in the contract as follows:

"The government of Ecuador, on its part, guarantees with its customs revenues the sum of twelve million two hundred and eighty-two thousand American dollars gold, represented by the bonds to be issued; subjecting itself solely to the guaranty prescribed in the present article. This guaranty covers both the principal and the interest at the rate of 6 per cent. per annum, and 1 per cent. per annum for a sinking fund; said amounts to be paid to the trustees provided for in the third article. It is hereby distinctly stated that the government has pledged its customs revenues for the following amounts payable monthly in this form. [Then followed prior guaranties by the government covering existing indebtedness aggregating 104,637.74 sucres.] The above amounts have the right of priority representing both principal and interest for the periods named, over the guaranties constituted in the present

contract; it being understood that the customs revenues at present amount to four million sucres annually. Once said periods have expired, the government agrees to grant priority to the guaranty stipulated in this contract upon the whole of the customs revenues, as soon as the aforesaid sums have been paid. * * * In each bond it shall be distinctly stated that both principal and interest are guaranteed by the government of Ecuador with its customs revenues and a mortgage on the Railway, its properties and appurtenances. * * * "

A supplemental contract was executed between the government of Ecuador and the railway company after its incorporation, dated November 26, 1898, covering the subject-matter of the foregoing arrangement and modifying it in some respects, the terms of which do not need to be dwelt upon. The securities were issued and the bonds guaranteed by the government as called for by the contract. On each bond there was printed the covenant signed by the minister of finance of Ecuador that the government—

"guarantees with its entire custom house receipts, subject only to the prior liens thereon, * * * the payment of the principal of the within bond and of the interest thereon at the rate of 6% per annum, and of 1% per annum for sinking fund, and subject to the liens aforesaid * * * pledges to the United States Mortgage & Trust Company, as trustee, all its said custom house receipts as security for the equal payment of the principal and interest on this bond and all other bonds of this series and also of the aforesaid sinking fund. * * * "

In 1908 the railway was in default in some of its sinking fund and interest payments and a supplemental contract dated September 30, 1908, was made between the government and the railway providing for the issue of \$2,486,000 prior lien bonds secured by the property of the company and the guaranty of the government and reducing the interest rate. It provided that the banks in which the customs revenues are deposited should daily set aside and place to the credit of the council for foreign bondholders, as representing the owners of the bonds, one three hundred and sixty-fifth part of the amount required to meet the annual payments on the bonds, and stated that:

"* * * This designation shall constitute a first and preferential charge on the entire customs revenues; and the government hereby declares, that after 31st December, 1908, there will exist no charge on the customs revenues in priority to or ranking pari passu with that designated for the bondholders; and that it will not in future constitute any charge on such revenues to the prejudice of the bondholders' rights."

The prior guaranties were met, but payments for interest and sinking fund again became in default, and under these circumstances the government obtained a loan from Speyer & Co. The latter contracted on December 31, 1910, with the government to purchase 3,000,000 sucres at 85 per cent. of par in treasury certificates secured (1) by 50 per cent. of the export duties; (2) by 500,000 sucres from the liquor tax; (3) all custom house revenues "immediately subject to the liens which they bear up to the present time." This contract was entered into when the government was subjected to unusual expenses for military purposes owing to the hostilities of the republic of Peru and the funds borrowed from Speyer & Co. were used for military and current administration purposes.

The defendants were aware of the guaranty of the bondholders, but proceeded to collect and receive \$1,317,728 of customs receipts for application to their loan and held this sum in a special account to await the determination of the bondholders' claims. Speyer & Co. claim that the government of Ecuador is a sovereign power, that it did not and could not hypothecate its revenue, and insist that the claim arising from the default in coupons and sinking fund of \$1,047,065 which is secured by the mortgage, should not be satisfied from the moneys in the hands of Speyer & Co.

I can have no doubt that the law of Ecuador, in which the contracts under consideration were made and to be performed, must govern this case as to the substantive rights of the parties. *Smith v. Weguelin*, 8 Eq. Cas. 198; *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; *Scudder v. Union National Bank*, 91 U. S. 406, 23 L. Ed. 245. The testimony seems to be conclusive that no pledge of the customs receipts was effected under the general law of Ecuador. The doctrine of notice which obtains in the common law is unknown under the law of Ecuador, and all the witnesses say that a pledge of personal property can only be effected under the general law of Ecuador by physical delivery of the thing pledged. The complainant's expert, Dr. Lazo-Arriaga, did, to be sure, set forth a theory that the intention of the parties should prevail in the absence of an express prohibition, but he evidently regarded the requirements of the Code as to the creation of a pledge as a statutory regulation of the subject-matter, for he said at the close of his testimony:

"Q. Is there any prohibition against the creation of a pledge, where the article pledged is not delivered to the pledgee—is there any prohibition? A. If in a contract say that I give you a pledge, and that pledge is not pledged with you, I naturally draw the contract knowing that the word 'pledge' has a legal meaning, and in such a case that would not be a valid contract. Q. It would not be valid? A. As regards the pledge."

In short, Dr. Lazo-Arriaga relied upon the doctrine he enunciated in answer to question 155, where he said:

"It is possible under the law of Ecuador for Congress to modify that law for a specific case and create a pledge."

He said that the contract of the railroad amounted to a special law of the republic which in terms pledged the revenues in a way that is effective, though unknown to the general laws. While such a theory is ingenious, it involves a construction of the contracts so contrary to the general laws of Ecuador, and one which would result in such a practical nullification of the governmental power to apply public revenues according to the exigencies which might arise, that it should be followed with hesitation. This theory of the rights of the parties would involve the obligation of Ecuador to pay its debts to the bondholders, even though it had no funds with which to conduct a war of defense or to pay the salaries of its officials.

A guaranty can only be enforced in Ecuador against the government by obtaining a decree of the Supreme Court that the customs receipts be appropriated to the bonds and by proceedings before the

Congress of Ecuador in the nature of impeachment proceedings if the proper officials fail to observe the judicial decree. The procedure in the national Supreme Court, and the resulting process to require application of the revenues to the interest in default, would furnish a means of determining whether any revenues were available for the purpose of paying the sums which were in default. This was the legal and rational means of determining the rights of the bondholders, and not the present form of action.

It is to be observed that there is no language in the contracts of 1897 and 1898, which were all instruments authorized by the Congress of Ecuador, that purported to pledge the customs revenues as security for the bonds represented by complainant. The only language clearly attempting to pledge the customs is found in the bonds and mortgage, and these instruments having been executed in pursuance of the prior contracts of 1897 and 1898, which were made under congressional authorization, must be limited by the terms of these contracts. Complainant contends that the following language of the later contract of September 30, 1908, created a lien:

"This designation shall constitute a first and preferential charge on the entire customs revenues."

The Spanish word translated "charge" was "obligacion." I think this word does not mean "lien," but only obligation or guaranty to pay from the customs receipts. The testimony shows that the language amounted to no more than a promise or executory agreement to pay out of the customs receipts, and that it created no lien. All the witnesses, except Dr. Lazo-Arriaga, agree to this, and in spite of his reputation for knowledge of the law of South American countries, it must be admitted that he had no special knowledge of the law of Ecuador, nor did he seem to speak with the clearest conviction and certainty when he argued that the language of this contract was to be regarded as sufficient to alter rights which would have obtained under the general law of Ecuador as well as other civil law countries. For these reasons I think it cannot be successfully urged that any special law arising from the authorization of the contracts by the Congress of Ecuador resulted in a pledge of the customs revenues. There was a mere agreement to pay out of revenues thereafter to accrue which created no lien. Even though the contracts made by authorization of the Congress of Ecuador would by designating the funds from which payment was to be made create an equitable lien in favor of the bondholders under our laws, no such thing was effected under the law of Ecuador. This court certainly cannot impress the funds with a trust after the government of Ecuador has applied them to payment of its debt to Speyer & Co.

The cases referred to by complainant's counsel, in which the Louisiana courts are held to have a right to enforce equitable remedies, are not a safe precedent for holding that the contracts under consideration created equitable liens in Ecuador. The restricted field which the civil law occupies in Louisiana, surrounded as it is by common-law territory, has naturally caused the introduction of doctrines of the English law which never obtain in foreign nations where the civil-

law system prevails without let or hindrance. I think that the great weight of testimony, as well as the inherent probabilities of the situation, make it most unlikely that a pledge of the entire customs revenues of Ecuador was authorized or effected either by any general or special law applicable to this case. The case of *Twycross v. Dreyfus*, L. R. 5 Ch. Div. 605, contains an interesting discussion of the power of a court to adjudicate as to the acts of a foreign nation by Lord Jessel, and the Circuit Court of Appeals of this Circuit, in the case of *American Banana Co. v. United Fruit Co.*, 166 Fed. 261, 92 C. C. A. 325, adopted a view similar to that of the English judges, and held that a court could not adjudicate as to such matters. See, also, the opinion of the Supreme Court in *Kawananakoa v. Polyblank*, 205 U. S. 349, 27 Sup. Ct. 526, 51 L. Ed. 834. In the *Twycross Case*, Lord Jessel said as to a pledge of its revenues by the republic of Peru:

"Now, what does the bond offer to them [i. e., purchasers of the bonds]? In my opinion, rightly construed, and having reference to the nature of the government which issued it, it did not amount to what, as regards a private individual, could be treated as a mortgage. It says: 'As a guaranty for the fulfillment of the obligations contracted in this bond, the government of Peru, under the national faith' (that means the national honor, the national faith in the sense of good faith), 'pledges the general revenue of the republic, and especially the free proceeds of the guano in Europe and in America, after the engagements which it has contracted on them are covered,' and other property. What is the meaning of the word 'engagement'? First of all, everybody knows that the first engagement a government contracts to pay out of its own revenues is the engagement necessary to continue its own existence as a government, to pay for its military and civil services to any extent the government thinks necessary. How can any rational person call that a mortgage or pledge which is preceded by the right of the pledgor to appropriate as much of the property as he pleases to any purpose he thinks desirable for his own use? It is impossible to look upon that seriously as a pledge. It is so much as the government chooses to leave them after satisfying the ordinary engagements and wants of the government. Then there is another stipulation that in all the contracts which the government may enter into for the sale of guano, or under whatever form this sale may have, it binds itself to direct that there be set aside out of the proceeds of each half year a sum sufficient for the service of that same half year, and after such service being secured, to dispose freely of the surplus. That is, the government binds itself to direct it. If it does not direct it you have nothing but the national faith to look to or appeal to. The case beyond that is simply this: It is said the government has sent guano to some agents in Europe, who are made defendants, that these defendants have sold the guano, that they have notice of the bonds, that they claim some charge or lien on the guano—it is not said what it is, because the plaintiff does not know and cannot ascertain—and that the republic makes no claim. All that is perfectly consistent with this, which for aught I know may be the case, that the Peruvian government have borrowed money to more than the amount of the proceeds of the guano from these agents, and that the agents are entitled to retain the proceeds in repayment of that loan, and that loan may be a loan contracted by the government for the purpose of satisfying its most pressing wants and needs, wants which must be satisfied in order to secure the existence of the government as such. All that is perfectly reconcilable with these statements."

The complainant must seek its remedy in the tribunals of Ecuador, where the contract was made, or by diplomatic intervention, and this court cannot question payments made by the government of Ecuador to the defendants. It is urged by complainant that under the Con-

stitution of Ecuador the contract of Speyer & Co. was unlawful because that instrument forbids the application, even for public defense, of funds appropriated to railroads. This provision of the fundamental law of Ecuador is for the internal regulation of the governmental powers of that republic and cannot be invoked to obtain relief in our courts against the acts of that government, if it has chosen to make an illegal application of its revenue. It is enough to say that the government of Ecuador has done nothing but fail to perform a contract, that no valid pledge was ever created, and that the defendant received payment of its claim and holds the cash paid to it without any lien thereon.

For the foregoing reasons, the bill is dismissed, with costs.

JOHN A. ROEBLING'S SONS CO. OF CALIFORNIA v. KINNICUTT et al.

(District Court, S. D. New York. December 26, 1917.)

1. EQUITY ⇨43—JURISDICTION OF FEDERAL COURTS—ADEQUATE REMEDY AT LAW.

In the federal courts the distinction between law and equity is substantial and not technical; jurisdiction in equity being withheld by statute where a plain, adequate, and complete remedy may be had at law.

2. DISCOVERY ⇨20—DEMURRER TO RELIEF—EFFECT.

Where in a bill for discovery and relief the discovery sought is incident to the relief sought, a demurrer well taken to the relief is also good as to the discovery.

3. COURTS ⇨371(2)—JURISDICTION OF FEDERAL COURTS—EFFECT OF STATE STATUTES.

That a state statute authorizes a suit in certain cases by bill in equity does not confer jurisdiction on a federal court to entertain such a bill.

4. CORPORATIONS ⇨265(1)—INSOLVENCY—SUITS AGAINST STOCKHOLDERS—NECESSARY PARTIES.

Where there are a number of creditors, a single creditor cannot maintain a bill in equity against the stockholder of an insolvent corporation to collect unpaid subscription for his benefit alone.

5. TRIAL ⇨11(3)—FEDERAL COURTS—PROCEDURE—TRANSFER OF CAUSE BROUGHT ON WRONG SIDE.

Where a bill is insufficient to give a federal court jurisdiction in equity, but states a cause of action at law, the court is required by Act March 3, 1915, c. 90, 38 Stat. 956 (Comp. St. 1916, § 1251a-1251c), to transfer the cause to the law side.

6. CORPORATIONS ⇨268(1)—INSOLVENCY—ACTIONS AGAINST STOCKHOLDERS.

Under Rev. St. Me. 1903, c. 47, § 50, which authorizes corporations to issue stock for property or services, which shall be full-paid stock, and provides that "in the absence of actual fraud in the transaction the judgment of the directors as to the value of the property purchased or services rendered shall be conclusive," creditors seeking to hold stockholders of an insolvent corporation, who obtained their stock in payment for property, liable under other provisions of the statute, on the ground that their stock is not full paid, must competently allege facts showing actual fraud.

In Equity. Suit by the John A. Roebling's Sons Company of California against G. Hermann Kinnicutt and others. On motion to dismiss bill. Motion granted.

See, also, 243 Fed. 527, 156 C. C. A. 225.

The complaint alleges that: (1) Plaintiff is a California corporation. (2) Kinnicutt, Bacon, Kissel, and Fuller, copartners doing business as Kissel, Kinnicutt & Co. (hereinafter called Kissel), and Hepburn, Hine, and Mainland, the trustees, and Hendee, are citizens of New York and residents within the Southern District. The amount involved is jurisdictional. Idaho Railway, Light & Power Company (hereinafter called Railway) is a Maine corporation, having an authorized capital stock of 300,000 shares, par value \$100 per share, of which 200,000 are common and 100,000 preferred. (3) Railway was qualified to and did do business in Idaho, and was there the owner of certain railroad and other properties. (4) Between March and May, 1913, plaintiff sold and delivered to Railway, in Idaho, merchandise of the value of \$38,577.17, which Railway agreed to pay. (5) Of this amount \$21,057.37, with interest, remained unpaid. (6) In December, 1913, the Westinghouse Company, a Pennsylvania corporation, brought suit by a creditors' bill against Railway in the District Court of the United States for the District of Idaho, Southern Division, and a receiver was appointed and Railway was adjudged insolvent. (7) About December 20, 1915, the District Court aforesaid entered its "final decree and judgment" by which, inter alia, it was adjudged and decreed that Railway was indebted to plaintiff upon its above-mentioned claim in the sum of \$24,960.29 (principal and interest). Thereafter execution was issued and returned wholly unsatisfied. (8) The Revised Statutes of Maine provide for personal liability of stockholders for debts of a Maine corporation (which provisions will be referred to infra). (9) Prior to the sale of the merchandise by plaintiff to Railway a syndicate was formed for the purpose of acquiring and controlling certain railroad and other properties in Idaho and Oregon, which syndicate was composed of Kissel and others (Kissel being syndicate manager) and acquired control of certain securities and other property, including the stock of Railway to be organized under the laws of Maine. Between November, 1911, and August, 1912, in pursuance of an agreement between members of the syndicate whereby each member was to be the separate owner of a specified amount of the common stock of Railway, the syndicate made certain written proposals to the board of directors of Railway whereby the syndicate offered to sell to Railway the stock and other property held by the syndicate in consideration of the issuance and delivery to the syndicate, or upon its order, of a large amount of securities of Railway, including approximately \$6,630,000 of its 5 per cent. first and refunding bonds secured by a mortgage upon all the property of Railway, and together therewith approximately 96,896 shares of the common stock of Railway aggregating at par value \$9,689,600. The property was sold under foreclosure and realized far less than the face of the mortgage bonds. (10) The value of the assets of Railway prior to foreclosure did not exceed \$4,000,000, and since foreclosure Railway has had no assets with which to pay its remaining indebtedness and has ceased to carry on business, and it is therefore requisite to call on the holders and owners of Railway's capital stock to discharge the amount remaining unpaid on the capital stock. (11) The offers above mentioned were, prior to August, 1912, accepted by the Railway's board of directors, which consisted, in part at least, of the members of the syndicate. Said Railway's directors, pursuant to the offers, caused approximately \$6,630,000 of the bonds and approximately 96,896 shares of common stock to be issued to or on the order of the members of the syndicate, and "for convenience caused certain certificates" of the capital stock "to be issued or transferred to and held by" Hepburn, Hine, and Mainland "as trustees for the said syndicate and members thereof," and "said capital stock * * * thereupon became and was the separate property of the members of said syndicate in certain agreed shares or parts, the exact amount of which" plaintiff does not know. The members of the syndicate, however, then and there became and ever since have been owners of not less than 12,000 shares of the capital stock of Railway, and said certificates, representative of the

capital stock, ever since their issue to the trustees (including the date of the incurring of the debt of Railway to plaintiff), have been and are now held by the trustees for the separate benefit of the members of the syndicate. The total outstanding stock of Railway is \$12,565,100, par value, common, and \$3,536,400, par value, preferred, and the total outstanding bonds is about \$9,095,000. (12) The stock and other property which the syndicate transferred to Railway in return for the issuance to the members of the syndicate of the bonds and stock were of less value than the bonds issued, executed, and delivered by Railway and no consideration was paid by Railway for the 96,896 common, and neither defendants nor any member of the syndicate paid to Railway any consideration whatsoever upon the par value of the 96,896 common, which, including stock belonging to the members of the syndicate, remains unpaid. (13) The Kissel firm individually and as copartners became subscribers for not less than 13,000 shares for which payment has not been made bona fide in cash or otherwise at a fair valuation and under the laws of Maine are liable to judgment creditors as original subscribers for the amount remaining unpaid on their subscriptions. (14) The members of the syndicate (except Fuller for one share) do not appear on the books of the Railway as stockholders of record. The trustees appear on the books as holding 96,896 shares of common, but that plaintiff has no means of ascertaining who are the real or equitable owners of the stock liable to the creditors of Railway, except by a discovery and accounting. (15) That Hendee was a subscriber for not less than 3,000 shares, which were issued to him for the benefit of Fuller, or of the Kissel firm and therefore that Hendee, or the person or corporation for whom he holds the stock, is liable, as an original subscriber to judgment creditors. (16) Plaintiff is without a plain, complete, and adequate remedy at law.

The relief prayed for is as follows: (1) That the usual writ of subpoena issue. (2) That defendants Kissel (this does not include Hepburn nor Hine) may set forth an account of any right, title, or interest in and to any shares of the capital stock of Railway subscribed for or agreed to be taken or held by them, or any of them, or by any one for their benefit, and briefly, all the circumstances under which all and every of payments or transfers or subscriptions or agreements were respectively made, and how the same respectively have been applied or disposed of. (3) That defendant George E. Hendee may, in effect, make full discovery concerning his holding. (4) That there be a discovery of the terms of the trust, and an adjustment of liabilities thereunder, of all parties herein named as defendants. That defendants Hepburn, Hine, and Mainland may set forth an account of the transactions by which they became trustees or voting trustees of any shares of stock in the Railway, the number and par value of said shares, and the terms and conditions upon which they hold the same. The name or names of the person, persons, partnerships, or corporations for whom or which said shares or any of them are held by said trustees; any sum or sums of money or other matter of value received by or paid by said trustees or any of them for the said shares of capital stock or any of said shares in consideration of any right, title, or interest, legal or equitable, which may have been transferred, assigned, or set over to said trustees; and what persons, partnerships, or corporations are, or were at any time herein mentioned, the real and true owners in law or equity of said shares of stock so held by said trustees. (5) That the defendants, or any of them, may be adjudged and decreed to pay to the plaintiff the amount of the balance due on the debt of Railway, to wit, \$24,960.29, with interest according to the provisions of the laws of Maine, the contribution of each of said defendants to be computed thereunder according to the amount unpaid bona fide in cash or other thing or matter of value on the par value of any shares of the capital stock of Railway for which said defendants or any of them are adjudged to have subscribed and which were held by or for them or any of them at the time the said debt of Railway to plaintiff was incurred. (6) That plaintiff may have such other and further relief, etc. Plaintiff does not sue on behalf of all creditors, nor is the bill against all the stockholders of Railway.

The grounds for the motion to dismiss on behalf of Hepburn and Hine, individually and as trustees (which are inclusive of the grounds for the motion

made on behalf of Kissel et al.), are: (1) That the bill does not state a cause of equity. (2) That this court has no jurisdiction of the subject of the suit. (3) That there is a defect of parties, in that, as appears on the face of the bill: (a) There are other creditors of Railway who are not made parties; (b) plaintiff sues individually, and not in behalf of itself and other of such creditors similarly situated; (c) there are other stockholders of Railway, necessary parties defendant herein, who are not made parties defendant; and (d) Railway is not made a party. (4) That the bill is multifarious, in that: (a) The liability alleged is not one asserted against all the material defendants and sufficient grounds do not appear for uniting the alleged causes of action in order to promote the convenient administration of justice; (b) it seeks independent judgments upon separate causes of action against different defendants; and (c) it joins causes of action against defendants Hepburn and Hine in different capacities.

The relevant sections of the Maine statute (R. S. of Maine, chapter 47, sections 87, 88, 89, and 50) are quoted below:

"Sec. 87. The capital stock subscribed for any corporation is declared to be and stands for the security of all creditors thereof; and no payment upon any subscription to or agreement for the capital stock of any corporation, shall be deemed a payment within the purview of this chapter, unless bona fide made in cash or in some other matter or thing at a bona fide and fair valuation thereof.

"Sec. 88. No dividend declared by any corporation from its capital stock or in violation of law, no withdrawal of any portion of such stock, directly or indirectly, no cancellation or surrender of any stock, and no transfer thereof in any form to the corporation which issued it, is valid as against any person who has a lawful and bona fide judgment against said corporation, based upon any claim in tort or contract or for any penalty or as against any receivers, trustees or other persons appointed to close up the affairs of an insolvent corporation.

"Sec. 89. Any person having such judgment * * * may, within two years after their right of action herein given accrues, commence an action on the case or bill in equity, without demand or other previous formalities, against any persons, if a bill in equity, jointly or severally, otherwise severally, who have subscribed for or agreed to take stock in said corporation and have not paid for the same; or who have received dividends declared from the capital stock, or in violation of law; or who have withdrawn any portion of the capital stock, or cancelled and surrendered any of their stock, and received any valuable consideration therefor from the corporation, except its own stock or obligation therefor; or who have transferred any of their stock to the corporation as collateral security or otherwise, and received any valuable consideration therefor as aforesaid: and in such action they may recover the amount of the capital stock so remaining unpaid or withdrawn, not exceeding the amounts of said judgments or the deficiency of the assets of such insolvent corporation."

"Sec. 50. Any corporation may purchase mines, manufactories and other property necessary for its business, and the stock of any company or companies owning, mining, manufacturing or producing materials or other property necessary for its business, and issue stock to the * * * value thereof in payment therefor, and may likewise issue stock for services rendered to such corporation and the stock so issued shall be full-paid stock and not liable to any further call or payment thereon; and in the absence of actual fraud in the transaction, the judgment of the directors as to the value of the property purchased, or services rendered, shall be conclusive."

Noble, Estabrook & McHarg, of New York City (Henry D. Estabrook, of New York City, of counsel), for plaintiff.

Charles E. Rushmore and James F. Sandefur, both of New York City, for defendants Hepburn and Hine.

Frank L. Crocker, of New York City, for defendants Kinnicutt, Bacon, Kissel, Fuller, and Hendee.

MAYER, District Judge (after stating the facts as above). 1. As it is not alleged that either Hepburn or Hine was a subscriber, the bill must be dismissed as to each of them individually.

[1] 2. It is clear that, while the relief sought is a money judgment; the bill is for a discovery. The distinction between law and equity is substantial, and not technical, as urged by plaintiff (Judicial Code, § 267; Comp. St. 1916, § 1244), although mere matters of procedure are now regulated with desirable elasticity (Act March 3, 1915, 38 Stat. 956). In the United States courts, examinations before trial, in actions at law, are unknown, and hence litigants on the law side cannot avail of the system in that regard, familiar to the New York courts. A defendant, of course, is entitled to a jury trial, if the action is at law, and hence the insistence that a cause is not one of equity, but of law, involves substantial rights.

[2] The complaint, as here framed (disregarding, for the moment, the Maine statute), falls within the principle stated by Judge Rogers in *Church v. Swetland*, 233 Fed. 891, at page 896, 147 C. C. A. 565, at page 570:

"Where, in a bill for discovery and relief, the discovery sought is incident to the relief sought, a demurrer well taken to the relief is held to hold good as to the discovery also. In *McClanahan v. Davis*, 8 How. 170, 183, 12 L. Ed. 1033 (1850), Mr. Justice Nelson, speaking for the court, said: 'The complainant having, in our judgment, failed to set forth any foundation for relief, the right to the discovery, which is claimed as incidental, of course fails with it.'"

See, also, *Curriden v. Middleton*, 232 U. S. 633, 34 Sup. Ct. 458, 58 L. Ed. 765.

[3] 3. The fact that the Maine statute authorizes a suit by way of bill in equity does not confer jurisdiction upon this court to entertain such a bill. This precise question was considered in *Alderson v. Dole*, 74 Fed. 29, 20 C. C. A. 280,¹ the court observing:

"Independently of the statutes of Maine, there could be no jurisdiction in equity. Those statutes cannot affect the jurisdiction of the federal courts in that particular."

See, also, *Van Norden v. Morton*, 99 U. S. 378, 25 L. Ed. 453; *Wehrman v. Conklin*, 155 U. S. 327, 15 Sup. Ct. 129, 39 L. Ed. 167; *Mathews Slate Co. v. Mathews (C. C.)* 148 Fed. 490; *Street on Federal Equity Practice*, § 23; *Simkins' Treatise on a Federal Equity Suit* (3d Ed.) p. 17.

[4] 4. As stated in *Signor Tie Co. v. Monett & S. W. Const. Co.* (D. C.) 198 Fed. 412:

"The law has been well settled by a long line of decisions of the Supreme Court of the United States and the national courts generally, where there are a number of creditors, that a single creditor cannot maintain a bill in equity against the stockholders of an insolvent corporation, having no corporate assets, to collect unpaid subscriptions from the stockholders, and thus

¹ To clear up the suggestion of plaintiff that plaintiff in the *Alderson Case* was not a judgment creditor, Mr. Rushmore has had the record examined by Boston attorneys and they report that "court records show that the bill of complaint * * * alleged judgment against the corporation entered * * * in the Circuit Court. * * *"

enable him to secure payment of his own debt to the exclusion of the other creditors."

See, also; Pollard v. Bailey, 87 U. S. (20 Wall.) 520, 22 L. Ed. 376; Gillin v. Sawyer, 93 Me. 151, 44 Atl. 677; Middletown Bank v. Railway Co., 197 U. S. 394, 25 Sup. Ct. 462, 49 L. Ed. 803.

5. The case is not one where equity will take jurisdiction in order to prevent multiplicity of suits. Hale v. Allison, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380.

[5] Other grounds advanced by defendants are sound, but enough has been pointed out not to require further discussion on the proposition that the bill, as framed, will not lie in equity. If, however, the pleadings set forth an action at law the cause would be transferred to the law side. Act March 3, 1915, 38 Stat. 956; Church v. Swetland (District Court memorandum opinion by Judge Lacombe, Oct. 30, 1915, and my memorandum opinion, dated May 11, 1916, neither reported).

[6] 6. Consideration is therefore required of the contention of defendants that the allegations of the bill do not set forth the "actual fraud" referred to in section 50 of the Maine statute, viz.:

"In the absence of actual fraud in the transaction, the judgment of the directors as to the value of the property purchased * * * shall be conclusive."

The complaint, in effect, alleges that the property transferred by the syndicate was exchanged for the bonds and stock of Railway. Plaintiff then assumes, not as a fact, but as a conclusion, that the stock was issued for nothing. The allegation as to the payment for the stock not being made "bona fide in cash or in any other matter or thing at a bona fide and fair valuation thereof" is a mere conclusion. That result must follow from some facts alleged. It is elementary that when fraud is relied upon it must be competently alleged. The meaning of the Maine statute is thus stated in Dyer on Corporation Law (7th Ed.) p. 90:

"This section is copied literally from the present New Jersey Law, enacted in 1896, except that a provision is added that shares may be issued for services, and to this extent our statute in terms is more favorable to incorporators and stockholders than the New Jersey act. It undoubtedly reduces to some extent the liability of original subscribers to the stock of a corporation formed under our general law, and the foregoing provisions relating to stockholders' liability, and the decisions under them, must be read in the light of it. This limitation is to be found in the substitution of the judgment of the directors for that of the court; in the power to fix the value of the property or services at the inception of the enterprise; and perhaps in the words 'in the absence of actual fraud' as distinguished from 'a bona fide and fair valuation' of the earlier section. The statute as it stood before the enactment of the section just referred to enabled the creditor of a corporation to go behind even the honest opinion of its directors and to question the actual sufficiency of the consideration for which the shares might have been issued. * * * The statute as it stands has yet to be construed by our court; but, in view of the fact that it is a copy of the New Jersey law, the decisions of the courts of that state will furnish us with some indication of the construction which will prevail in Maine."

See, also, *McMahon v. Pneumatic Transit Co.*, 85 N. J. Eq. 544, 96 Atl. 999; *Coit v. Gold Amalgamating Co.*, 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420.

7. Under some circumstances, Hepburn and Hine, as trustees, might be proper, if not necessary, parties, and that question need not now be passed upon.

The motion as to Hepburn and Hine individually is granted unconditionally, with costs. The bill as to the remaining defendants, and Hepburn and Hine as trustees, is dismissed, with leave to amend within 20 days. If not amended, the bill as to them will be dismissed, with costs.

ADDENDUM.—I note with deep regret, the death of Mr. Estabrook. The attorneys for plaintiff, if they desire, may therefore have more time within which to amend.

Settle order on notice.

LEWIS v. IOWA STATE TRAVELING MEN'S ASS'N.

(District Court, S. D. Iowa, C. D. January 22, 1918.)

1. INSURANCE ⇨455—ACCIDENT INSURANCE—EXTERNAL, VIOLENT AND "ACCIDENTAL MEANS" OF INJURY.

To come within a policy insuring against death resulting from bodily injuries received "through external, violent, and accidental means," it is not sufficient that the result should be accidental, but the means must also have been accidental, or, if the cause of the injury was a voluntary act, its effect must have been unusual and unexpected.

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

2. INSURANCE ⇨455—ACCIDENT INSURANCE—EXTERNAL, VIOLENT, AND "ACCIDENTAL MEANS" OF INJURY.

Insured discovered a pimple on his lip, which he opened with a gold scarf pin taken from his tie. The pin was infected, and infected the wound, causing his death in a few days. *Held*, that his death was due to an injury received "through external, violent, and accidental means," within the terms of his policy.

3. INSURANCE ⇨456—ACCIDENT INSURANCE—RISKS INSURED AGAINST.

In such case the insurer is not exempted from liability, by a provision in the policy that it should not be liable for accidental death "resulting wholly or partially, directly or indirectly, from * * * local or general infection," except when such infection or inflammation results from a visible or open wound.

At Law. Action by Maud Lewis, executrix, against the Iowa State Traveling Men's Association. Trial to court. Judgment for plaintiff.

Stipp, Perry, Bannister & Starzinger, of Des Moines, Iowa, for plaintiff.

Sullivan & Sullivan, of Des Moines, Iowa, for defendant.

WADE, District Judge. [1] 1. The first question is whether John F. Bailey the insured, died as the result of bodily injuries received "through external, violent, and accidental means." It would be an

endless and futile task to undertake to review the numerous authorities presented in briefs of counsel, and any effort to reconcile them all would be hopeless. It may be taken as settled by the great weight of authorities that, under language of this kind in a policy, it is not sufficient that the result shall be accidental, but the "means" must be accidental, as well as the result. In the brief, "Accidental Means," by Cornelius, it is well stated:

"Where there is evidence that, in the act which precedes and brings about an injury causing death, something undesigned and fortuitous occurs; that is to say, where there is evidence of an element of accident in the means bringing about the injury, the verdict of a jury holding the company liable will not be disturbed on appeal."

Were the "means" in this case accidental? That is, "unforeseen, involuntary, unexpected;" "happening by chance; unexpectedly taking place; not according to the usual course of things." If, "in the act which precedes the injury, something unforeseen, unexpected, unusual, occurs, which produced the injury, then the injury has resulted through accidental means." U. S. Association v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60.

Judge Sanborn well defines "accidental means" in *Western Association v. Smith*, 85 Fed. 401, 29 C. C. A. 223, 40 L. R. A. 653, as follows:

"The significance of this word 'accidental' is best perceived by a consideration of the relation of causes to their effects. The word is descriptive of means which produce effects which are not their natural and probable consequences. The natural consequence of means used is the consequence which ordinarily follows from their use—the result which may be reasonably anticipated from their use, and which ought to be expected. The probable consequence of the use of given means is the consequence which is more likely to follow from their use than it is to fail to follow. An effect which is the natural and probable consequence of an act or course of action is not an accident, nor is it produced by accidental means. It is either the result of actual design, or it falls under the maxim that every man must be held to intend the natural and probable consequence of his deeds. On the other hand, an effect which is not the natural or probable consequence of the means which produced it, an effect which does not ordinarily follow and cannot be reasonably anticipated from the use of these means, an effect which the actor did not intend to produce, and which he cannot be charged with the design of producing, under the maxim to which we have adverted, is produced by accidental means. It is produced by means which were neither designed nor calculated to cause it. Such an effect is not the result of design, cannot be reasonably anticipated, is unexpected, and is produced by an unusual combination of fortuitous circumstances; in other words, it is produced by accidental means."

[2] In this case the facts are agreed upon. John F. Bailey, the insured, was a strong, vigorous man, in excellent health. He discovered a small pimple on the right side of his upper lip. He removed his gold scarf pin from his necktie and intentionally pricked the pimple with said scarf pin. His lip at said place became immediately infected with staphylococci infection from the scarf pin. The infection spread and caused his death in a few days. It is also agreed:

"That the scarf pin used by insured in pricking his lip communicated or caused infection by being introduced into the tissues of the lip."

Therefore there can be no dispute in the case that the pin was infected; that it carried the cocci upon it. It is not a case of breaking

the skin and having it afterwards infected, but it is specifically agreed "that the infection was caused by, and came from, the scarf pin." If it came from the scarf pin, it is apparent that the cocci were on the scarf pin. It cannot be assumed that the deceased knew that the cocci were upon the pin. There is no basis for the assumption that the deceased intentionally infected his lip. He did the act, which, as a matter of common knowledge, thousands do every year—he used a pin which he had at hand to open a pimple. I suppose it would be safe to say, as a matter of common knowledge, that not once in a thousand times does such use of a pin, even when no effort to sterilize is made, result in infection.

If the injury resulted from the pin alone, and there was no proof that the pin was infected, the accidental result would not be covered by this policy; but the deceased clearly used something which he did not intend to use. He used, not only the pin, but he used an infected pin—a poisoned pin. This infection was such that it could not, in the nature of things, be discovered by him without perhaps a microscopic investigation. To my mind the means were clearly accidental. A man who eats infected food, without knowledge of its infection, is doing something he did not intend to do. The eating of the food is voluntary, but the eating of the poison is not. The housewife goes to the flour bin, kneads her bread, bakes it, and serves it. Those who eat it die. It is found that the bin contains, not only flour, but arsenic. The unfortunates voluntarily ate the bread, composed of flour and arsenic. The "means," causing death, is accidental. I see no distinction in principle between the case at bar and the numerous cases illustrated by ptomaine poisoning, and other cases of unintentional infection.

[3] 2. Is the defendant exempted from liability under its general covenant to pay, by section 6 of article VI of the by-laws, which among other things provides that the "association shall not be liable * * * for accidental death * * * resulting wholly or partially, directly or indirectly, from * * * local or general infection" (except when such infection or inflammation results from a visible or open wound caused by external, violent, and accidental means). What is meant by infection which "results from a visible or open wound"? Strictly speaking, how can infection "result" from a visible or open wound? Modern science has demonstrated that infection "results" from the entry of living organisms into a wound. Here in this case we have a "wound." What caused the wound? The pin and the cocci.

From the agreed facts it must be apparent that the wound was not caused alone by the pin, but that in its nature and character, and possibly its appearance, it was in part caused by the cocci. The fact that the cocci entered the wound in its making, as agreed by the parties, ought not to make any difference in the construction of this provision of the contract. In any event, this being an exception to the general liability clause, if there is any doubt about it, it ought to be resolved in favor of the insured, and it is my judgment that this exception does not furnish a just or legal reason why the defendant should escape liability. Upon the agreed facts there will be a judgment in favor of the plaintiff.

Counsel has asked for an elaborate finding of facts. The court is not required to make any finding of facts, except where the facts are in dispute. In this case there are no facts in dispute. Everything is agreed to. I find no reason for making any finding of facts; but, if counsel feels that finding of facts is necessary to preserve all the rights of the defendant, I shall reconsider this matter.

Counsel for plaintiff will prepare judgment entry and submit it to the attorneys for the defendant, who will have five days in which to file objections thereto. Such judgment entry to reserve proper exceptions.

In re M. DEWING CO.

In re GLADDING.

(District Court, D. Rhode Island. July 13, 1917.)

No. 1389.

MORTGAGES 567(1)—LANDS OF DIFFERENT OWNERS—DIVISION OF SURPLUS ARISING FROM FORECLOSURE SALE.

Where a mortgage covered two tracts of land, one of which was afterward acquired by bankrupt subject to the incumbrance thereon, the surplus arising from a foreclosure sale of both tracts should be divided pro rata, according to the respective values of the two tracts, between the estate and the owner of the other tract.

In Bankruptcy. In the matter of the M. Dewing Company, bankrupt. On petition of George D. Gladding, executor of the will of Ardelia C. Dewing, deceased. Decree for petitioner in part.

J. Jerome Hahn, of Providence, R. I., for petitioning creditors.

Harold Remington, of New York City, for Investors' Agency.

Harold Remington, of New York City, and Mumford, Huddy & Emerson, of Providence, R. I., for Frank H. Main.

Charles W. Littlefield, of Providence, R. I., for executor of the estate of Ardelia C. Dewing.

William B. Greenough, of Providence, R. I., for petitioning executor.

Richard B. Comstock and Comstock & Canning, all of Providence, R. I., for receivers.

BROWN, District Judge. This petition raises the question of rights in a fund of \$5,696.18, paid into the registry of the court as the surplus resulting from a sale, pursuant to a stipulation on file, by the Citizens' Savings Bank, mortgagee, named in a mortgage deed made by Ardelia C. Dewing in her lifetime, covering land then owned by her on Dartmouth avenue, and also a certain wharf property on South Water street, in the city of Providence. Subsequently the South Water street property was conveyed to the M. Dewing Company, the bankrupt, by an unrecorded deed, which has not been found or produced.

At the mortgagee's sale the South Water street property brought \$7,000, and the Dartmouth avenue property \$13,000. The mortgage on both tracts was originally \$12,000, with accrued interest, expenses,

and taxes, amounting, at the time of the sale, to \$14,303.82, leaving the surplus above stated.

The executor claims the whole of this fund, on the ground that the M. Dewing Company agreed to assume and pay certain outstanding mortgages, including the mortgage above described, and thus relieve the Dartmouth avenue property of its incumbrance.

I find the evidence wholly insufficient to establish such an agreement. Nothing in the documentary evidence, or in the testimony, as to the terms of the lost deed, tends to show this. There is no evidence that the Dartmouth avenue property had any connection with the business of the M. Dewing Company, and it is highly improbable, under all the circumstances, that the M. Dewing Company, as purchaser of the dock property on South Water street, would have agreed to lift the incumbrance from the Dartmouth avenue property. The oral evidence given or offered on this topic could not be regarded as sufficient to prove anything more than that the M. Dewing Company took the wharf property subject to the existing incumbrances.

The argument that the expression, "The entire properties now owned and used by the said Ardelia C. Dewing in the oyster business, together with the incumbrances thereon," indicates an agreement to relieve the Dartmouth avenue property of the incumbrance, is manifestly unsound, in that the only property there referred to is the wharf property. There is not the slightest evidence that the Dartmouth avenue property was ever used in the oyster business.

I find as a fact that the M. Dewing Company took title to the wharf property subject to existing incumbrances, but did not assume or agree to pay any incumbrance on either tract.

The effect of a conveyance thus subject to mortgage is stated in 27 Cyc. as follows:

Page 1342: "Where a conveyance of land is made expressly subject to an existing mortgage, the effect, as between the grantor and the grantee, is to charge the incumbrance primarily on the land, so as to prevent the purchaser from claiming reimbursement or satisfaction from his vendor in case he loses the land by foreclosure or is compelled to pay the mortgage to save a foreclosure; in reality it amounts simply to a conveyance of the equity of redemption."

Page 1343: "The effect * * * is to make the land the primary fund for the satisfaction of the incumbrance."

Page 1344: "The contract being one of indemnity and the land being the primary fund for the payment of the mortgage, if the grantor is compelled to pay it, he may require an assignment of the mortgage to himself, or he will be regarded as an equitable assignee so as to be subrogated to the rights of the mortgagee, and so will be enabled to use the mortgage to force reimbursement from his grantee."

According to this statement of the law there arises no equity of the M. Dewing Company to require its grantor to relieve it from a proportional share of the incumbrance charged primarily on the land. This rule seems to be recognized by the Supreme Court of Rhode Island. In *Fenner v. Tucker*, 6 R. I. 551, 554, it is said:

"Where there are two distinct parcels of a tract of land, of which two persons are severally seised, the whole tract being under mortgage to a third party, the one entitled to either tract has a right to redeem the mortgage, and to take an assignment and hold the land until the other pays his share. The

land is charged with a burden, of which each part ought to bear no more than its due proportion. 1 Powell on Mortgages, 261-316, and cases cited."

Applying this rule, the surplus fund should be divided pro rata according to the respective values of the two tracts of land; i. e., seven-twentieths to the trustees and thirteen-twentieths to the executor, subject, however, to correction and adjustment of any special charges peculiar to either tract.

A draft decree may be presented accordingly.

In re BRITTON et al.

(District Court, N. D. California, First Division. March 2, 1918.)

Nos. 2546, 2549.

ALIENS \Leftrightarrow 68—**NATURALIZATION—DECLARATION OF INTENTION.**

Under Naturalization Act June 29, 1906, c. 3592, 34 Stat. 596, providing that petition for naturalization shall be filed not less than two nor more than seven years after declaration of intention, a declaration of intention filed by a seaman, being a foreigner, expires after seven years, notwithstanding Rev. St. § 2174 (Comp. St. 1916, § 4357), in force at the time of the passage of the Naturalization Act, allows such a seaman, who has declared his intention, to be naturalized on proof of three years' service in a merchant vessel of the United States, for the Naturalization Act of 1906 makes five years' continuous residence a prerequisite to admission to citizenship, just as did the prior acts, and it is obvious the provision as to expiration of declarations of intention, which was entirely new, was intended to apply to all declarations.

In the matter of the applications for naturalization of Samuel Britton and Frederick Willarts. Applications dismissed.

Geo. A. Crutchfield, Chief Naturalization Examiner, of San Francisco, Cal., for the United States.

DOOLING, District Judge. The Chief Examiner of the Bureau of Naturalization of this district moves to dismiss the petitions for naturalization of Samuel Britton and Frederick Willarts for the reason that the declarations of intention of such applicants were more than seven years old when the petitions were filed. The applicants are seamen, and their petitions are based upon section 2174 of the Revised Statutes (Comp. St. 1916, § 4357), which is as follows:

"Every seaman, being a foreigner, who declares his intention of becoming a citizen of the United States in any competent court, and shall have served three years on board of a merchant vessel of the United States subsequent to the date of such declaration, may, on his application to any competent court, and the production of his certificate of discharge and good conduct during that time, together with the certificate of his declaration of intention to become a citizen, be admitted a citizen of the United States."

Section 2174 was in force when the Naturalization Act of 1906 was passed. Its only effect theretofore was to reduce the period of residence required before naturalization from five years, as required by the general Naturalization Law, to three years' service, subsequent to the declaration of intention, so that an alien arriving in this country

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

could make his declaration of intention immediately, and by shipping on board a merchant vessel of the United States, serving three years, and receiving a certificate of discharge and good conduct, could be admitted to citizenship because of such three years' service, without residing in the country for five years, as was required of other applicants. But his service did not dispense with the necessity of making a declaration of intention, nor of producing such declaration at the time of his application. His application for naturalization presupposed a valid declaration of intention.

Before the act of 1906 there was no limitation upon the life of such declarations. By that act, however, it is provided that petitions for naturalization shall be filed not less than two nor more than seven years after the making of the declaration of intention. The act further requires, as did the former naturalization law, a continuous residence of at least five years in the United States, and one year in the state or territory of the application, as a condition precedent to naturalization. So that the provisions of section 2174 as to three years' service are just as operative under the new act as under the old one.

But there is nothing in the act of 1906 which manifests any intention on the part of Congress to exempt seamen from the absolute provision that an application for naturalization must be filed not more than seven years after the making of the declaration of intention. Under this act all declarations become invalid at the expiration of seven years. The provisions of section 2174 require the production of the applicant's declaration of intention to become a citizen. This must, of course, mean a valid declaration.

But as all declarations now expire at the end of seven years, and as the declarations upon which the present applications are based are more than seven years old, the first essential of a valid application is wanting, and such want is not supplied by the fact of three years' service. The Supreme Court, in the case of *United States v. Morena*, 245 U. S. 392, 38 Sup. Ct. 151, 62 L. Ed. —, decided January 7, 1918, speaking of declarations made prior to the act of 1906, says:

"It is no destruction of a right or privilege to limit the time for its assertion, and the cited provision does no more. Section 4 prescribes a time for completing the declaration, a time so liberal, regarding the privilege granted and the reason for granting and seeking it, as not to be considered in any just appreciation of words as even a limitation of it. And there was appealing purpose. There were reasons for diligence and reasons for giving to all declarations the same duration. * * * The act, therefore, does not invalidate old declarations. It only specifies a time for their realization, a time ample to consider and estimate the value of realization, the extent of its duty and responsibility, a time determined and applied, therefore, upon full consideration; and we are not impressed with the argument that would assign an eternity of duration to prior declarations."

The language of the Supreme Court is quite applicable to the instant cases. There is nothing in the act, and nothing in reason, that would assign an eternity of duration to declarations of intention, simply because the declarants endeavor to take advantage of a three years' service, instead of a five years' residence.

The applications are therefore dismissed.

BUTTE & SUPERIOR COPPER CO. v. CLARK-MONTANA REALTY
CO. et al.

(Circuit Court of Appeals, Ninth Circuit. February 18, 1918. Rehearing
Denied April 1, 1918.)

No. 2939.

1. COURTS ⇨365—FEDERAL COURTS—PRECEDENTS.

Decisions of the Montana state court as to the validity of mining locations are not precedents binding on the federal courts in a suit involving the validity of locations in that state made prior to the rendition of such decisions of the Montana court.

2. MINES AND MINERALS ⇨22—LOCATION—VALIDITY.

Though locator of a mining claim did not comply with the Montana statute in force at time, declaring that within 20 days after discovery the locator should file for record with the county recorder a declaratory statement in writing, verified by oath, describing the location, yet, as the statute made no provision for forfeiture for failure to record, the location is valid, though not recorded.

3. MINES AND MINERALS ⇨44—PATENTS—CONCLUSIVENESS.

As the action of the Land Department in issuing patents is the judgment of a special tribunal, not assailable, except by direct proceedings for annulment, the invalidity in a mining location is cured by a subsequent issuance of a patent.

4. MINES AND MINERALS ⇨43—LOCATION—CURE OF DEFECTS.

Rev. Codes Mont. 1907, § 2292, bearing the caption "Validating Locations Heretofore Made," and declares that all mining locations made and recorded under the laws of the state heretofore in force, that in any respect have failed to conform to the requirement of such laws, shall, in the absence of the rights of third persons, be valid, if the making and recording of such locations conform to the act; while section 2294 declares that the issuance of United States patent for a mining claim shall be deemed conclusive that the requirements of the laws of the state relative to location and record of such claims have been duly complied with. While the caption was inserted by the compiler of the Codes, yet the Codes, after they were framed, were enacted. *Held* that, though section 6213 declares that no part of the Codes is retroactive, unless so expressly declared, such sections must be deemed to have a retroactive effect, and a failure to comply with the Montana laws as to the recordation of locations is cured by subsequent issuance of a patent.

5. MINES AND MINERALS ⇨41—ISSUANCE OF PATENT—FAILURE TO ADVERSE—SURFACE RIGHTS.

Where a prior locator, who was already extracting ores from his claim, did not file any adverse against the application of an adjacent locator for a patent, although there was a surface conflict between the two claims, the prior locator did not, the patent being issued, lose his priority as to extralateral rights, as they could not have been determined in the course of the patent proceedings; issuance of the patent affecting only the surface.

6. MINES AND MINERALS ⇨55(2)—QUITCLAIM DEED—OPERATION.

A quitclaim to an undivided one-fourth interest in a mining claim, executed by the owner of an adjacent claim which was first located, carries with it only the interest covered by the patent to the claim conveyed, and does not work an estoppel by deed barring the grantor from asserting extralateral rights to any vein or ores in his claim extending beneath the surface of the claim conveyed.

7. APPEAL AND ERROR ⇨101(1)—REVIEW—FINDINGS.

Findings of fact by the trial court on conflicting testimony are conclusive on appeal.

8. MINES AND MINERALS ⇨38(14)—DISPUTE—BURDEN OF PROOF.

In a suit involving a dispute over extralateral rights asserted by the owners of adjacent mining claims, defendant, whose location was last, has the burden of proving that it has priority throughout its entire depth as to a vein apparently joining one having its apex in complainant's claim.

9. MINES AND MINERALS ⇨38(25)—MINING CLAIMS—ADJUDICATION.

In suit between owners of adjacent mining claims, involving a dispute over extralateral rights, the court properly declined to quiet title to claims resting on an undeveloped or possible junction of veins at great depths beneath the surface.

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

.. Suit by the Clark-Montana Realty Company, a corporation, and the Elm Orlu Mining Company, a corporation, against the Butte & Superior Copper Company, a corporation. From a decree for complainants (233 Fed. 547), defendant appeals. Affirmed.

W. H. Dickson and A. C. Ellis, Jr., both of Salt Lake City, Utah, Kremer, Sanders & Kremer, J. Bruce Kremer, L. P. Sanders, and Alf C. Kremer, all of Butte, Mont., William Scallon, of Helena, Mont., and Russell G. Schulder, of Salt Lake City, Utah, for appellants.

John P. Gray, of Cœur d'Alene, Idaho, J. L. Templeman and George F. Shelton, both of Butte, Mont., Myron A. Folsom and Rufus Thayer, both of San Francisco, Cal., and W. A. Clark, Jr., of Butte, Mont., for appellees.

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

GILBERT, Circuit Judge. The Clark-Montana Realty Company, hereinafter called the appellee, as the owner of the Elm Orlu lode mining claim, together with the Elm Orlu Mining Company, its lessee, brought this suit against the appellant, the owner of the Black Rock lode mining claim, to quiet title and to obtain an accounting for ores alleged to have been taken by the appellant from the appellee's mine. The court below, upon the issues and the testimony, found the following facts:

(1) That the Elm Orlu claim was located before the Black Rock claim was located.

(2) That the north wall of the Rainbow vein apex crosses the common side line between said claims 190 feet from the southwest corner of the Black Rock claim, and that the south wall of said vein apex so crosses 301 feet from said corner.

(3) That the Pyle strand of the Rainbow vein diverges from the south side of the latter vein in the Elm Orlu claim, and there and for some indefinite distance easterly has its apex in the Elm Orlu claim.

(4) That the Jersey Blue vein apexes in the Black Rock claim, does not unite with the Rainbow vein, and crosses on strike and dip the Rainbow vein, on strike east of the Rainbow apex crossing of the common side line.

(5) That the Creden vein diverges from the north side of the Rainbow vein in the Elm Orlu claim, and has its apex in both the Elm Orlu and Black Rock claims.

(6) That the apex of the easterly strand of the Rainbow vein in the Black Rock claim terminates at a point within said claim east of the Elm Orlu east end line projected and about 250 feet west of the Black Rock east end line.

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

(7) That, prior to the Black Rock location and patent entry, both the Rainbow vein and the Jersey Blue vein at their apices were discovered and known within the Black Rock claim, and at their apices appeared as a continuous east-west vein.

(8) That each party has mined the ore bodies of the other in the claims involved.

From the findings the court deduced the following conclusions of law:

(1) That plaintiff owns all ore bodies in the Rainbow vein between the Elm Orlu west end line and a parallel line projected from where the south wall apex of said vein crosses the common side line, or about 980 feet of said vein.

(2) That the defendant owns all ore bodies in the Rainbow vein between the projected Elm Orlu end line at the south wall apex crossing of the common side line by said vein and the east end line of the Black Rock claim, or about 1,200 feet of said vein.

(3) That plaintiff owns all ore bodies in the Pyle strand from its divergence at its west end from the Rainbow vein in the Elm Orlu claim easterly as far as the apex of said strand is within said claim, and between Elm Orlu end lines projected, and defendant owns all thereof east of the projected east end line last aforesaid.

(4) That defendant owns all ore bodies in the Jersey Blue vein between the points where the apex departs from defendant's premises across end lines as laid or projected, throughout depth save at its intersection or crossing of the Rainbow vein between Elm Orlu end lines as laid and projected.

(4-2) That plaintiff owns all ore bodies in the Creden vein from its divergence at its east end from the Rainbow vein westerly as far as the Creden apex is within the Elm Orlu claim between Elm Orlu end lines there projected, and defendant owns all thereof west of the projected west end line last aforesaid.

(5) That accounting in damages be had.

The appellant assigns error to the finding of the court below that the Elm Orlu claim was located before the Black Rock claim was located. If the Elm Orlu has priority, the appellee is entitled to all of the Rainbow vein lying between the westerly end line of that claim, and a line parallel thereto running south from a point on the north side of said claim 301 feet easterly from the southwest corner of the Black Rock claim, where as the court found, the foot wall of the Rainbow vein crosses the common side line, and is also entitled to all ores within the intersection spaces of that vein with the Jersey Blue vein and the Creden vein; but, if the Black Rock has priority, then the eastern plane of the appellee's rights in the Rainbow vein would be upon a line parallel to the west line of the claim and running from a point on the north side of the claim 190 feet easterly from the southwest corner of the Black Rock claim, where, as the court found, the northerly wall of the Rainbow crosses the common side line. Discovery and location was made of the Elm Orlu claim on April 18, 1875, and the declaratory statement of the locators was recorded on April 22, 1875, and continuous possession was had by the locators and their successors down to January 1, 1884, the date of the issuance of the patent, for which final entry had been made on February 20, 1882. The Black Rock claim was located November 6, 1875, and the declaratory statement was recorded a week later. Patent was issued on February 15, 1882, final entry having been made on November 24, 1880.

[1, 2] Notwithstanding that the location of the Elm Orlu was prior

in time, the appellant contends that the respective mining rights of the parties hereto are fixed and determined by the dates of the issuance of the patents, and this for the reason that the locators of both the said lode claims failed to comply with the statute of Montana in force in the year 1875, which required that within 20 days after discovery the locator should file for record with the county recorder a declaratory statement in writing on oath before some person authorized by law to administer oaths, describing such location in the manner provided by the laws of the United States; the Supreme Court of Montana having held that declaratory statements substantially in the form of those which were filed by the locators of these two mining claims were void. *McBurney v. Berry*, 5 Mont. 300, 5 Pac. 867; *O'Donnell v. Glenn*, 8 Mont. 248, 19 Pac. 302; *Hickey v. Anaconda Copper Min. Co.*, 33 Mont. 46, 81 Pac. 806. It is true that the Montana courts so held, but, in view of the harshness of the rule so established, the Legislature at its session next following the decision in the *Hickey Case* enacted that the issuance of a patent for a mining claim shall be deemed conclusive that the requirements of the laws of the state relative to location and record have been duly complied with, and it validated all mining locations under the laws of the state "heretofore made that in any respect have failed to conform to the requirements of such laws, except as against one who has located the same ground in good faith and without notice." The court below declined to follow the rule of the Montana decisions, for the reason that the locations of the parties to the present suit had been made prior to the date of those decisions, and they were therefore not binding upon a federal court, and for the further reason that the Montana statute had not provided that failure to record a notice which complied in all respects with the statute of the territory should work a forfeiture of a claim; the court holding that the better rule has always been that, if the recordation law does not expressly provide for a forfeiture for failure to record, the location is valid, though not recorded, citing *Last Chance M. Co. v. Bunker Hill & S. M. Co.*, 131 Fed. 586, 66 C. C. A. 299, and *Yosemite Mining Co. v. Emerson*, 208 U. S. 25, 28 Sup. Ct. 196, 52 L. Ed. 374. In so holding we think the court below committed no error. *Vogel v. Warsing*, 146 Fed. 949, 77 C. C. A. 199; *Sturtevant v. Vogel*, 167 Fed. 448, 93 C. C. A. 84. In the *Yosemite Case* the question was whether a locator with knowledge of the existence of a mining claim could take advantage of the prior locator's failure to post two notices required by local rules, he having posted but one. The local rule provided for no forfeiture in case of failure to post two notices. The court said:

"To hold that the want of notice under such circumstances would work a forfeiture would be to permit the rule to work gross injustice, and to subvert the very purpose for which it was enacted."

[3] Again, we are of the opinion that if there was invalidity in the original certificate of location of the Elm Orlu lode claim, it was cured by the issuance of the patent. In *Steel v. Smelting Co.*, 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226, referring to the powers and functions of the Land Department in issuing patents the court said:

"Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable, except by direct proceedings for its annulment or limitation."

In *Mining Co. v. Tunnel Co.*, 196 U. S. 337, 25 Sup. Ct. 266, 49 L. Ed. 501, the court, after enumerating the requisite steps for the location of a mining claim, such as discovery, marking the surface boundaries and filing a location certificate within a specified time as prescribed by the Colorado statutes, said that the issuance of a patent in Colorado for a lode claim "is therefore not only a conclusive adjudication of the fact of the discovery of the mineral vein, but also of compliance with these several provisions of its statutes." In *Lawson v. United States Mining Co.*, 207 U. S. 1, 28 Sup. Ct. 15, 52 L. Ed. 65, the locations had been made prior to the Act of July 26, 1866 (14 Stat. 251, c. 262). The court, answering the contention that there was no evidence that the locations were made in conformity to the local customs or rules, said:

"It is sufficient to say that by stipulation of counsel it was agreed that the patents * * * were issued upon the location notices. Inasmuch as they were accepted by the government, and patents issued thereon it was a recognition by the department of the conformity of the proceedings to the local rules and customs of the district, and such ruling is not open to challenge by third parties claiming rights arising subsequently to such notices. * * * Acceptance by the government of location proceedings had before the statute of 1866, and issue of a patent thereon, is evidence that those location proceedings were in accordance with the rules and customs of the local mining district."

So in *El Paso Brick Co. v. McKnight*, 233 U. S. 250, 34 Sup. Ct. 498, 58 L. Ed. 943, L. R. A. 1915A, 1113, it was held that the entry of the local land officer issuing the final receipt to a locator is in the nature of a judgment in rem, and determines the validity of locations, completion of assessment work, and absence of adverse claims. And in *Stewart Mining Co. v. Bourne*, 218 Fed. 327, 134 C. C. A. 123, this court held that, where a patent has been issued for a mining claim, a conclusive presumption arises that there is a discovery vein therein, that the claim was properly located thereon, and that all precedent acts necessary to authorize the issuance of the patent had been performed. The earlier decisions of the Supreme Court of Montana were in line with the cases above cited. *Butte City Smokehouse Lode Cases*, 6 Mont. 397, 12 Pac. 858; *Talbott v. King*, 6 Mont. 76, 9 Pac. 434; *Chambers v. Jones*, 17 Mont. 156, 42 Pac. 758. They were overruled, however, in *Hickey v. Anaconda Copper Min. Co.*, 33 Mont. 46, 81 Pac. 806, the court there holding that if the declaratory statement was invalid, a location was not effected, and that in such a case there was no date to which the patent could relate antecedent to the date of the application therefor, which, the court said, was the first intimation to the government that an attempt had been made to locate the claim. The court reasoned that if the locator did not proceed according to law, he initiated no right to which the patent could relate, and observed that of course the government, being the owner, might issue patent upon the showing which Congress saw fit to exact. In brief, the court held that the issuance of the patent was

an adjudication only of compliance with the laws of the United States, and not of compliance with the laws of the state. The case stands alone in so holding. The reverse was held, as we have seen, in *Mining Co. v. Tunnel Co.*, supra.

[4] We think also that any defect in the location of the Elm Orlu claim was cured by provisions of the Revised Codes of Montana of 1907. Section 2294 provides:

"The issuance of United States patent for a mining claim shall be deemed conclusive that the requirements of the laws of this state, relative to location and record of such mining claim, have been duly complied with: Provided, however, that where questions of priority are involved, the date of the location shall be an issuable fact where it is claimed to have been prior to the date of the record of the location."

Section 2292 provides:

"All mining locations, made and recorded under the laws of this state heretofore in force, that in any respect have failed to conform to the requirements of such laws, shall, nevertheless, in the absence of the rights of third persons accruing prior to the passage of this act, be valid if the making and recording of such locations conform to the requirements of this act."

It is urged against the effect of these statutes that they are not retroactive, since section 6213 enacts that no part of the Revised Codes is retroactive unless so expressly declared. Section 2292 has this caption: "Validating Locations Heretofore Made." The appellant points to the fact that the caption to the section was inserted by the compiler of the Codes, and is of no avail as expressing the intention of the lawmakers. The Codes, after they were framed, were enacted, however, as the law of Montana, and even assuming that it was not the intention to make the caption to the section a part of the law, we think the language of the act itself is sufficient to express the intention of the Legislature to make it retroactive. It is expressly made applicable to mining locations that "have failed to conform" to the form and requirements of the laws "heretofore in force." *Consolidated Min. Co. v. Struthers*, 41 Mont. 565, 111 Pac. 152.

[5] The appellant contends that priority was lost to the Elm Orlu for its failure to adverse the application for the Black Rock patent. At the time when the application for the Black Rock patent was filed, there was surface conflict between a portion of that claim and the Elm Orlu as those claims were marked upon the ground: The application for patent for the Black Rock claim embraced the conflict area, and patent was issued therefor. No adverse claim was filed by the owners of the Elm Orlu. In the application for the Black Rock patent the plat showed only the Black Rock claim, and there was no reference to any conflict between that claim and the Elm Orlu, nor was mention made of the existence of the Elm Orlu claim. The applicants for the Black Rock patent were well aware of the Elm Orlu claim, and knew that it had been located at the time when they made their own location. The notice of intention to apply for patent stated that "the nearest claimants to these premises are claimants to Pollock lode on the southwest." At that time lessees were mining and shipping ore from the Elm Orlu. There was no fence or inclosure of any part of the Black Rock claim, and there was no con-

trovery of any character between the claimants of the two claims. The adjudication of the Land Office was made solely upon the record which was before it, and nothing was determined by the issuance of the Black Rock patent further than the right of the patentees to the surface. *Lawson v. United States Mining Co.*, 207 U. S. 1, 28 Sup. Ct. 15, 52 L. Ed. 65, affirming *United States Min. Co. v. Lawson*, 134 Fed. 769, 67 C. C. A. 587. The doctrine of the decision in the *Lawson Case* is that an adjudication by the Land Office of the question of surface rights does not necessarily determine the question of underground rights, and that those rights not being subject to adverse claims, the failure to adverse does not estop the parties to litigate the question of priority. It is thus expressed in *Kenney on the Law of the Apex*, 233:

"Where the owner of two overlapping claims applies for a patent for one of them and gets it, the patent conclusively determines that the overlapping area was part of such claim at the time of the proceedings. But it does not necessarily determine that the patented claim was located first; and, if it is not shown that that question was put in issue and actually determined in the course of the patent proceedings, the owner of the other claim is not estopped from showing that his claim was really the first located, in a controversy that arises afterwards in regard to extralateral rights which were not, and could not have been determined in the course of the patent proceedings."

The same view of the effect of the *Lawson Case* is taken in *Lindley on Mines* (3d Ed.) § 742, and in *Costigan on Mining Law*, page 396.

[6] The appellant assigns error to the refusal of the court below to hold that the appellee is estopped by deed from asserting title to any vein or ores of the Elm Orlu claim which extend beneath the Black Rock surface. The deed so referred to is a quitclaim executed by the appellee on October 29, 1906, whereby it conveyed to one of the appellant's predecessors in interest, an undivided one-fourth interest in the Black Rock claim, and it is contended that thereby the appellee segregated from the Elm Orlu all mineral rights of that claim bounded by the vertical plane of its north side line, citing *Montana Mining Co. v. St. Louis Mining & Milling Co.*, 204 U. S. 204, 27 Sup. Ct. 254, 51 L. Ed. 444. In the case so cited, in order to settle a dispute between two adjoining mining claims, the owners of one claim deeded to the owners of the other a portion of the former claim described by metes and bounds, "together with all the mineral therein contained." The court held that the effect of the conveyance was not simply to locate a boundary between two mining claims, leaving all surface rights to be determined by the ordinary rules, but that its effect was to convey all mineral below the granted surface, including a vein which apexed in unconveyed land of the grantor, and in so holding recognized the common law of Montana that a deed of real estate conveys all beneath the surface unless there be words of exception or limitation. Here there is no conveyance of a parcel of land described by metes and bounds, but a conveyance of an interest in a mining claim designated by its name. There is no reference in the deed or in the negotiations leading up to its execution to the fact that the grantor owned the adjoining Elm Orlu mining claim, and obviously there was no intention on the part of the grantor to convey, or upon the

part of the grantee to acquire an interest in that claim. In fact, such intention is expressly negated by the appellant's answer in the present case in which it denied that it claimed any estate or interest adverse to the appellant in or to the Elm Orlu claim, and expressly admitted that the appellee was the owner and in the possession of that claim. There are other circumstances connected with the transaction which might be adverted to, as showing that the intention of the parties was as we have above indicated; but we regard the proposition so plain as to require no discussion that, when the owner of two adjoining mining claims sells and conveys one of them, he conveys only that which is granted by the government when it issues the patent to that claim.

[7] There are several assignments of error to the findings of fact, the principal of which are that the court erred in finding that the Pyle strand of the Rainbow vein diverges from the south side of that vein in the Elm Orlu claim, and there and for some indefinite distance easterly has its apex in the Elm Orlu, and in finding that the apex of the easterly strand of the Rainbow vein in the Black Rock claim does not cross the easterly end of that claim, but terminates at a point within said claim, about 250 feet west of the east end line, and in finding that prior to the Black Rock location, both the Rainbow vein and the Jersey Blue vein at their apices were discovered and known within the Black Rock claim, and appeared as a continuous east-west vein. The appellant does not assert that the findings of fact are unsupported by competent evidence, but contends that they are contrary to the weight of the evidence. The trial court made its findings after an evidently careful and painstaking investigation of the testimony and the exhibits, and after a personal inspection of the mining properties. We have examined the record sufficiently to see that the findings are all supported by the credible testimony of reputable witnesses. Upon settled principles, which this court has always recognized, findings so made upon conflicting testimony are conclusive upon this appeal.

[8, 9] The appellant contends that even though the conclusion is reached that the Elm Orlu claim has priority over the Black Rock, and that the appellee is not estopped by deed to assert title to any ore bodies beneath the surface of the Black Rock, still the court erred in denying to the appellant a decree quieting its title to the Jersey Blue vein through its entire depth, and its title to all ore bodies beneath the surface of the Black Rock claim easterly of a plane parallel to the west end line of the Elm Orlu drawn through a point on the northerly side line thereof 301 feet easterly of the southwest corner of the Black Rock claim, at which point the court found that the Rainbow vein on its foot wall side in its course departed from the Elm Orlu and entered the Black Rock, and this because there was utter failure of proof on the part of the appellee to establish its contention that easterly of such plane there was found within the Elm Orlu claim the apex of any vein or branch of a vein which on its downward course united either with the Jersey Blue vein or with that part of the Rainbow vein, the top of which is conceded to be within the boundaries of the Black Rock extended downward vertically. The contention involves the assumption that the burden was upon the appellee to prove

that there was union upon dip between the Rainbow and the Pyle veins, and the fact that the court failed to fix the point, of departure of the apex of the Pyle vein from the Elm Orlu claim. It is true that the court did not determine, but expressly reserved, the question of the point where the apex of the Pyle vein passed out of the Elm Orlu. The evidence was not sufficient to justify a decision of that question. The burden was upon the appellant to show that the apex of the Pyle vein passed through the common side line. Its expert witnesses expressed the opinion that it was possible that it did. One of them said that of two possibilities it was "probably the most probable one." The court below was of the opinion that the proof was clear that the Pyle vein apexed in the Elm Orlu, dipped beneath the Black Rock, and on strike and dip united with the Rainbow, and said:

"Despite diligent, extensive, and costly development work by both parties, the extent of all thereof was indefinite."

And the court reached the conclusion that the appellee owned the Pyle strand or vein in so far as the apex is within the Elm Orlu, and that the appellee owned 980 feet of the Rainbow vein, and that, if the veins unite on dip, the prior location owns all below, the appellee's being the prior location, and the court left to future development the question of how far the Pyle apex continued in the appellee's location, and to what extent beneath the Black Rock it united with the Rainbow in such position as to be controlled by the apex in the Elm Orlu. As to the Jersey Blue vein, one of the issues in the case was whether that vein unites with the Rainbow. It was not only proven, but it was admitted by the appellant, that the Rainbow vein from its apex in the Elm Orlu on its dip extends beneath the Black Rock, and that in said vein is the great ore body in dispute west of the apex crossing of the common side line under both claims, and that it extends downward to unknown depth. There was therefore imposed upon the appellant the burden of proving not only that its claim was prior to the Elm Orlu, but that the Jersey Blue vein unites with the Rainbow vein above any part of the ore body which the appellant claimed. This the appellant failed to show. The court was of the opinion that the alleged union of the veins was doubtful, and that the finding must be that they do not unite, even though the evidence failed to indicate that they cross.

The court below properly declined to quiet title to claims resting on an undeveloped or possible junction at great depths beneath the claim. We think that the court had the power to make the decree which was made on the proven facts, and to leave to future development and proof other rights not yet made certain. *Keely v. Ophir Hill Consol. Min. Co.*, 169 Fed. 601, 95 C. C. A. 99. In *Union Pacific Ry. Co. v. Chicago, etc., Ry. Co.*, 163 U. S. 564, 603, 16 Sup. Ct. 1173, 41 L. Ed. 265, the court approved its decision in *Joy v. St. Louis*, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843, where it had been said that it was not unusual for a court of equity to take supplemental proceedings to carry out its decree and make it effective under altered circumstances.

The decree is affirmed.

WEBB et al. v. SOUTHERN RY. CO.

(Circuit Court of Appeals, Fifth Circuit. February 20, 1918.)

No. 3071.

1. REMOVAL OF CAUSES ⇨88—PROCEEDINGS—BOND.

Under Judicial Code (Act March 3, 1911, c. 231) § 29, 36 Stat. 1095 (Comp. St. 1916, § 1011), providing that a party desiring to remove a suit shall file a petition for removal of such suit into the District Court to be held in the district where such suit is pending, and shall make and file therewith a bond with good and sufficient surety for his or their entering in such District Court a certified copy of the record and for paying all costs that may be awarded by such District Court, if it shall hold the suit was wrongfully or improperly removed, a removal bond conditioned upon the filing of the record either in the District Court for the district wherein the action was begun or in the District Court for another district is insufficient, and does not authorize removal.

2. REMOVAL OF CAUSES ⇨48—SEPARABLE CONTROVERSY.

Where an action was begun in the state court by several plaintiffs only one of whom was a resident of the state against defendant a nonresident, defendant is not entitled to remove the cause to the federal court, unless there is a separable controversy between it and that plaintiff who was a resident of the state wherein the action was begun.

3. COURTS ⇨366(2)—PRECEDENTS—DECISIONS OF STATE COURT.

A decision of a state court, affirming the constitutionality of a state statute, is not conclusive on the federal courts, where the statute is attacked as in violation of the federal Constitution.

4. REMOVAL OF CAUSES ⇨30—PARTIES—WHO ARE—STATUTE.

Under Code Ala. 1907, § 2490, declaring that, in all cases where suits are brought in the name of the person having the legal right for the use of another, the beneficiary must be considered the sole party in the record, an action begun by resident of Alabama in the state court against a Virginia railroad company, to recover for damages from a fire alleged to have resulted from the railroad company's negligence, where the Alabama resident, who had received payment from two nonresident insurance companies, sued in part for their benefit, such companies having become partially subrogated to his rights, must be treated as a suit by three plaintiffs, only one of whom was a citizen of Alabama.

5. REMOVAL OF CAUSES ⇨52—SEPARABLE CONTROVERSIES.

An Alabama resident, whose property had been injured and destroyed by fire alleged to have been negligently caused by a railroad company, a Virginia corporation, sued the railroad company in the Alabama state court. He sued in part for the benefit of insurance companies, residents, respectively, of a foreign state and a foreign country, which had paid a portion of the loss and were subrogated in part to the rights of the owner. *Held* that, as recovery by each depended on the railroad company's liability, there was no separable controversy between the owner of the property and the defendant railroad company which would justify removal of the cause to the federal court.

In Error to the District Court of the United States for the Southern District of Alabama; Henry D. Clayton, Judge.

Action by John C. Webb (individually and for the use of the Queen Insurance Company of America and the London & Lancashire Fire Insurance Company), the Queen Insurance Company of America, and the London & Lancashire Fire Insurance Company against the Southern Railway Company, begun in the state court and removed to the

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

federal court. Motion to remand being denied (235 Fed. 578), plaintiffs bring error. Reversed.

Alex C. King, of Atlanta, Ga., Alexander M. Garber, of Birmingham, Ala., and Hugh Mallory, of Selma, Ala., for plaintiffs in error.

E. W. Pettus, of Selma, Ala., and J. T. Stokely, of Birmingham, Ala. (Stokely, Scrivner & Dominick, of Birmingham, Ala., Henry McDaniel, of Demopolis, Ala., and Pettus, Fuller & Lapsley, of Selma, Ala., on the brief), for defendant in error.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

WALKER, Circuit Judge. This was an action brought in the law and equity court of Marengo county, Ala., to recover damages for the injury to and destruction of property by fire alleged to have been negligently caused by the defendant in error, the Southern Railway Company, a corporation organized under the laws of the state of Virginia. The plaintiffs in the suit were John C. Webb, a citizen of Alabama, the owner of the injured and destroyed property, suing for the use of himself and of two insurance companies, one a corporation of the state of New York and the other a British corporation, and the two insurance companies. The complaint showed that each of these companies had insured against loss by fire property of Webb which was burned, the loss by the fire covered by one of the policies being \$12,626.66, and that covered by the other policy being \$19,931.84, which amounts were paid to Webb by the respective insurance companies before the suit was brought, and that Webb had assigned in writing to each of the insurance companies, to the extent of the payment made by it, an interest in his claim against the defendant for negligently causing the fire. The defendant undertook to remove the suit to the federal court. The petition for removal alleged that Webb is a citizen of Alabama, that the defendant is a Virginia corporation, with its principal place of business at Richmond, in the Eastern judicial district of that state, and that "the District Court of the United States for the Northern Division of the Southern District of Alabama, or the District Court of the United States for the Eastern District of Virginia, * * * has jurisdiction to try and determine this suit," and prayed an "order of removal of said cause to the said United States District Court for the proper district." The condition of the bond which accompanied the petition for removal was as follows:

"The condition of the above obligation is such that, whereas, said Southern Railway Company, a corporation, has applied by petition to the Marengo law and equity court of Marengo county, Ala., for the removal of the above-entitled cause to the District Court of the United States for the Northern Division of the Southern District of Alabama, or to the District Court of the United States for the Eastern District of Virginia: Now, if the said Southern Railway Company, a corporation, shall enter in such District Court, within 30 days from the date of the filing of said petition in this court, a certified copy of the record in this suit, and shall pay all costs that may be awarded by said District Court, if the said District Court shall hold that such suit was wrongfully or improperly removed thereto, then the obligation shall be void; otherwise, to remain in full force and effect."

The state court refused to make an order for the removal of the case. Within the time stated in the condition of the removal bond the defendant filed a transcript of the removal proceedings and of the record in the suit in the United States District Court for the Northern Division of the Southern District of Alabama. Thereupon the plaintiffs filed in that court a motion to remand the case to the state court on the following grounds:

"(1) Because, upon the allegations in the petition to remove and the pleadings, the Southern district of Alabama appeared to be not the district of the residence of either the plaintiffs or of the defendant, and that this court could not properly acquire jurisdiction of the case, it being one of which it would not have had original jurisdiction.

"(2) Because the petition for removal was not one for a removal to the United States District Court for the Southern District of Alabama, but one which prayed for a removal to either that court or to the United States District Court for the Eastern District of Virginia, without saying to which court the removal was prayed, and the bond was conditioned to be void if the record was filed in either of these districts."

"(3) Because no petition and bond for removal in accordance with the United States statutes permitting such removal has been filed."

This motion was overruled, and, as a result of a trial, there was a final judgment for the defendant.

[1] The right to remove a suit from a state to a federal court is conditioned upon the party entitled to a removal filing a petition "for the removal of such suit into the District Court to be held in the district where such suit is pending" and upon his making and filing therewith "a bond, with good and sufficient surety, for his or their entering in such District Court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said District Court if said District Court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein." Judicial Code, § 29 (Comp. St. 1916, § 1011). A petition so framed that its prayer would be granted by an order removing the suit into a court other than "the District Court to be held in the district where such suit is pending" could not well be regarded as such a petition as the statute prescribes. For a bond to be in substantial conformity with the requirement of the statute its condition must be such that it would be breached by a failure to file a certified copy of the record in the suit in the District Court of the United States "held in the district where such suit is pending." The bond in question in this case did not contain such a condition. Its condition, in so far as it dealt with the matter of filing a certified copy of the record, might have been fully performed without a certified copy of the record ever being filed in the District Court for the Southern District of Alabama. In the respect mentioned the condition would have been satisfied by entering a certified copy of the record in a place other than "the District Court to be held in the district where such suit is pending." There is a failure to comply with a prescribed prerequisite of removal when the only bond filed is so conditioned that liability on it could be discharged without entering a certified copy of the record in the suit

in the district court of the district where the suit is pending. *Alexandria National Bank v. Willis C. Bates Co.*, 160 Fed. 839, 87 C. C. A. 643.

[2-4] As neither all the plaintiffs nor the defendant company are residents of the district in which the suit was brought, the suit was not removable unless it involved a separable controversy between the plaintiff who is a resident citizen of that district and the defendant. *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264. The two insurance companies were part legal owners of the cause of action asserted, and were entitled to join in bringing and prosecuting the suit with their assignor Webb, who retained an interest in the claim against the defendant, if a statute of Alabama which provides that "claims against railroad companies, for injuries to property, may be assigned in writing, and each successive assignee thereof may sue thereon in his own name" (Code of Alabama 1907, § 5159), is constitutionally valid. The Supreme Court of Alabama has decided that the statute quoted is valid. *Parnell v. Southern Railway Co.*, 74 South. 437. As the validity of the statute is questioned on the ground that it is violative of the Constitution of the United States, that decision is not conclusive. But, whether that statute is valid or not, the act of Webb in bringing the suit for the use of himself and the two insurance companies had the effect of making those companies real parties plaintiff. "In all cases where suits are brought in the name of the person having the legal right for the use of another, the beneficiary must be considered the sole party in the record." Code of Alabama (1907) § 2490.

A manifest effect of this statute is to require that one for whose use a suit is brought be recognized as a real plaintiff, though the person having the legal right and in whose name the suit is brought is also to be recognized as a real plaintiff because of the fact that he also has or retains a beneficial interest in the recovery sought. If the instruments which purported to be assignments by Webb of interests in his cause of action against the railway company were ineffective to make the insurance companies part legal owners of that cause of action, so as to entitle them to join as plaintiffs in a suit at law asserting it, still they were effective as contract or conventional subrogations of the insurance companies to Webb's rights to the extent of the specified amounts of any recovery on the cause of action against the railway company. They evidenced the recognition or admission by the person in whose favor the cause of action accrued that the two insurance companies were beneficially interested in any recovery on that cause of action, and made Webb's suit one in fact, as it purported to be, in behalf of himself and of the two insurance companies which, before the suit was brought, had acquired legally cognizable beneficial interests in the cause of action asserted. Though Webb be regarded as the sole legal owner of the cause of action asserted and the sole proper nominal party plaintiff, the fact that he sued for the use of himself and the two insurance companies beneficially interested in the recovery had the effect, under the statute last quoted, of requiring the recognition of those companies as being as real parties plaintiff in the record as Webb himself. *Southern Railway Co. v. Stonewall Ins. Co.*, 163

Ala. 161, 50 South. 940; *Henderson v. Hall*, 134 Ala. 455, 32 South. 840, 63 L. R. A. 673. The statute operates to make the suit one by three plaintiffs, respectively citizens of Alabama, New York, and Great Britain, against a Virginia corporation, to recover damages for a tort alleged to have been committed by the latter.

[5] For the defendant, a citizen of Virginia, to sustain its claim of right to remove the suit, it must be one involving a controversy between it and the plaintiff who is a citizen of the district in which the suit was brought, which can be fully and finally determined between them without affecting the interest in the subject-matter of others whose relation to the suit as it was brought is that of plaintiffs in the record. The suit having been rightfully so brought as to make it one by three plaintiffs to recover on a single and indivisible cause of action, the absence of a separate and distinct cause of action in favor of the resident plaintiff against the defendant, which can be finally disposed of between them without affecting the interest of the other plaintiffs in the single cause of action sued on, makes the suit unremovable by the defendant, though one of the plaintiffs might have brought a removable suit based on the same cause of action by suing alone and for the use of himself only to recover damages for the burning of property of his not covered by the insurance policies, the injury to or loss of which did not affect the insurers. *Chesapeake & Ohio Ry. Co. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121; *Fraser v. Jennison*, 106 U. S. 191, 1 Sup. Ct. 171, 27 L. Ed. 131; *Chicago, R. I. & Pac. Ry. v. Dowell*, 229 U. S. 102, 33 Sup. Ct. 684, 57 L. Ed. 1090. It is quite apparent that the only controversy between the plaintiff Webb and the defendant, which the suit as it was brought discloses, is one in which the two insurance companies are vitally interested. The sole right of recovery claimed by Webb is one as to which he asserts the right of the two insurance companies to share. They lose by a failure to maintain the suit. A cause of action asserted cannot be judicially disposed of without affecting the beneficial owner of a share in it. There did not exist in the suit a separate and distinct cause of action in favor of Webb alone. A removal of the suit only in so far as it represented an effort of Webb to recover something for his own use would require a splitting of the single cause of action counted on. This cannot be done, because of the indivisibility of that cause of action.

Before the suit was brought the two insurance companies acquired such a beneficial interest in the recovery sought as to justify the bringing of the suit for the joint use of them and of the plaintiff to whom the single and indivisible cause of action counted on originally accrued. The record discloses that they have such a relation to the suit as requires that they be treated as parties plaintiff. The suit counts on a single cause of action in which each of the three real plaintiffs has an interest, all of them being on one side of the controversy raised. The citizenship of the parties is such as to make the suit as it was brought one which is not removable, as it is not one which could have been brought in the court below, neither all the plaintiffs nor the defendant being residents of that district, and the suit not involving a separable controversy between the defendant and the plaintiff who is

a resident of that district. *Turk v. Illinois Central R. Co.*, 218 Fed. 315, 134 C. C. A. 321; *Gaugler v. Chicago, M. & P. S. Ry. Co.* (D. C.) 197 Fed. 79.

The conclusion is that the court was in error in overruling the motion to remand. The judgment is reversed, with direction to grant that motion.

Reversed.

SUN CO. et al. v. VINTON PETROLEUM CO.

(Circuit Court of Appeals, Fifth Circuit. February 15, 1918. Rehearing Denied March 23, 1918.)

No. 3039.

1. APPEAL AND ERROR ⇨847(1)—REVIEW—EQUITY CASES.

An appeal in an equity case brings the entire case before the appellate court for review.

2. APPEAL AND ERROR ⇨1078(1)—ISSUES—WAIVER.

A party's failure to urge an issue in the appellate court is a waiver thereof.

3. APPEAL AND ERROR ⇨1096(3)—DETERMINATION—REMAND.

Where a decree for defendant was on complainant's appeal reversed, defendant, not having urged in the appellate court that the decree in its favor was proper under its cross-demand for reformation of a written instrument, cannot complain, on appeal from a subsequent decree for complainant, that the trial court refused to consider its cross-demand, for, as the question could have been raised on the first appeal, defendant is concluded, as questions brought before an appellate court cannot, on subsequent appeal, be again insisted on.

4. APPEAL AND ERROR ⇨1071(6)—REVIEW—HARMLESS ERROR.

Where, under the evidence, defendant's cross-demand would have been denied, had it been considered, the refusal of the trial court to consider the same is not prejudicial, if erroneous.

5. REFORMATION OF INSTRUMENTS ⇨19(1)—MISTAKE—MUTUAL MISTAKE.

Where defendant sought reformation of an option contract on the ground of mistake, it must show that the contract did not express the meaning which the parties understood was to be expressed, and also that the mistake was mutual.

6. REFORMATION OF INSTRUMENTS ⇨45(1)—EVIDENCE—SUFFICIENCY.

Where an alleged mistake is denied, reformation of a written instrument should not be decreed, except on evidence of the clearest and most satisfactory character.

7. REFORMATION OF INSTRUMENTS ⇨45(2)—EVIDENCE—SUFFICIENCY.

Where defendant claimed reformation of an option contract on the ground of mistake, evidence *held* insufficient to establish the mistake, or that the mistake, if it existed, was mutual.

Batts, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge.

Bill by the Vinton Petroleum Company against the Sun Company and others. From a decree for complainant, defendants appeal. Affirmed.

E. E. Townes, of Houston, Tex., T. L. Foster, of Beaumont, Tex., and Alex W. Smith, of Atlanta, Ga., for appellants.

W. D. Gordon and Henry G. Russell, both of Beaumont, Tex., and A. P. Pujó, of Lake Charles, La., for appellee.

Before PARDEE, WALKER, and BATT'S, Circuit Judges.

WALKER, Circuit Judge. This is an appeal from a decree rendered after the reversal by this court, on an appeal by the plaintiff, the appellee in the present appeal, of a former decree, and the remandment of the cause. *Vinton Petroleum Co. v. Sun Co.*, 230 Fed. 105, 144 C. C. A. 403. There was no change in either the pleadings or the evidence in the case after it went back to the trial court. What the appellant, the defendant below (and which will be called the defendant), now complains of, is the refusal of the trial court, when the case came before it again as a result of the reversal and remandment by this court, to consider and pass on that part of the defendant's answer to the bill which prayed that the option clause of the contract between the parties of December 21, 1912, be reformed, and alleged, in support of the prayer for such relief, that before that contract was reduced to writing it was mutually agreed between the parties that the price at which the defendant was to have the option of renewing the contract for the plaintiff's production of oil for an additional two years following December 24, 1914, was to be equal to the highest price which either of the pipe line companies doing business in the Vinton oil field when the original contract was made was, on or about December 24, 1914, in good faith contracting to pay or offering by contract to pay for oil in said field, but that by mutual mistake in the choice of words and in reducing the contract to writing the contract failed to clearly express the intention and meaning of the parties which had actually been agreed on before the contract was written, and which they thought and believed the writing expressed. It is pointed out by counsel for the defendant that the claim asserted by the bill was resisted on two grounds, namely: (1) That the contract as it was written did not have the meaning attributed to it by the bill; and (2) that if, as it was written, it had that meaning, such a mutual mistake was made in reducing it to writing as to entitle the defendant to have it reformed, and that the trial court, by the decree which was reversed, sustained the first-mentioned ground of defense and made no disposition of the other one. And, based upon the fact that in the opinion rendered by this court on the former appeal nothing was said about the claim made by the defendant in its answer that the option provision, the exercise of which was sued on, should be reformed, the contention is made that the former action of this court left that issue undisposed of and subject to be presented anew to the trial court.

[1-3] In the opinion of the writer the last-mentioned contention is not sustainable. Under the well-settled rule that an appeal in an equity case brings the entire case before the appellate court, the issue raised by the defendant's answer and the evidence adduced to support it as to its right to have the option feature of the contract so

reformed as to make it express the agreement which it was alleged the parties made before they undertook to reduce it to writing was before this court when the case was here on a former appeal. It was as open to the party opposed to the reversal of that decree to resist a reversal of it on the ground that the evidence supported its cross-demand for a reformation of the option provision of the contract as it was to resist reversal on the ground that the meaning for which it contended was expressed by the contract as it was written. If the issue as to the suggested reformation of the option clause of the contract had been insisted on by the defendant when the case was here on the former appeal, the ruling which this court then made could not properly have been made without deciding that issue against the defendant. A party may abandon an issue by failing to insist on it. It seems that this is what the defendant did by failing to urge in this court, when the case was here on the former appeal, that the decree then under review should be sustained because the evidence supported the claim, set up by the defendant's answer, that the option provision of the contract should be reformed. It is not at all uncommon for a court's opinion to omit any mention of an issue raised by the pleadings and evidence in the case under consideration, but which is not insisted on by the party by whom that issue was tendered. The writer understands that questions which by an appeal have been brought before an appellate court for its decision cannot again be insisted on when the case comes before the same court on a subsequent appeal; that a party cannot create an exception to this rule by calling to the attention of the appellate court, when the case is first before it, some only of the questions which the record presents for its decision, reserving other questions, also presented by the record, for a second presentation to the trial court in the event of the remandment of the case to it, or to the same appellate court on a subsequent appeal; and that a subsequent appeal brings up nothing but the proceedings subsequent to the mandate. *Illinois v. Illinois Central Ry. Co.*, 184 U. S. 77, 22 Sup. Ct. 300, 46 L. Ed. 440; *United States v. Camou*, 184 U. S. 572, 22 Sup. Ct. 505, 46 L. Ed. 694; *Smith v. Vulcan Iron Works*, 165 U. S. 518, 17 Sup. Ct. 407, 41 L. Ed. 810. As was said in the opinion in the first-cited case:

"To allow a second writ * * * or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation."

The propositions just stated are not controverted by the decisions in the cases of *Mutual Life Insurance Co. v. Hill*, 193 U. S. 551, 24 Sup. Ct. 538, 48 L. Ed. 788; and *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 16 Sup. Ct. 291, 40 L. Ed. 414. The questions which in those two cases were held to have been open to decision in the trial court after a remandment by the appellate court had not been raised when the cases were first in the appellate court, but were first raised by proceedings in the trial court subsequent to the mandates. Expressions made use of in the opinions in those cases are to be read in the light of this fact. It seems to the writer that this court's former de-

cree disposed of the issues raised by the pleadings and evidence as disclosed by the record then before it, as well the one which was waived by not being urged for consideration, when it was open to the defendant to do so if it chose, as the one which was argued by counsel and was discussed in the court's opinion.

[4] But, if the record discloses that the result must have been the same if the action which is complained of had not been taken, it may be assumed, without being conceded or decided, that when the case went back to the trial court the demand asserted by the bill could not properly have been maintained, if the evidence which had been adduced was such as to support the claim set up by the defendant that it was entitled to have the option provision of the contract reformed pursuant to the prayer contained in its answer. The defendant could not have been prejudiced by the refusal of the trial court, when the case was last before it, to pass on an issue it had tendered, if the record discloses that the evidence which it had to rely on to support that issue was insufficient for that purpose.

[5-7] By a written contract between the plaintiff and the defendant dated December 21, 1912, the former sold and the latter bought the former's production of oil during the period of two years commencing December 25, 1912. What is sought to be reformed is a clause contained in that contract which gave the defendant the option of renewing the contract for an additional two years following December 24, 1914. On January 2, 1915, the defendant exercised the option in the way prescribed in the option provision as it was written, without suggesting that the option it was entitled to exercise was in any way different from what the writing showed it to be. So far as the record discloses, the first suggestion that the option which the parties agreed on was not truly expressed in the writing was made by the defendant in its answer, filed April 10, 1915, to the bill in this case. It may be inferred that in the circumstances existing on January 2, 1915, the defendant would not have exercised the option, if it had then understood or believed that the option provision contained in the written contract had the meaning which this court has decided was expressed in the provision as it was written. So it is disclosed that the defendant did not seek a reformation of the option provision as it was written until after its exercise of the option had made it of vital importance to it to sustain the contention that the option for which it really contracted was not correctly stated in the written instrument which evidenced the contract. If at any time both the parties to the contract understood that the option provision which they agreed on was different from the one expressed in the writing, certainly it was not made to appear that that mutual understanding existed when the option was exercised. The defendant's exercise of the option, shown by the written communication, dated January 2, 1915, was not preceded by any negotiations or verbal communications between its representatives and those of the plaintiff; and in the reply promptly made to the notice given by the defendant of its election to exercise the option it was clearly disclosed that the plaintiff relied on the writing as truly stating the con-

tract, and that it gave the option provision the meaning which this court has decided was expressed by its language.

The defendant cannot sustain its claim that it is entitled to have the option provision as it was written reformed, without showing that, before the instrument of December 21, 1912, was signed the parties had verbally agreed on the option provision alleged in the answer, and that each of the parties signed the written instrument under the mistaken belief that it correctly stated the substantially different previously made verbal agreement. It was incumbent on the defendant to prove that before the written instrument was signed the alleged different provision which is sought to be substituted in the place of the one found in that instrument was verbally agreed on by the parties, each acting through a representative or representatives authorized to bind it. The negotiations which led up to the making of the contract between the two companies were conducted by J. Edgar Pew, who had charge of the defendant's business, and J. M. Abbott, who at that time was not an officer or agent of the plaintiff company, and, so far as appears, was without authority to bind it, but who a short time before had acquired stock in that company, and in that way was interested in its making a contract for the sale of its production of oil. It was distinctly made to appear that what Abbott did in behalf of the plaintiff company was to make a preliminary arrangement, which was subject to be rejected or confirmed by the plaintiff's board of directors. The two individuals mentioned agreed on the terms of a contract to be made by and between the two companies. A draft of the proposed contract was made by an agent or official of the defendant company on a printed form of contract which had been prepared by Mr. Pew and the attorney of the defendant company several years before, which form had been used frequently by the defendant in the conduct of its business. There was evidence tending to prove that Dr. Brown and W. H. Stark, directors of the plaintiff company, were present at an interview in Mr. Pew's office in the afternoon of the same day during the evening of which the contract as it was written was approved by the plaintiff's board of directors and signed by its president. During that interview the use of the term "market price" in the proposed option provision was discussed, with the result that those words were discarded, and it was agreed to use the language found in the contract as it was written and signed, namely:

"A price equal to the highest contract price then and in good faith being paid by either of the pipe line companies now doing business in the Vinton oil field for similar oil in said field."

There was no testimony which would support a finding that in the interview just mentioned anything was said from which it could be inferred that the minds of the negotiators met in an agreement that what the defendant was to pay, in the event of its exercise of the option stipulated for, was to be determined by what any pipe line company was at that time contracting or offering to pay for oil. The option provision, as it is found in the written instrument evidencing the contract, was either dictated by the defendant's attorney, an experienced

and capable lawyer, or was examined and approved by him. It is not explained how it happened that such a lawyer could have approved the option provision as it was written, if he had been informed that what his client's representative had assented to was a distinctly different provision. The option provision found in the written instrument evidencing the contract remained just as it was when the draft of the proposed contract was presented to the plaintiff's board of directors for its approval or rejection. Four witnesses testified as to what occurred on that occasion; Mr. Pew and Mr. Abbott, who were examined in behalf of the defendant, and Dr. Brown and Mr. Stark, who were examined in behalf of the plaintiff. The testimony of no one of these witnesses indicates that on that occasion the option provision was verbally mentioned or discussed, except that Mr. Pew stated that he thought that the question of the option came up again on that occasion, and that he was not sure whether it was Mr. Gordon, who was a director of the plaintiff and its attorney, or Mr. Bankenstein, who was a director of the plaintiff, that raised the question, and that he thought that Mr. Gordon ruled that the price that the pipe line companies were paying for oil at that time would sufficiently protect them. Mr. Abbott, who at the time he testified was not connected with the plaintiff and had no financial interest in it, testified that he had no recollection of anything being said on that occasion about what the option provision meant. Dr. Brown and Mr. Stark testified that on that occasion nothing was said about the option provision.

In the course of the direct examination of Mr. Pew he stated in effect that the verbal agreement was that the Sun Company, if it exercised its option to buy the Vinton Petroleum Company's oil for an additional two years, would have to do so at the highest price that would be offered by any one else. This was a statement of the opinion or conclusion of the witness as to the meaning of what was said and assented to in discussions or conversations between the negotiators before the written instrument evidencing the contract was signed. He did not detail or narrate any previous conversation or statement which would support the conclusion that the negotiators agreed on an option provision different from the one which the signed written instrument contains. Besides, it may be inferred that this witness would have had the same opinion as to the meaning of the option provision which he claims was verbally agreed on by him and Mr. Abbott, if the oral statement of what that provision was to be had been in the identical language which was used in the provision as it was written, as it was brought out in the course of the examination of this witness that he construed that provision as it was written to mean that, if the Sun Company exercised the option, the effect of its doing so was to obligate it to pay the highest price being offered on contracts at that time by either of the pipe line companies doing business in the Vinton oil field for similar oil in that field.

We think that the evidence adduced was wholly insufficient to warrant the granting of the relief which the defendant prayed for. Proof to establish a mistake in a written contract is to be received with great caution, and, where the alleged mistake is denied, should

never be made the foundation of a decree variant from the written contract, except it be of the clearest and most satisfactory character, sufficiently cogent to satisfy the mind of the court that the writing does not express what was intended by the parties, not merely the one who seeks a reformation, and what it was they intended the writing should express. *Snell v. Insurance Company*, 98 U. S. 85, 25 L. Ed. 52; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. Ed. 1063; *Travelers' Insurance Co. v. Henderson*, 69 Fed. 762, 16 C. C. A. 390; *Hertzler v. Stevens*, 119 Ala. 333, 24 South. 521. In the opinion rendered in the case of *Travelers' Insurance Co. v. Henderson*, supra, the following was said:

"The rule referred to is so well settled that it may be safely asserted that a court of equity has no right to correct an alleged mistake in a written agreement, on the strength of testimony purely oral, if the testimony is to such extent uncertain, equivocal, or contradictory as to leave the fact of mistake open to doubt. Moreover, a court of equity ought to be especially cautious in altering the provisions of a written contract where it has been in force for a considerable period before an attempt is made to reform it, and the parties thereto have in the meantime had ample opportunity to become acquainted with its provisions, and an event has also occurred which renders a change in the terms of the contract of vital importance to the person who is seeking to reform the instrument."

The evidence in the instant case by no means clearly and satisfactorily proves that the two men who conducted the negotiations which led to the framing of a proposition for a contract to be submitted to the plaintiff's board of directors for its adoption or rejection mutually agreed that the option provision which the proposed contract was to contain was to be the one which the defendant seeks to have substituted for the one found in the written instrument which was adopted and signed. But, even if the minds of those two men met on the proposition that the option provision was to be the one which the defendant alleges was verbally agreed on, that was not enough to entitle the defendant to the relief it seeks. There was no contract, either verbal or written, which bound the plaintiff until it was assented to by the plaintiff, which acted in the matter through its board of directors. There was an entire absence of evidence to support the conclusion that the plaintiff's directors ever at any time or in any way assented or agreed to an option provision different from the one contained in the written instrument, which they approved and authorized the plaintiff's president to sign. Even though the defendant's representative signed that instrument under the mistaken belief that the option provision it contained had a meaning different from that expressed by its language, it was not entitled to have that provision reformed, unless it proved that the other party to the contract labored under the same mistaken belief when it signed that instrument. Certainly this was not shown by that measure and character of proof which is required in such a case. To say the least, the requisite mutuality of the alleged mistake was not proved. The effect of granting the relief prayed for would be to incorporate into the contract made by the parties a provision which the party resisting the granting of that relief is not shown ever to have agreed to.

The conclusion is that the record shows that the defendant was not legally prejudiced by the action of the trial court of which it complains.

The decree appealed from is affirmed.

BATTS, Circuit Judge (dissenting). I cannot concur in the judgment of affirmance entered herein. The Sun Company and the Vinton Petroleum Company, on December 21, 1912, entered into a contract, to continue for two years, for the sale of the oil production of the Vinton Company. A provision of the contract was:

"In consideration of the obligations assumed by the first party hereinbefore [Sun Company] said first party is to have the option to renew for an additional two years following December 24, 1914, this contract at the expiration of said two years, the oil for said following two years to be paid for in case said option to buy the same is exercised by the Sun Company at a price to be equal to the highest contract price then and in good faith being paid by either of the pipe line companies doing business in the Vinton oil field for similar oil in said field; notice of the exercise of said option by the said first party to be given to the second party by the said first party in writing within ten days following December 25, 1914."

On January 2, 1915, the Sun Company addressed a letter to the Vinton Company, advising the latter that it elected to exercise the option, and quoting from the contract the provision with reference to the price, followed with the statement:

"We understand that the price being offered by the companies named is approximately 45 cents. If we are mistaken in this, and you have bona fide offers from them as provided in the contract for a higher price, we will be pleased to go over the offers with you and determine definitely what the price should be."

A letter from the Vinton Company, acknowledging receipt of the notice, contained a paragraph to this effect:

"We beg to call your attention to the fact that, as a basis for the price established, your contract with the Gum Cove Company, which we understand is \$1, and we understand there are several other contract prices now in good faith being paid at \$1."

On the 25th of January following the Vinton Company filed its bill of complaint in the United States District Court for the Eastern District of Texas, setting up the contract aforesaid and the correspondence between the parties, alleged the difference between the construction given to the contract by the Sun Company, and its insistence that the price to be paid was 60 cents per barrel, and its own construction of the contract and contention that the price was \$1, alleged an additional difference of construction which is not material to the present controversy, and asked for a specific performance of the contract, as construed by complainants, and for an accounting.

The defendant answered that:

Under the terms of the contract, the price to be paid "for said oil so delivered under said contract is to be determined by ascertaining the highest contract price being in good faith offered or contracted on or about December 24, 1914, to be paid for a production of oil of similar character in the Vinton oil field by other of the pipe line companies which were doing business in said Vinton field December 21, 1912; in other words, the highest price at

which other of the pipe lines which were doing business in the Vinton oil field on December 21, 1912, were, on or about December 24, 1914, offering or contracting to pay for oil to be produced and delivered to them, beginning on or about said date, and extending over a period thereafter."

The paragraphs setting up this defense, and defenses with reference to the other points in controversy, were followed by another to the effect that:

"In the event the court should construe and hold the contract and the option clause therein providing for a two years' extension, as written and signed by the parties, to fix as the price for the oil during said extension period the highest contract price for similar oil in the Vinton field, which was being in good faith, on or about December 24, 1914, paid by either of the pipe lines which were doing business therein December 21, 1912, without reference to the time when said contract was entered into, and not the highest contract price being in good faith, on or about December 24, 1914, offered or contracted by either of said lines to be paid, [defendant] presents this its counterclaim."

And it says that it was the intention of the parties, when the contract was entered into, to pay the price provided by the contract as construed by the defendant, and that the parties believed that the writing so expressed their contract, and that, if the writing meant anything other than this, a mutual mistake in the choice of words and in reducing the contract to writing had been made, and the defendant prayed that the contract be reformed to express the intention of the parties.

Evidence was introduced of the circumstances under which the contract was made and the option exercised, and of pertinent facts concerning the conduct of the oil business. The court's opinion was introduced by the words:

"I am called upon to construe a certain contract"—identifying the contract in question. "It is the contention," said the court, "of the plaintiff that the price to which reference is made in this contract under consideration in this suit was the price at which oil was being sold under contracts executed in 1913, before the expiration of this contract period in 1914. I do not think I can give it that construction without doing violence to the language employed, even without regard to the testimony produced on the trial of this case as to the meaning the witnesses understood was conveyed by the language of the contract. * * * The witnesses have plainly indicated that there is a difference between the market price and the contract price of oil. The market price means the price at which oil will be delivered to the purchaser, and the contract price is the price at which the producing company can sell oil for a period in future covered by an agreement. * * * So that I think, under the agreement the parties have made, and the language contained in this contract, the purpose of the parties was to give the Sun Company the right to renew this contract for a period of two years at the price for which the oil could be contracted at the time of renewal, and not at the price for which oil could be contracted for months in advance of the expiration of the agreement between the parties. I hold, therefore, that the Sun Company has the right under this contract to exercise its option of renewing its contract at the contract price of 60 cents per barrel."

A judgment was accordingly entered, from which judgment an appeal was taken. The appellants, in their brief filed therein, begin their argument by stating:

"There was no proof offered to show any mutual mistake, and that issue is not in this case. The question is: What does the language of the contract mean?"

The brief of the appellees was entirely confined to a consideration of the meaning of the contract. The Circuit Court of Appeals reversed the case. 230 Fed. 105, 144 C. C. A. 403. The opinion was confined exclusively to the construction of the contract. Neither in the opinion of the trial judge, nor in the brief of appellant, nor in the brief of appellee, nor in the opinion of the appellate court, was any reference made to the cross-action of the defendants. The opinion of the appellate court sustained the construction given by the District Court to the contract, except as to the meaning of the paragraphs hereinbefore recited with reference to the renewal price. The opinion concludes:

"Because of the effect it gave to the provision of the contract first above mentioned, that decree is reversed, and the cause is remanded for further proceedings not inconsistent with the conclusions above stated."

The cross-action was, under its very terms, effective only in the event that the construction refused by the District Judge and given by the appellate court should prevail. There was no occasion for the trial court to pass upon the question as to whether or not a mutual mistake was made in the drawing of the contract, because the trial court held that the contract meant exactly that which the defendants who filed the cross-action insisted that it meant. There could be no occasion to determine whether a mutual mistake was made in the use of language, when the language was construed to mean what the defendants filing the cross-action said that the parties understood it to mean.

It is quite possible that, notwithstanding the trial court had no reason and no occasion for passing upon the facts with reference to mutual mistake, the appellate court could have held that the evidence introduced in the first trial was available for determining the cross-action, and could have held that this evidence did not sustain the cross-action. Such a holding would have deprived the defendants of the very substantial right of having this issue of fact passed upon by the trial court; but it is possible that the appellate court could, nevertheless, have determined the issue. But no such issue was determined by the appellate court. No reference whatever was made to the cross-action. Until the filing of the opinion of the majority of the court in the present case, no court had ever undertaken to determine whether or not a mutual mistake was made by the parties in using the language which the trial court held to mean one thing, and which this court has held to be unambiguous and to mean another thing.

Upon the remanding of the case for "further proceedings not inconsistent with the conclusions above stated," the evidence introduced in the original case was again introduced. The trial court, assuming that the judgment of the Circuit Court of Appeals disposed of the case, refused the Sun Company a trial upon its cross-bill. In my opinion, the Sun Company was and is entitled to a trial upon this cross-bill. A determination that the parties to the contract did not mean to contract as the writing indicated could not be in conflict with a conclusion as to what the words actually meant. In the case of Mutual

Life Ins. Co. v. Hill, 193 U. S. 551, 24 Sup. Ct. 538, 48 L. Ed. 788, Justice Brewer says:

"When a case is presented to an appellate court it is not obliged to consider and decide all the questions then suggested, or which may be supposed likely to arise in the further progress of the litigation. If it finds that in one respect an error has been committed so substantial as to require a reversal of the judgment, it may order a reversal without entering into any inquiry or determination of other questions. While undoubtedly an affirmance of a judgment is to be considered an adjudication by the appellate court that none of the claims of error are well founded, even though all are not specifically referred to in the opinion, yet no such conclusion follows in case of a reversal. It is impossible to foretell what shape the second trial may take, or what questions may then be presented. Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided. An actual decision of any question settles the law in respect thereto for future action in the case. From the rule as stated above the appellate court is not compelled to pass upon all questions presented, and the parties and the trial court are bound only by those decided."

If additional authority on this question is desired, it is furnished in the following cases: *Sibbald v. United States*, 12 Pet. 488, 9 L. Ed. 1167; *Ex parte Union Steamboat Co.*, 178 U. S. 318, 20 Sup. Ct. 904, 44 L. Ed. 1084; *In re Sanford Fork & Tool Co.*, 160 U. S. 248, 16 Sup. Ct. 291, 40 L. Ed. 414; *Hawkins v. Cleveland*, 99 Fed. 323, 39 C. C. A. 538; *Taenzer v. Chicago, etc., Ry. Co.*, 191 Fed. 543, 112 C. C. A. 153.

Appellants are entitled to a trial in the District Court on the issues of fact presented by their pleadings, and they have never secured such a trial. The court in its present opinion holds that appellant has not been prejudiced by the failure of the trial court to pass upon the issue, upon the ground that the evidence was insufficient to support a finding for appellant. I do not undertake to express an opinion as to what judgment ought to be rendered on the facts of this case. I am, however, of the opinion that, if the District Judge had found for the appellants upon the issue of fact presented by the cross-action, an appellate court would not be justified in setting aside the finding.

The question as to the meaning of the clause under consideration has been definitely determined. Apparently all of the parties to the contract primarily construed the language as the District Judge construed it. At the date of the exercise of the option, the appellant construed it in the same way. According to testimony, it was not until after that that a lawyer could be found who gave it a different construction. This court has held that the language of the agreement is "not ambiguous"; that its meaning "is not doubtful." While this must be accepted as true, the circumstance that all the persons connected with the transaction primarily gave it a different meaning from that now given must be regarded as evidence of great weight in determining the issue of mutual mistake. The circumstance that it was not a contract of a character that parties would have been likely to enter into under the circumstances connected with the oil business is also entitled to weight in determining that issue. Parties were contracting with reference to a price two years subsequent to the date of the contract; it is not to be assumed that they intended to have the

price fixed by contracts of others which might have been entered into prior to the making of this contract, or at any time within two years thereafter; it is not to be assumed that they would have made any reference to good faith in the fixing of the price, if prices were to be determined by contracts entered into antecedent to the making of the contract providing for the renewal.

Even at the time the renewal was made, and the Vinton Company acknowledged the receipt of the notice of renewal, it called attention to contract prices of \$1, and stated that it understood that the contract "is renewed for two years at the price of \$1, or over, if we ascertain a higher contract is being paid." It cannot be assumed that the parties intended to make the contract dependent upon facts not even ascertainable. No other language can be as clear as that which is judicially determined to be unambiguous, but the circumstances detailed cannot be ignored in passing upon the question of mutual mistake. The testimony of the manager of the Sun Company leaves no question of the fact that he made a mistake, even if any additional evidence was required, when he renewed at \$1; the market price being 60 cents. Mr. Pew, the manager, testified that:

There was a discussion between the parties, before the renewal clause was placed in the contract, to the effect that the Sun Company, "to exercise its option, would have to do so on the basis of the highest market price then paid by pipe line companies at that time." "The agreement was that the Sun Company, if it exercised its option, would have to do so at the highest price that would be offered to them by any one else." "There was a very clear understanding of what we were trying to do; everybody understood it." "They claim these terms meant the contract price was the price being offered on contracts at that time; they understood it that way, and that is the way I think it is." "The other parties to the contract understood it that way." "I understand the contract price at any time is the contract price then being offered for contracts." "I was not mistaken as to our intention—the Sun Company's intention and the Vinton Petroleum Company's intention." "We discussed the matter with Stark and Brown as to market price, and we left it at the highest market price being paid by our competitors." "I think it was fully discussed. I know the opposite side, as represented by Mr. Abbott, who negotiated the contract, had the same idea." "Undoubtedly, we would not have made a contract for a long term of years, unless we could govern the prices of oil on renewal. We insist absolutely that that was to govern the price—the price at that time."

Mr. J. M. Abbott testified that he participated in negotiating the sale. He testified:

"Well, the thing was how to word it, so that it would be properly worded. I remember we discussed using the term 'market price,' and finally put it in the language that is in the contract now. My recollection is that there was not much discussion about it; it was just how to word it so as to convey the meaning intended to be conveyed." "My recollection is that the only thing that was considered was what was to be paid for the oil in the incoming year after the two outgoing years. The parties tried to put it down; I remember that we discussed the words 'market price,' and the language that was in the contract was finally put in." "Q. Well, did the parties reach a common agreement and understanding as to what should be paid for the oil sold by the Vinton Petroleum Company to the Sun Company after the termination of the two years period? A. I thought so at the time. Q. Now, you say that you were discussing as to how you should arrive at the option price to be exercised, and you discussed the market price, and substituted for that the highest

contract price? A. Yes, sir; to be paid by other companies or by any company in the field, by any pipe line company in the field."

"Question by the Court: You said awhile ago that you talked about the market price, and discarded that word, and used the words 'highest contract price.' Was there anything said before you discarded that term and used the other? You said for some reason the market price was concluded not to be the proper term to use and was discarded, and the term 'highest contract price' was used. A. Well, we wanted to get the benefit of all the competition, in order to get the highest price for the incoming years under the option of the Sun Company. Q. By competition you mean you were to get the best offers of other companies, and get the price that way; is that what you mean? A. You understand, if we had expressed it any other way, nobody would bid on Dr. Brown's oil, or the Vinton Petroleum Company's oil, rather, and by putting it at the highest price paid you would have the benefit of any deal that the Gulf Company would make with other parties, or the Texas Company would make with other parties, as a guide for the price."

The evidence clearly indicates that the officers of the Vinton Petroleum Company, contemporaneously with the renewal, or just prior thereto, undertook to secure offers for the oil, to be used as the basis for the charge to be made the Sun Company under the terms of the renewal contract. This is indicated by the testimony of the witness Harlan with reference to what took place between him and Mr. Dulinham, the secretary of the Vinton Company. To the like effect is the testimony of the witness Hanszen, who testified with regard to what took place between Mr. Nazro, of the Guffey Petroleum Company, and Mr. Gordon and Mr. Bankenstein. The testimony of W. H. Stark, a stockholder, and, at the time of the trial, general manager, of the Vinton Company, indicated that at the date of the renewal he understood the contract as the Sun Company did, and undertook to ascertain what was being paid at that time on contracts by the Texas Company and the Gulf Company. The testimony of this witness also indicates that the construction now contended for by them did not occur to any one of them until the day on which a letter was written, acknowledging receipt of the renewal notice, and suggesting that the price payable was to be determined by contracts made prior to that time. It was asked:

"Was not that the first time it ever occurred to you? A. I don't know; it might have been the first time. I do not say it was or was not. Q. Didn't Mr. Holland suggest that interpretation of the written contract then for the first time? A. I don't know; I think so, probably. Q. You think it is a fact? A. Yes, sir."

No effort is made to give all the testimony; but, if the District Judge had predicated a finding in favor of the defendants on the testimony of the witnesses referred to, this court would have been compelled to depart from its ordinary practice in order to set aside the finding.

A litigant has the right to a trial of his cause, and then to an appeal. At least, that is so ordinarily, and certainly that was the right of the Sun Company in this case. The right to have the trial court pass upon the issues of fact is a very substantial right. If the trial court finds for a party, he has thereafter the point of vantage; the burden of showing the incorrectness of the judgment is upon his adversary. The appellate court will not reverse the finding of the trial court upon a

matter of fact, unless it is clearly erroneous. The course which this case has taken has deprived the Sun Company of this substantial right. It has not been permitted to secure the judgment of the District Court upon whether or not the parties intended to enter into a contract such as the Sun Company insists was entered into. If the trial court had passed upon the issue of fact presented by the cross-bill, and had made a finding in behalf of the Vinton Company, a judgment of affirmance would, doubtless, have been in accordance with the function and practice of an appellate court. If his finding had been in behalf of the Sun Company, the evidence heretofore reviewed would have rendered necessary an affirmance.

The case should be remanded, to give the Sun Company that which it is entitled to—a finding by the District Judge upon the merits of the cause submitted by its cross-action.

BIRGE-FORBES CO. v. HEYE.

(Circuit Court of Appeals, Fifth Circuit. February 11, 1918.)

No. 3065.

1. JUDGMENT ⇨721—CONCLUSIVENESS—MATTERS CONCLUDED.

Where defendant, an American exporter of cotton, agreed that the rules of the cotton exchange of which plaintiff, its foreign broker, was a member, should govern arbitration proceedings, and pursuant to the rules of the exchange plaintiff paid some of the awards against defendant, a judgment for plaintiff in an action against defendant, though limited to the amount of plaintiff's payment, was, the entire awards being involved, a conclusive adjudication as to their validity.

2. LIMITATION OF ACTIONS ⇨2(1)—FOREIGN STATUTES—AGREEMENT FOR ARBITRATION AND AWARD.

Where an American exporter of cotton, contemplating that there would be controversies as to quality, agreed with its German broker that such controversies should be arbitrated pursuant to the rules of the cotton exchange of which he was a member, and, arbitration being thereafter had, the broker paid awards against his principal, the American exporter, German Civil Code, § 477, declaring that the claims for reduction or for compensation on account of the absence of a promised quality are barred by prescription in the case of movables in six months after delivery, unless the seller has fraudulently concealed the defect, has no application, and the broker's action on account of awards paid cannot be defeated, though at the time of payment action was barred.

3. EVIDENCE ⇨84—PRESUMPTIONS—VALUE OF GERMAN MARK.

In action by German broker against his American principal to recover on account of payments made as the result of awards in arbitration proceedings against the principal, it will be presumed, payment having been made in German marks, that the mark was then at its normal value, notwithstanding at time of trial it had, as a result of a subsequent war, to which Germany was a party, greatly depreciated.

4. APPEAL AND ERROR ⇨1047(1)—REVIEW—HARMLESS ERROR—DEPOSITIONS.

The refusal of a federal court for Texas to suppress depositions taken in Germany, on the ground that they had not been transmitted to the court as provided by the Texas statutes, was not reversible error, though such depositions, because of a war between Germany and other countries, had been transmitted from Germany to the State Department at

Washington, and thence mailed to the court, for, had the depositions been committed to the mails in Germany, they might well never have reached their destination.

5. JUDGMENT \Leftrightarrow 731—CONCLUSIVENESS—MATTERS CONCLUDED.

Where plaintiff, a German broker, in pursuance of the rules of the cotton exchange of which he was a member, paid awards against his principal, an American exporter, a judgment in a previous action by plaintiff against his principal, which restricted his recovery to the amount of awards paid, cannot be deemed an adjudication against plaintiff's right of recovery on payment of the other awards; the judgment disclosing that it was held plaintiff's right of action as to the awards unpaid had not accrued.

6. WAR \Leftrightarrow 10(2)—TRADING WITH THE ENEMY ACT—EFFECT.

Under Trading with the Enemy Act Oct. 6, 1917, c. 106, 40 Stat. 411, a writ of error to review a judgment in favor of an alien, who became an alien enemy before disposition thereof, need not be held in abeyance; but, the judgment being upheld, it should be modified, so as to direct payment to the clerk of the court, and by him to be transferred to the Alien Property Custodian, without prejudice, however, to the rights of any person, not an alien enemy, to establish an interest therein.

In Error to the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge.

Action by Carl R. Heye against the Birge-Forbes Company. There was a judgment for plaintiff, and defendant brings error. Modified and affirmed.

Jesse F. Holt and H. O. Head, both of Sherman, Tex., for plaintiff in error.

Robert Harrison and Robert M. Rowland, both of Ft. Worth, Tex., for defendant in error.

Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

BATTS, Circuit Judge. Suit by Carl R. Heye, defendant in error, hereinafter called plaintiff, against the Birge-Forbes Company, plaintiff in error, hereinafter called defendant, was filed December 4, 1914. The petition alleged that plaintiff was a citizen of Germany, and the defendant, a Texas corporation; that in 1901 defendant, who was engaged in business of buying, selling, and exporting cotton, made a contract with plaintiff, then a cotton broker in Bremen, whereby he became selling agent in that city for defendant; that this relation continued until May, 1911; that the contract provided that all sales were to be made subject to and governed by Bremen law and arbitration and the rules of the Bremen Cotton Exchange; that between October 1, 1910, and about January 1, 1911, plaintiff made sundry sales for defendant to a number of different buyers; that disputes and controversies arose between the seller and the buyers as to the quality of the cotton sold, the buyers claiming that the cotton delivered was not up to the quality and description offered by defendant, and upon which the prices were based, and that the cotton was not in accordance with the contracts of sale; that these claims and disputes were submitted to arbitration in accordance with the rules of the Cotton Exchange, the

final result of such arbitration being awards aggregating 312,749.30 German marks (an exhibit in detail of these sales and awards was attached to the petition); that in some of the arbitrations appeals were taken to the appeal committee, and were regularly decided and the results certified, as indicated by another exhibit; that in the arbitration proceedings defendant was represented by controllers selected by it; that the proceedings were in all respects regular, and the awards made in good faith, and the defendant duly notified of the results; that by the final determination of the arbitrations plaintiff, by virtue of his contract, and under the rules of the Exchange, and by the terms of the contracts delivered by him to purchasers of the cotton, became bound and legally liable to pay at once to the purchasers the awards made by the arbitrators; that, on account of the matters alleged, plaintiff brought suit against defendant in the court in which this suit was pending, the suit being No. 156 on the law docket, and on May 23, 1913, recovered a final judgment for \$43,082.64, the sum including \$36,610.96 that had theretofore been paid by plaintiff to the buyers on the arbitration, \$1,730.16 for weight claims and other items mentioned in the pleadings, and interest on those sums to judgment; that this judgment was in full force and effect, and plaintiff averred that it was a binding and conclusive adjudication of the fact that the arbitrations were valid, and that the result of the awards had not been set aside, but remained in force; that, after the rendition of the judgment, plaintiff paid the remaining sums due on the awards, to wit, \$38,209.56. Plaintiff prayed for judgment for this sum, with interest.

Defendant, answering, attacked the awards made by the arbitrators, and further pleaded that, under the laws of Germany, each of the claims was barred by limitation, and that if the plaintiff made the payments, as he alleges, he made them long after they were barred by limitation under the laws of Germany as to both the plaintiff and the defendant, and when he was under no legal obligation to pay them.

Judgment was for plaintiff under instructions from the court.

The substantial issues involved in the trial of the case are indicated by the assignments of error of defendant after judgment against it, to the effect that there was error: (1) In charging the jury that the judgment of May 23, 1913, adjudged the validity of the awards involved in this suit, and especially in charging that that judgment adjudicated awards in excess of \$36,610.96; (2) in refusing defendant's requested instruction to the effect that the evidence was not sufficient to authorize the finding that any awards were rendered in favor of any of the buyers of cotton sold by plaintiff, as agent of the defendant; (3) in the charge that the claims were not barred by the laws of limitation in Germany; (4) in instructing a verdict for plaintiff for \$41,536.79; and (5) in overruling the defendant's motion to quash the depositions of Oscar Polletin and Carl R. Heye.

[1] The substantial questions with reference to the validity of the awards by the Bremen Cotton Exchange and the defendant's liability thereon were involved in the case referred to in plaintiff's petition, No. 156 in the District Court, between the same parties. It appears, however, in that case that only a part of the award for which the

plaintiff herein became liable had been paid by him, and the court instructed the jury that the plaintiff could not recover for any part of the amount for which he had become liable, except to the extent that he had actually paid it. He thereupon directed a verdict for the amount so paid, and the jury returned a verdict to this effect:

"We find for the plaintiff in the sum of \$36,610.96, being the amount paid by the plaintiff on the awards made by the Bremen arbitrators upon the differences in the cotton as sold and that actually delivered at Bremen to the buyers at that place, together with 6 per cent. interest on both of said sums from May 1, 1911."

A judgment was entered, in which the verdict of the jury was incorporated, and by which it was adjudged that the plaintiff recover of defendant the sum of \$43,082,64, with interest, "said sum being the principal and interest of such parts of the liabilities alleged in plaintiff's pleadings to have been incurred by him as he has up to this time actually paid, and as to which a cause of action in his favor against the defendant has already accrued."

The judgment from which quotations have just been made, considered in connection with the pleadings, the charge of the court, and the verdict of the jury, necessarily involve the proposition that the defendant was bound by the awards in arbitration, which were alleged in the petition, and which became the basis of the suit. It is apparent that the only circumstance which prevented the plaintiff from recovering a judgment for the total amount sued for was the fact that, while he had become liable to pay the entire amount of the awards, some of the awards had not actually been paid by him. The material and essential issues of law and fact presented in the present case were presented by the pleadings in the previous case, were the subjects of the introduction of evidence, of argument of counsel, of discussion by the court, and were necessarily ruled upon in giving the judgment rendered in that case. If the defendant was not bound by the arbitration awards, the judgment in that case was erroneous. If it was not so bound, the judgment could not have been rendered. The former case necessarily involved a determination of the basic facts essential to recovery in this case. With reference to this matter it has had its day in court, and is not entitled to a second determination of it. A judgment is conclusive in a subsequent action between the same parties of all issues definitely adjudicated.

Evidence was introduced to establish the identity of the awards sued on in this case with the awards which were passed upon in the other case, but for which judgment was not rendered on account of the circumstance that plaintiff had not yet discharged them.

[2] The plea of limitation is based upon section 477 of the German Civil Code, to the effect that:

"The claim for cancellation or reduction and the claim for compensation on account of the absence of a promised quality are barred by prescription, unless the seller has fraudulently concealed the defect, in the case of movables in six months after delivery; in the case of land, in one year after the transfer. The period of prescription may be extended by contract."

The parties to this suit, in entering into their contract, realized that there would be differences between them and the purchasers with

reference to the quality and grade of the cotton sold, and the agreement provided that these matters would be committed to the decision of the board of arbitration of the Bremen Cotton Exchange. No controversy arose with reference to these matters until a number of years after the contract was signed. When they did arise they were submitted to the arbitrators, as contemplated by the contract. The findings of the arbitrators being objected to, an appeal was taken and the findings affirmed. When it was determined by the arbitration appeal that the cotton sold by the defendant to German buyers failed in quality, grade, and staple, and that certain amounts of money should be paid, the awards were no longer claims for compensation of the character described by section 477, but had become ascertained and liquidated demands. It has not been made to appear that this provision in the contract was one which could not be legally made. Considering the fact that the parties ultimately liable for deficiencies in grade, etc., resided in a distant country, and that the facts with reference to their liability could not be promptly developed, and that recovery against them, especially on small claims, would have been expensive and difficult, the provision as to arbitration was one which it was perhaps necessary for them to make, in order to successfully conduct their business. The provision inured to the benefit both of their agent and his customers. It took the place of their right to appeal to the courts—a right rendered unsatisfactory, under the circumstances, on account of the short period of limitation. The buyers received what was due to them from Heye, in accordance with the contracts made with them by Heye, under authority from defendant; and, under the contract which gave this authority, he is entitled to be reimbursed. Even if Heye had been in a position to defeat the claims under a plea of limitation, not having so defeated them, but having done that which the contract contemplated that he should, and which common honesty required he should do, he is entitled to reimbursement from his principal. As between him and defendant, section 477 manifestly has no application.

[3] One of the assignments raises the question as to whether, in the rendition of a judgment, the German mark should be computed at its normal value, or at the value which it had at the time of the trial; the former being 23.8 cents, and the latter 18 $\frac{1}{8}$ cents. The purpose of the judgment is to make whole the plaintiff for the amount which he paid out in discharging the obligations of his principal. The evidence failing to disclose any depreciation of the German mark at the time of this payment, the assumption should be that the value of the mark was at that time the normal value, and the judgment should be predicated upon this value.

[4] The depositions of the witnesses Polletin and Heye were apparently taken under the Texas statute. These depositions were not returned directly by the officer taking them, nor directly by any one to whom he intrusted them. They were taken in Germany, and were transmitted to the United States in the only way that was practicable; that is, by giving them to an American Consul, and having them transmitted to the Department of State, and then to the clerk of the

court through the mail. This was not in absolute accordance with the procedure prescribed by the Texas statute; and it may be, under the strict rules which have been announced in that state, the depositions would have been suppressed. There could be no substantial reason for suppressing these depositions, based upon the fact that they went primarily to an officer of the United States, and then to the State Department, before being intrusted to the mails. No effort is made to attack the integrity of the depositions. The officer who took the depositions certified to them, and inclosed, sealed, and addressed them, as required by the Texas statute. When they were forwarded, Germany, was at war. If they had been sent by mail in the ordinary way, they would have been exposed to hazards to which packages sent in the manner adopted were not exposed. They would have been liable to seizure and search, involving the opening of the envelopes containing them. A result would have been to make it questionable whether what came to the hands of the clerk was the depositions as they were when deposited in the mail in Germany. The failure strictly to conform to the statutory method of forwarding the depositions involved no injury to the plaintiff in error. The judgment under review is not to be reversed because of a ruling which was not harmful. Without reference to whether the District Court was correct in the construction given to the stipulation between the attorneys as to the taking of these depositions, we are of the opinion that the overruling of the motion to suppress them was not reversible error.

[5] It is insisted that the claim involved in this suit was a part of the claim set up in the former, and that the allowance therein of part of the claim and the rejection of the balance was a final adjudication of the whole. This would ordinarily be the effect. Considering, however, the language of the opinion, of the verdict, and of the judgment, it sufficiently appears that it was not the purpose to do more than determine that the claim now asserted had not then matured. The holding was that the right was inchoate, and that the cause of action had not yet arisen.

[6] Since the trial of this case the plaintiff has become an alien enemy. Upon the authority of the case of *Owens v. Hanney*, 9 Cranch 180, 3 L. Ed. 697, and *Plettenberg v. Kalmon* (D. C.) 241 Fed. 605, we hold that it is not necessary that the disposition of this appeal be held in abeyance. We will, however, under the terms of the act, known as the "Trading with the Enemy Act," of October 6, 1917, direct that the judgment be modified, to require that the amount of the judgment be paid to the clerk of the trial court, to be by him turned over to the Alien Property Custodian.

The judgment, modified as indicated, is affirmed.

Modified and affirmed.

Extract from the Minutes of February 22, 1918.

The judgment heretofore, on the 11th day of February, 1918, rendered in this case, is so amended as to be without prejudice to the rights of any one, not an alien enemy, to establish an interest, by proper proceedings in the District Court from which the appeal herein

was taken, in the judgment herein rendered, and to have the amount of such interest paid to such person, instead of to the custodian of alien enemy property.

SAUVE v. M. L. MORE INV. CO. (two cases).*

In re MURRAY.

(Circuit Court of Appeals, Eighth Circuit. February 1, 1918.)

No. 4804 (181).

1. BANKRUPTCY ⚡446—REVIEW—PETITION TO REVISE.

On petition to revise, the facts cannot be reviewed.

2. BANKRUPTCY ⚡451—"CONTROVERSY ARISING IN BANKRUPTCY PROCEEDING"—REVIEW.

A proceeding on petition by a trustee to sell lands, on the theory that a warranty deed evidenced an equitable mortgage, opposed by the grantee, is a "controversy arising in a bankruptcy proceeding," instead of a proceeding in bankruptcy, and hence an appeal to review a judgment therein lies under the general appellate jurisdiction of the Circuit Court of Appeals; the case not being one in which Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 544, specifically provides for an appeal.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Controversy Arising in Bankruptcy Proceedings.]

3. MORTGAGES ⚡33(5)—CONVEYANCES ABSOLUTE ON THEIR FACE.

Where the bankrupt, being in financial difficulties, and the mortgagees being about to foreclose, by warranty deed conveyed a parcel of the land to an investment company, which at the same time gave her an option to repurchase the premises at any time within a period of seven months, the conveyance was, as it declared, an absolute one; it appearing that the parties so agreed, and that as part of the transaction, which was a most generous one to the bankrupt, she had an option of selling the premises within a prescribed period at their fair value.

Petition to Revise Order and Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

In the matter of the bankruptcy of Naomi Murray. Petition by David B. Sauve, trustee, for sale of lands alleged to belong to the bankrupt, opposed by the M. L. More Investment Company, a Colorado corporation. A finding by the referee in favor of the trustee was reversed on certificate for review, and the trustee appeals and petitions to revise. Petition to revise dismissed, and judgment affirmed.

James H. Brown, of Denver, Colo., for petitioner and appellant.

Henry McAllister, Jr., of Denver, Colo. (Robert M. Work and George C. Twombly, both of Ft. Morgan, Colo., on the brief), for respondent and appellee.

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

AMIDON, District Judge. Sauve is trustee in bankruptcy of the estate of Naomi Murray. He filed a petition before the referee, stating that a quarter section of land with appurtenant water rights were in his possession as part of the estate, and that it was subject to a

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

*Rehearing denied May 10, 1918.

first mortgage for \$7,500. The petition then states that the property was subject to various liens, which are described, and finally to an equitable mortgage evidenced by warranty deed, given by the bankrupt and her husband to the M. L. More Investment Company, which, as the petition says, was intended to secure the payment of an indebtedness of \$4,500. The trustee asked that the property be sold subject to the first mortgage for \$7,500, but free and clear of all other mortgages and liens whatsoever, and prayed that all parties in interest be cited to show cause why such an order should not be made. The Investment Company answered the petition. It asserted that the warranty deed was what it purported to be, an absolute conveyance. It denied that the bankrupt, or her trustee, had ever been in possession of the property since the execution of the deed, save and except only as tenant of the Investment Company under a written lease. It prayed that the petition be dismissed upon the merits. The issue thus raised was heard upon elaborate evidence by the referee, and decided in favor of the trustee. The cause was then taken before the District Court on certificate for review, and the decision of the referee reversed.

The trustee has brought the judgment of the District Court here for review by petition to revise and by appeal.

[1, 2] We must first decide which of these methods of review is proper. That depends upon whether the matter constitutes a "proceeding in bankruptcy" or a "controversy in a bankruptcy proceeding." If the former, the petition to revise is not proper, as a decision of the case requires the consideration of conflicting evidence (*Wm. R. Moore Dry Goods Co. v. Brooks*, 240 Fed. 943, 945, 153 C. C. A. 629), and the decision below is not one from which the bankruptcy law allows an appeal. If the latter, then the appeal lies under the general appellate jurisdiction of this court. Under the decisions of the Supreme Court and of this court, it is clearly a "controversy in a bankruptcy proceeding." *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 299, 24 Sup. Ct. 690, 48 L. Ed. 986; *Knapp v. Milwaukee Trust Co.*, 216 U. S. 545, 30 Sup. Ct. 412, 54 L. Ed. 610; *Houghton v. Burden*, 228 U. S. 161, 164, 33 Sup. Ct. 491, 57 L. Ed. 780; *In re Hartzell*, 209 Fed. 775, 126 C. C. A. 499. See, also, *Barnes v. Pampel*, 192 Fed. 525, 113 C. C. A. 81.

The petition to revise will therefore be dismissed.

On the merits the facts are complex. We shall state only those which seem to us controlling.

[3] Mrs. Murray had owned the property since 1910, and used it for raising sugar beets and diversified farming. In the month of May, 1915, her financial affairs were desperate. She had made default upon both principal and interest of the first mortgage for \$7,500, and the holder had been compelled to pay a large sum for delinquent taxes and water assessments. There was then due upon that mortgage \$8,736.70, and the mortgagee was threatening to foreclose. There was a second mortgage to Roediger, president of the Investment Company, upon which there was due, and in default for principal and interest, \$1,446.52. The holder of that mortgage was also threatening to foreclose. In addition to those previously paid by the first mortgagee,

there were delinquent taxes and water assessments for \$984.29. Two judgments had been recently recovered against Mrs. Murray, aggregating \$705.62. A chattel mortgage upon her horses and farm machinery was past due, and was in process of foreclosure. Upon this there was due, for interest and costs, \$1,030.35, making a total indebtedness of \$12,903.48, all of which was pressing for payment. The horses and machinery necessary for the operation of the farm had been seized under the chattel mortgage, thus depriving Mrs. Murray of the indispensable means of tilling the farm. At that time the property was worth about \$15,000. Mrs. Murray had exhausted every means to meet the crisis in her affairs. She had appealed to her relatives. A scheme had been developed by which her neighbors were to give a joint note to provide for all of the indebtedness, except the principal of the first mortgage. But after a full canvassing of her matters this fell through. A Mr. Stitt was on the point of buying the property for \$15,000, if satisfactory arrangements could be made as to the terms of payment, and certain other minor matters. At this stage a Mr. Giese, superintendent of the Great Western Sugar Company, a friend of Mrs. Murray, and a business man of large experience, intervened in her behalf, and applied to Mr. Roediger, the president of the M. L. More Investment Company, to see if some arrangement could not be made to meet the crisis in her affairs. The matter was fully canvassed between him, Mr. Roediger, and Mrs. Murray.

This conference resulted in an agreement which was reduced to writing, and embodied in several instruments. Those which concern us chiefly are the following: (a) The warranty deed conveying the land and water rights to M. L. More Investment Company. (b) An option agreement from that company to Mrs. Murray, granting her an option to purchase the property on or before January 1, 1916, upon payment of the amount due the Investment Company for prior debt, for advances made to meet the crisis, and for future advances during the cropping season. This instrument stated in unmistakable terms that it "is not nor is it intended to be a mortgage by the party of the second part to the party of the first part"; that it constitutes only "an option to purchase granted to the party of the second part"; and that "the party of the second part is not personally obligated to make such purchase or to pay such sums or any part thereof to the party of the first part." (c) A contract by Mr. Roediger to Mrs. Murray, agreeing to pay her \$15,000 any time on or before January 1, 1916, for the surrender of her said option to purchase the property. (d) A lease of the property from the Investment Company to Mrs. Murray for the cropping season from February 28, 1915, to February 28, 1916.

These instruments provided Mrs. Murray with funds to meet all of her pressing obligations, and with new advances indispensable for the farming season, and granted her an option to purchase the property at any time prior to January 1, 1916, upon repaying to the Investment Company the amount of its old debt and new advances. It further secured to her an absolute obligation on the part of Mr. Roediger, a responsible man, to buy the property at any time during the term pro-

vided by the option for the highest price that she had been offered for it. One of the objects of both parties to the agreements was to save the expense of foreclosing the mortgage, and yet secure to Mrs. Murray all the rights of a redemptioner for a term longer than the six months allowed by the statutes of Colorado for redemption. Before these instruments were signed, Mrs. Murray received the advice of an able and experienced lawyer, who had been her counselor during all the time that she had been trying to meet the crisis in her affairs. He sat at her side and read over aloud with her every one of the instruments, explained their provisions and legal effect, and made sure that they accurately expressed the things that she had agreed to. They were then signed and delivered.

Because of the different views of the referee and the trial court, we have carefully studied the entire evidence and briefs of counsel. As the result of that study we are convinced that the transaction, viewed from the standpoint of Mrs. Murray's situation, was wise, and from the standpoint of the Investment Company and Mr. Roediger, its president, was fair and just, not to say generous. The evidence, instead of showing that the warranty deed was intended as a mortgage, shows to a moral certainty that such was not its purpose in the mind of any of the parties. Why has an arrangement thus providently made failed to accomplish its purpose? Because Mrs. Murray wholly failed to observe its provisions. She waited until the 10th of January, 1916, and had then developed a new scheme for the sale of the property, and applied to the Investment Company for an extension of time during which she hoped to consummate that arrangement, and sell the property for a larger sum than \$15,000. The Investment Company refused to extend the time. She promptly filed her voluntary petition in bankruptcy. A trustee was presently elected who immediately entered upon this fruitless litigation.

The law which controls this case is plain. It is set forth in *Wallace v. Johnstone*, 129 U. S. 58, 9 Sup. Ct. 243, 32 L. Ed. 619; *Coyle v. Davis*, 116 U. S. 108, 6 Sup. Ct. 314, 29 L. Ed. 583; *Howland v. Blake*, 97 U. S. 624, 24 L. Ed. 1027. The decision of the case needs only a fair and impartial application of the facts to well-established rules of law.

The judgment is affirmed.

BANK OF FOLLANSBEE v. FOLLANSBEE LUMBER CO.

In re THOMAS & LOTT.

(Circuit Court of Appeals, Fourth Circuit. January 3, 1918.)

No. 1555.

1. MORTGAGES ↔178—PRIORITY—MECHANICS' LIENS.

Where a West Virginia materialman failed to file a lien within the period prescribed by the state law, the lien was lost, and could not, as against a mortgagee whose mortgage was subsequent to the lien, be revived by delivery of a trifling amount of material after expiration of the period, particularly where that was a mere subterfuge to revive the lien, and the contractor had become notoriously insolvent.

2. COURTS \Leftrightarrow 366(1)—FEDERAL COURTS—STATUTES—CONSTRUCTION.

Federal courts are bound by a decision of the highest state court construing a state statute.

3. MECHANICS' LIENS \Leftrightarrow 48—PERFECTION—USE OF MATERIALS.

The West Virginia statute (Code 1913, c. 75 [secs. 3842-3857]) by plain implication, if not by direct statement, requires a lien claimant to show that materials furnished by him have actually been used in the building on which the lien is claimed.

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

In the matter of the bankruptcy of Thomas & Lott. Petition by the Follansbee Lumber Company, a corporation, opposed by the Bank of Follansbee. From a decree for petitioner, the bank appeals. Reversed and remanded.

R. L. Ramsay, of Wellsburg, W. Va., for appellant.

F. R. Anderson, of Wellsburg, W. Va. (J. F. Cree, of Wellsburg, W. Va., on the brief), for appellee.

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

KNAPP, Circuit Judge. In September, 1915, the appellant, Bank of Follansbee, made a loan of \$1,500 to the firm of Thomas & Lott, building contractors, payment of which was secured by a deed of trust on a city lot in Follansbee belonging to M. K. Lott, one of the partners. Thomas & Lott were then engaged in building a house on this lot under contract with the owner, and were getting the materials therefor from the appellee, Follansbee Lumber Company, in pursuance of a verbal agreement previously made. On March 28, 1916, the lumber company served on Lott a notice of mechanic's lien for the amount claimed to be due for materials furnished prior to that date. This notice was recorded in the proper clerk's office on April 10th, and a foreclosure suit brought in September following, subject to the jurisdiction of the bankruptcy court, to enforce the alleged lien. The validity of this lien is the question to be determined, and the facts for consideration appear to be these:

In the notice served on Lott is a statement of account which begins with the heading, "Materials Furnished as per Estimate," and the figures "1915-1916." Under this is a list of some 77 items, without dates or prices, and the notation at the end, "Amount estimate \$827.00." Then follows an itemized list of "Extras," with dates and prices, amounting to \$196.84, making a total of \$1,023.84. Credit is given for \$363.29, for "materials not furnished or returned," leaving a balance of \$660.55, for which the lien is claimed. All these materials except two insignificant items, were furnished on or before December 3, 1915, and about this time, apparently, the insolvency of Thomas & Lott became generally known. Their contract to build the house in question had been abandoned without completion, and Thomas had left the county. Meetings of creditors were

held, which the president of the lumber company attended, and at which it was shown that the firm was hopelessly involved; but no plan of settlement was agreed upon, and bankruptcy presently followed. Whilst affairs were in this situation, the lumber company, at the alleged request of Lott, on February 1, 1916, delivered on the premises a few joints of sewer pipe, for which \$1.38 was charged, and on March 2, 1916, a couple of cellar sash, for which \$1.70 was charged. This was done, as the testimony indicates, not with any view of carrying out its agreement to supply the contractors with materials for the house, but for the sole purpose of extending the time for filing a lien. Neither of these items was embraced in the original estimate, and it is not proved that either of them was ever put into the building. In the bankruptcy proceedings the house and lot were sold free from incumbrance and the proceeds brought into court. Thereupon the lumber company filed a petition for the payment of its claim out of the fund, and this the bank resisted on the ground that the asserted lien was invalid.

[1] Under the West Virginia statute (Code 1913, c. 75 [secs. 3842-3857]), as we understand it, a lien claimant for materials is required (1) to file with the owner of the property an itemized account within 35 days after he shall have ceased to furnish materials; (2) to file with the clerk of the county for record a just and true account of the amount due and owing, after allowing all credits, with a description of the property, within 60 days after ceasing to furnish materials; and (3) to begin suit to enforce the lien within 6 months thereafter. If, therefore, March 2, 1916, the date when the item of cellar sash was delivered, be taken as the date when the lumber company "ceased" to furnish materials, it follows that the lien was filed in time; otherwise, it was obviously filed too late. As to this item, as well as the sewer pipe delivered February 1st, the learned District Judge in his opinion says:

"I think there can be no reasonable doubt that, at the time these two items were 'furnished,' the lumber company had ceased, for more than the statutory period of 60 days, to furnish material; that the furnishing of them was nothing more nor less than a subterfuge to save it from the legal consequence of its negligence in failing to file its lien in time; and that these two items of material were not only not used in the building, but that the lumber company did not expect them to be so used. This for the reason that, at the time they were furnished, the bankrupt contractors had ceased work on the building, were absolutely insolvent, and this lumber company and other creditors were consulting as to the best methods for closing them out and realizing from their assets payment of their debts."

As above stated, the testimony supports the findings contained in the paragraph quoted, and we are of opinion that these facts should be held to invalidate the lumber company's lien. The question here is not between materialman and owner, or between materialman and contractor, but between materialman and the bank, which loaned its money, while the house was in process of erection, on the security of the property. That security was subject to whatever right the lumber company then had to a mechanic's lien for the supplies it had furnished. But, as the lumber company failed to assert its right by filing

a lien within the prescribed period, its right was lost by the delay, and could not be revived by delivering for that purpose a trifling amount of material at a time when otherwise it would be barred. 27 Cyc. 147. If the lumber company had proceeded within the required time, even reckoned from the 3d of December, its lien would have had priority over the deed of trust. The bank was presumed to know that its security was subordinate, so long as the lumber company had the right to file a lien, and was bound to take such measures as it could to protect itself while that situation continued. But, when the statutory period was allowed to pass without action, the bank was justified in assuming that the deed of trust had become the first claim on the property. As was said in *Inman v. Henderson*, 29 Or. 116, 45 Pac. 300:

"One who takes a mortgage on land after the construction of a building thereon has been commenced holds it subject to any valid mechanic's lien the claim of which may be filed within the time required by statute; * * * but the interests of the mortgagee cannot be affected by any agreement between the owner and the lien claimant extending the time in which to file such claim, even if such agreement is valid as between them."

Moreover, in this case, the insolvency of Thomas & Lott and their abandonment of the contract to build the house were known to the lumber company as early as December. They were absolved thereby from any obligation to complete the supply of materials called for by their verbal agreement, whatever its terms, and had then the undoubted right to file a lien for the materials theretofore furnished. But for some reason they refrained from taking any steps to assert their lien until it was discovered that the time for doing so had elapsed. Under these circumstances, it seems clear that they could not re-establish their right, and avoid all the consequences of their negligence, by delivering on the premises an insignificant quantity of merchandise for no other purpose than to postpone the date when they "ceased" to furnish materials. As against the deed of trust their attempt to do so must be regarded as futile and ineffective. We are persuaded that the lumber company could not thus enlarge the time for filing a lien.

[2, 3] We are also of opinion that the lien is invalid because it is not shown that these belated items were ever put into the building. The West Virginia statute by plain implication, if not by direct statement, requires the lien claimant to show in a case like this that the materials furnished by him have actually been used in the building on which the lien is claimed. So the Supreme Court of Appeals of that state held in *McConnell v. Hewes*, 50 W. Va. 41, 40 S. E. 436, and we are bound by its construction of the statute. On this ground, also, the lien in question must be held invalid.

The case of *Canton Roll & Machine Co. v. Rolling Mill Co.*, 168 Fed. 465, 93 C. C. A. 621, which constrained the court below to sustain the lien, turned mainly upon other questions, and seems distinguishable from the case at bar. Upon the facts here presented it is enough to say that we are impelled to the conclusions above stated, even if they appear in some degree at variance with the former decision.

The decree must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

Reversed.

SHRYOCK v. S. P. CALKINS & CO.

(Circuit Court of Appeals, Fourth Circuit. January 10, 1918.)

No. 1509.

1. LIBEL AND SLANDER ⇨9(1)—ACTIONABLE LIBEL—PUBLICATION TENDING TO INJURE IN BUSINESS OR OCCUPATION.

A written publication, which affects one injuriously in his trade or calling and contains imputations against his honesty and integrity, and which would as its natural and proximate consequence occasion pecuniary loss, constitutes a prima facie cause of action and is libelous per se, and the right follows to such damages as must be presumed to proximately and necessarily result from such publication.

2. LIBEL AND SLANDER ⇨80—ACTION FOR LIBEL—PLEADING.

The logical elements of a declaration for libel are, first, the creating or making of a written document either libelous per se or libelous by reference to circumstances, and, next, its publication, and no further particulars are necessary to fully inform defendant of plaintiff's claim. If the pleadings set up these facts, and the libelous character per se of the document and its publication be proven, plaintiff is entitled to some damage, the amount of which it is peculiarly within the province of the jury to determine under all the circumstances of the case.

3. LIBEL AND SLANDER ⇨99—ACTION FOR LIBEL—PLEADING.

Defendant in an action for libel is not entitled to a bill of particulars from plaintiff, setting out the persons to whom the libel was published, with a statement of the amount of damages claimed because of each such publication.

4. LIBEL AND SLANDER ⇨104(1)—ACTION FOR LIBEL—EVIDENCE OF MALICE.

A copy of a libelous publication sent by defendant to plaintiff is competent evidence in an action for the libel on the question of malice.

5. LIBEL AND SLANDER ⇨50½—PRIVILEGED COMMUNICATION—QUALIFIED PRIVILEGE.

Where, in response to a request by the publisher of a trade paper and rating book for information of his complaint against plaintiff, defendant, instead of stating the facts as claimed by him, furnished a copy of a circular, which he wrote and had printed, containing libelous matter concerning plaintiff, such communication was not privileged.

6. LIBEL AND SLANDER ⇨50—PRIVILEGED COMMUNICATION—QUALIFIED PRIVILEGE.

The fact that a defendant, in voluntarily sending circulars containing libelous matter concerning plaintiff to others, asked their opinion as to the propriety of publishing the same, did not render such communications privileged.

7. LIBEL AND SLANDER ⇨124(1)—ACTION FOR LIBEL—INSTRUCTIONS.

Instructions given by the court in an action for libel *held* without error.

8. EVIDENCE ⇨472(1)—MATTERS IN ISSUE—ACTION FOR LIBEL.

On the trial of an action for libel, it was not error to exclude testimony of a witness as to whether he considered the alleged libelous publication given him a confidential communication.

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

Action at law by S. P. Calkins & Co. against F. A. Shryock. Judgment for plaintiffs, and defendant brings error. Affirmed.

Harry R. Kern and T. W. Harrison, both of Winchester, Va. (R. T. Barton, Jr., of Winchester, Va., on the brief), for plaintiff in error. James H. Malone, of Memphis, Tenn., and Randolph Harrison, of Lynchburg, Va. (Harrison & Long, of Lynchburg, Va., on the brief), for defendant in error.

Before PRITCHARD and WOODS, Circuit Judges, and SMITH, District Judge.

SMITH, District Judge. F. A. Shryock, the plaintiff in error in this case, was an apple dealer in Frederick county, Va., and in the latter part of 1913 sent a postal card, which was received by S. P. Calkins & Co., the defendants in error, advertising his apples. S. P. Calkins & Co. were fruit brokers carrying on business in Memphis, Tenn. As the result of subsequent telegraphic communications between the parties Calkins & Co., as brokers, sold for Shryock 1,000 barrels of York Imperial apples at \$3.75 per barrel, less brokerage of \$10 per car, of which five carloads were sold to M. E. Carter & Co. of Memphis, to whom they sold one car to be shipped about November 3d and another car about November 10th. These two first cars were shipped, and on receipt of the first it was rejected by Carter & Co. as being in bad condition, and, under subsequent telegraphic communications between Shryock and Calkins & Co., Carter & Co. were authorized to sell the car of apples for the account of Shryock. The second car was also rejected by Carter & Co. on account of the condition, and, after telegraphic communications between the parties, Calkins & Co. were by Shryock authorized to do the best they could, and thereupon sold it to Carter for \$3 per barrel. The result of the sales of the apples was a loss over and above the contract price estimated by Shryock as equal to \$576.25. Great difference of opinion as to the action of Calkins & Co. and Shryock's treatment developed between the parties.

In the summer of June, 1914, Shryock prepared a circular which is the libelous writing set up in the declaration. This circular was headed "Catchum and Skinnem," and then contained the other alleged libelous statements in full. Shryock first showed his rough draft to one Bentley of the firm of Kern & Campbell, and then sent the draft to a printer in Winchester and printed 400 of the circulars. The circular as printed had the words "Catchum and Skinnem" as a caption at the top, and of these circulars with that caption, according to Shryock's own admission, one copy was given to the representative of a publication called "The Packer"; another copy was given to the representative of the Produce Reporter Company, who published a book called the Blue Book, which appears to have been a book containing the ratings of persons engaged in the produce brokerage business, and included S. P. Calkins & Co. He also inclosed a copy of the circular with the words "Catchum and Skinnem" at the top to Calkins & Co., informing them that he had printed it for the trade papers and the trade in general. After hearing from The Packer, whose opinion he asked, as to whether he incurred any responsibility for liability for issuing this circular, he cut out or tore off the caption

"Oatchum and Skinnem," and then sent out the circular to a number of fruit dealers and fruit trade journals, according to the defendant, amounting to 15 in all. He sent the circular, accompanied with a short letter asking if, in the addressee's opinion, the circular was likely to make him liable to the parties concerned if he had it published, and inclosing an envelope for reply.

In January, 1915, the declaration in this case was filed, claiming damage for the publication of the libelous matter contained in the circular, for damages done to the plaintiff in their business connections as brokers, and also for general damages done to them to their good name, fame, and credit, by a libelous publication of the kind. To this declaration on the 27th March, 1915, the defendant pleaded the general issue of not guilty, and moved the court that the plaintiffs be required to file a bill of particulars of their claim, and obtained at the same time leave to plead specially to the declaration within 30 days. Subsequently, on 16th April, 1915, the court overruled the motion for a bill of particulars, and the defendant thereafter filed no special plea, but went to trial upon the declaration and the plea of not guilty, being the plea of the general issue. At the trial the jury returned a verdict in favor of the plaintiff, and it is from the judgment on this verdict that the writ of error in this case has been taken.

[1] The first assignment of error is to the ruling of the presiding judge below, refusing defendant's motion that the plaintiffs be required to file a bill of particulars of their claim. The motion as stated in the transcript is very ambiguous; it simply says a bill of particulars of the complaint or claim of the plaintiffs. Whether thereby was meant a bill of particulars of the number of libelous circulars issued by the defendant, or a bill of particulars of the items of his damages, does not appear. The argument of the counsel for the plaintiff in error is upon the line that the bill of particulars he was entitled to have was a bill of particulars setting out the damages claimed as to each separate party to whom the publication was claimed to have been made of the libelous document. A written publication, which affects one injuriously in his trade or calling and contains imputations against his honesty and integrity, and which would as its natural and proximate consequence occasion pecuniary loss, constitutes a prima facie cause of action and is libelous per se; and the right follows to such damages as must be presumed to proximately and necessarily result from such a publication. In an action for libel, if the document be libelous, then damages follow as a matter of course—damages of some amount. The extent of those damages depends upon the circumstances of the case, such as the malice of the defendant, the offensive character of the libel, the pain caused to the injured party, the number of publications, the general circumstances of the libel, independent of any actual specific loss on each publication.

[2] The logical elements of declarations for libel are, first, the creating or making of a written document either libelous per se, or libelous by reference to circumstances, and, next, its publication. If the pleadings set up these facts, and the libelous character per se of the document and its publication be proven, the plaintiff is entitled to some

damage. Libel has been said to be peculiarly a case in which the assessment of damages is for the jury under all the circumstances of the case. No further particulars are necessary to fully inform the defendant of the plaintiff's claim. It may be that under such a declaration the court would exclude testimony of any specific instance of damage done, such as the loss of a position and its accompanying salary, unless specifically pleaded; but upon the general issue, under the general question of damage done by the publication of the malicious libel, it would be sent to the jury to determine under all the circumstances what were the proximate damages that necessarily would follow the publication. Without overloading the plea by extensive evidentiary matter, it would be impossible for a plaintiff in the case of a wide publication to state how much damage resulted from the document brought to the attention of every party who read or heard of it. It may have been read by thousands. The test is the general damage done by its general current publication in the community, that damage being perhaps less according as the circle of the people made acquainted with it may be restricted either in number or class.

[3] There is no necessity, therefore, or requirement of any kind, that the plaintiff in an action for libel should set out specifically each party to whom the libel was published, with a statement of the accompanying amount of damages claimed to have resulted from the publication to that particular person. Where each publication is relied upon as a separate and independent cause of action, as distinct from the general damage resulting from the publication of the libel, then the fact and circumstances of that separate publication should be averred. Where, however, the libel is pleaded on generally as one cause of damage, then the proof of a number of different publications is competent as evidence to establish the widespread circulation of the libel and the actual malice of the defendant as intensifying the necessary and proximate damages. It is true that the declaration does not distinguish between the circulars with the caption "Catchum and Skinnem" and those without it. The words "Catchum and Skinnem," although perhaps more offensive to the plaintiff, added nothing to the charge of fraud made in the circular itself, and called for no bill of particulars as to the separate publication of the two.

Further, with regard to any bill of particulars sought as to the number of people to whom the libel was communicated or published, that should be more peculiarly within the knowledge of the defendant than of the plaintiff; the plaintiff only knows by report or hearsay of the general current knowledge of the publication of the libel, but the defendant himself must know to whom in the first instance he himself directly communicated it or published it. It would not appear, therefore, that the presiding judge below was in error in overruling the motion for a bill of particulars.

[4] The second assignment of error is to the presiding judge's refusal to charge that the copy of the circular described in the declaration, which was sent to the plaintiff by the defendant, was not a libel, and was not to be considered in arriving at their verdict. It is evident,

however, that the sending the copy of the circular to the plaintiffs might be, in the opinion of the jury, strong evidence of malice. The sending of an offensive and insulting document to the party so insulted is held to be competent evidence on the question of malice. Injury to the feelings, and consequent mental suffering, is held to be one of the elements of damage. To flaunt the fact of a libelous publication by sending it to the party injured is a circumstance the jury have a right to consider in coming to their conclusion as to the actual malice of the defendant and the wound to the feelings of the plaintiff. It is thus entirely proper, upon the question of malice as affecting the question of damages (as well as of libel, in cases where malice is a necessary element of the existence of a libel), that the sending to the party libeled of the defamatory document in question is competent testimony to go to the jury. In this case it is more competent upon the question of malice, because it was inclosed in another written document, a letter from Shryock to Calkins & Co., notifying them that he had printed the libelous document for the trade papers and the trade in general.

[5] The third and tenth assignments of error may be considered together. They practically raise the question whether or not the judge should have charged the jury that the sending of the two circulars with the heading "Catchum and Skinnem" to the publisher of The Packer and also to the agent of the Blue Book publication, or the Produce Reporter Company, were privileged or conditionally privileged in either case. There was no evidence that the plaintiff in error furnished those circulars in such manner to either of the representatives of these two concerns as to bring his act within the doctrine of qualified privilege. So far as The Packer is concerned, the paper published by the owners of The Packer, the defendant had no request whatsoever from that paper for information. He showed it to the representative of the paper, who happened to be in Winchester, looking up subscribers and taking subscriptions. The representative of the paper came to Shryock, but did not ask for any information about Calkins & Co., or his transactions, but asked for a subscription, and the defendant thereupon showed the circular to the representative and asked his opinion about it. He volunteered the information to the representative of The Packer to get his opinion as to whether or not "it would be wise" to have the circular published. There was no circumstance connected with the delivery of this document to the representative of The Packer which would make it qualifiedly privileged.

With regard to the circular to the representative of the Produce Reporter Company, who published the Blue Book, the evidence of the defendant is that the representative of the publisher of the Blue Book came to him to get full information of his complaint against S. P. Calkins & Co.; that the defendant answered all questions that he asked, and then handed one of these circulars to him, and told him that this circular explained his side of the case as well as he could possibly tell it to him. In the first place, it is to be noted that this circular was not a simple statement to the Produce Reporter Company of the facts of the case. It contained a characterization which was outside of mere information, and could not have been in any wise called for in any re-

lation of the defendant to that concern for information furnished to the publishers of the Blue Book. As stated by the counsel for the plaintiff in error in his brief:

"There will be no denial on our part but that a privileged occasion may be abused, and that if the defamer exceeds the privilege of the occasion he will be liable."

Without deciding whether or not information of this character, communicated in the shape of voluntary information to a publication of the character of the Blue Book, is qualifiedly privileged, it is evident that the occasion did not call for any such publication as the defendant made. The instruction asked by defendant was that the copies given to the Reporter Company and The Packer were not libels and could not be considered by the jury. Any such unqualified instruction would have been unsound. The instruction of the presiding judge that in no instance mentioned in the evidence was the dissemination of the printed circular in question privileged does not, under the circumstances of this case, appear erroneous. The publication to The Packer was clearly not privileged, and the publication to the publishers of the Blue Book was of a libelous character, so uncalled for as to put it outside of the claim of qualified privilege. There had been two preceding publications of the libel with the caption "Catchum and Skinnem," one to Bentley Kern, and the other to the printer who printed it. The circular handed to the publishers of the Blue Book was not the giving of a piece of confidential information confined to the giver and the recipient, but the repetition of a libelous publication already made, and in any event could be considered by the jury upon the existence of malice.

[6] The fourth assignment of error is to the presiding judge's refusal to instruct the jury that if the copies of the alleged libelous documents, which had been by the defendant Shryock sent or delivered to the several persons and publishers named in the testimony of the defendant, had been sent or delivered in good faith, for the purpose alone of soliciting opinions as to the propriety of publishing the circular, then that they were privileged communications, and not libels upon the plaintiff, and that the jury should find for the defendant. The unsoundness of this assignment of error appears in the proposition that a person could thereby, under guise and pretense of asking for information as to proposed action, circulate and publish his libel as extensively as he saw fit. It is incredible that the circulars were sent merely for the purpose of eliciting information; but, even if they were, they contained libelous charges, and therefore the defendant was not entitled to the instruction mentioned in this assignment.

[7] The fifth assignment of error is for an instruction, which was refused by the court in the manner and form as asked as set out in the bill of exceptions No. 6, but which was correctly charged by the presiding judge as set out in the bill of exceptions No. 12, and any error referred to in bill of exceptions No. 6 covered by this assignment was cured.

Assignment Sixth. There was no evidence whatsoever to show that the loss in the plaintiffs' business could be referred to any other

cause than the libelous attack of the defendant. The plaintiffs proved the making of the libel, its publication, and the loss of business. Even, however, if the proposition were correct, it is corrected by the presiding judge in his instruction as to the limitation as to the damages to be allowed by the jury set out in bill of exceptions No. 9, which is that the—

“plaintiffs should be allowed fair compensation for the loss or injury, if any, to their business, for the insult to them, including mortification or mental suffering, if any, inflicted upon them by the dissemination of the charges, and for injury to their reputation as men and citizens, which you may believe from the evidence was the approximate result of the dissemination of the aforesaid circular. By approximate result I mean a result which in your judgment was the natural and probable consequence of the dissemination of the defamatory charges in question, and such as should have been foreseen by the defendant.”

This charge to the jury made the finding of the damages to their business depend upon whether that loss or injury, if any, to them, in their business, was the proximate result of the dissemination of the circular.

Assignments of error 7, 8, and 9 appear to the court to be wanting in merit, as the correctness of the instructions appears to be unquestioned.

[8] Assignment No. 11, to the refusal of the court to permit a witness on behalf of the defendant to ask whether he considered the circular a confidential communication, is without weight. It is for the court to decide from all the circumstances if the circumstances be admitted, or for the jury to decide where the question of fact is submitted to them by the court, whether or not the alleged libelous document was a confidential communication. The mere opinion of a person to whom it was published (he not being shown to hold any such relations such as would constitute it a privileged or qualifiedly privileged communication) is not competent.

Assignment 12 is only an assignment of error to the refusal of the presiding judge to grant a new trial on the ground that the verdict was contrary to the law and evidence, as set forth in the assignments of error, which have been already considered, and upon the further ground that the verdict was excessive, and need not be considered.

The judgment below must therefore be affirmed.

WESTERN UNION TELEGRAPH CO. v. LANGE et al.

LANGE et al. v. WESTERN UNION TELEGRAPH CO.

(Circuit Court of Appeals, Ninth Circuit. February 11, 1918. Rehearing Denied April 1, 1918.)

No. 3007.

1. CORPORATIONS ⇨116—SALE OF MINING STOCK—RIGHT OF BUYERS TO TERMINATE.

A contract for the sale of mining stock provided that payments should be made, \$7,500 on execution of the agreement, \$11,250 on or before May 1, 1907, and deferred installments at 60-day intervals. It was agreed that, on payment of the first sum, the sellers should deposit the stock in escrow in a bank, and make an escrow agreement with the buyers and the bank, whereunder the bank should hold the stock, to be delivered to the buyers on payment of the final payment provided for. It was also agreed that if the buyers defaulted in making any of the payments, the bank should be authorized to deliver the stock to the sellers, and that all payments made by the buyers should be forfeited to the sellers, and all rights of each of the parties cease and determine. *Held*, that the contract was an optional, not an absolute, agreement to buy the stock, the buyers having the right to terminate it by failing to make a payment, that the forfeiture clause was not intended to provide an additional remedy for the benefit of the sellers, that the provision that all rights of each of the parties should cease related to the default of the buyers, and not to the return of the stock, and that the contract was not a continuing offer to sell, accepted when the buyers mailed a bank draft to the bank holding the stock in escrow to meet the second payment.

2. ESCROWS ⇨5—SALE OF MINING STOCK—DEFAULT BY BUYERS—DUTY OF BANK HOLDING IN ESCROW.

When the buyers defaulted on a payment, by the terms of the contract and the escrow agreement, there arose a duty on the part of the bank to turn over the stock to the sellers, and also all payments which the buyers had made previously.

3. PRINCIPAL AND AGENT ⇨8—BANK AS AGENT TO MAKE PAYMENT.

Where the optional buyers of mining stock, held in escrow by a bank until completion of the installment payments, arranged with the bank to pay the amount of the draft sent to it by the buyers at the bank in gold coin to the sellers, pursuant to the contract covering the sale of the stock, the bank was the agent of the buyers to pay the gold on the draft, and possession of the draft by the bank, without further act looking toward payment to the sellers in gold coin, was possession for the buyers.

4. TELEGRAPHS AND TELEPHONES ⇨36—DUTY OF TELEGRAPH COMPANY—PROMPT TRANSMISSION.

The legal duty of a telegraph company was to send a message with reasonable promptness at the regular rates and to deliver it.

5. TELEGRAPHS AND TELEPHONES ⇨38—PROMPT TRANSMISSION—INSURANCE—ORAL CONTRACT.

In the absence of regulation by a telegraph company requiring a written contract to insure delivery of an unrepeatable message, a valid oral contract may be made between the company and the sender of a message, whereby the company, for a consideration, may insure prompt transmission and delivery.

6. TELEGRAPHS AND TELEPHONES ⇨38(1)—DELAY—STIPULATION AS TO FORWARDING.

Under its stipulation as to liability in case of messages forwarded over the lines of other companies, a telegraph company was not released from liability for damages resulting from delay in the transmission of a mes-

sage, where the only delay took place on its own line, and not on the line of a forwarding telephone company.

7. TELEGRAPHS AND TELEPHONES ⇨38(6)—DELAY IN TRANSMISSION—GROSS NEGLIGENCE.

Where the urgency of the situation was explained in detail to the agent of the telegraph company by the senders, when they delivered a telegram for transmission, and the senders did all they were advised to do to insure immediate delivery of the message, but the telegraph company nevertheless failed to effect a delivery until more than three days had passed, the telegraph company was guilty of gross negligence.

8. TELEGRAPHS AND TELEPHONES ⇨70(1)—INTEREST—DAMAGES—DELAY IN TRANSMITTING TELEGRAM.

Under Civ. Code Cal. § 3287, providing that every person entitled to recover damages certain, or capable of being made certain by calculation, on a particular day, is entitled to recover interest from that day, the senders of a telegram negligently delayed in transmission were entitled to recover interest from the telegraph company at least from date of presentation of written claim to it for the amount they were damaged by the delay.

In-Error to the District Court of the United States for the Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Action by William Lange, Jr., and another against the Western Union Telegraph Company, a corporation. Judgment for plaintiffs, and all parties bring error. Judgment modified to include interest, and, as modified, affirmed.

Action for damages against the telegraph company because of delay in transmission and delivery of a telegram sent by Lange and Hastings from Oakland, Cal., to the Lyon County Bank, Yerington, Nev. After trial to the court, judgment for \$11,250 went against the telegraph company, whereupon it brought writ of error; and because the District Court refused to include interest upon said sum, Lange and Hastings also sued out writ of error. The entire record is presented in one transcript, and for convenience we will refer to the parties as they stood, plaintiffs and defendant, in the trial court.

Samuel Poorman, Jr., of Los Angeles, Cal., for plaintiffs.

Beverly L. Hodghead, of San Francisco, Cal. (Albert T. Benedict, of New York City, of counsel), for defendant.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the case as above). The facts found were substantially as follows: The telegraph company maintains offices in California and Nevada. On March 16, 1907, the plaintiffs made a contract with one Pitt and one Campbell, in which Pitt and Campbell agreed to sell and deliver to Lange and Hastings, and Lange and Hastings agreed to buy and receive from the parties of the first part, 625,000 shares of the capital stock of the Kennedy Consolidated Mining Company, "upon the following terms and conditions, to wit": (1) Total price of the shares was \$75,000 gold coin, payable in this manner: \$7,500 upon the execution of the agree-

ment; \$11,250 on or before May 1, 1907; and deferred installment payments at 60-day intervals. (2) It was agreed that, upon payment of the first-named sum, the parties of the first part would deposit in escrow in the Lyon County Bank at Yerington, Nev., certificates of stock standing in their names, indorsed in blank by the persons in whose names the certificates stood, and representing in the aggregate 625,000 shares of capital stock of the mining company, and would thereupon enter into escrow agreement with the parties of the second part and the bank, whereunder the bank should hold the stock deposited with it, to be delivered to the parties of the second part immediately upon the payment by them of the final payment provided for in the agreement. The bank was made the agent of the parties of the first part for receiving payments to be made under the agreement and giving necessary acquittances. (3) It was agreed that, in the event of default by said parties of the second part in making any of the payments provided for, the bank should be authorized under the terms of the deposit in escrow, and was authorized by the agreement, to deliver all of the shares of stock so deposited with it pursuant to the agreement to the parties of the first part, and that "all payments theretofore made by said parties of the second part shall be forfeited to said parties of the first part, and that thereupon all rights of each of the said parties hereunder shall forever cease and determine." It was found that upon the execution of this contract Lange and Hastings paid Pitt and Campbell the initial installment of \$7,500, and that thereupon Pitt and Campbell deposited in escrow with the bank at Yerington certificates representing 625,000 shares of mining stock, properly indorsed, and the bank received the certificates of stock in escrow and held the same in accordance with the contract; that on the same day, after the execution of the contract, plaintiffs arranged with the bank to treat any drafts they might send the bank in partial payment under the contract as gold coin, and to pay the amount of the draft in gold coin to Pitt and Campbell for plaintiffs, pursuant to the terms of the contract; that to make payment mentioned in the contract by the plaintiffs to Pitt and Campbell, which under the contract had to be made on or before May 1, 1907, the plaintiffs, Lange and Hastings, on April 27, 1907, sent by mail from Oakland, Cal., to the Lyon County Bank at Yerington, Nev., a draft for \$11,250, payable to the order of the Lyon County Bank, the draft being perfectly good; that the draft was received by the bank at Yerington on April 30th, between the time the bank opened for business, 8:30 a. m. and 9 a. m. of the same day; that on April 29, 1907, before any telegram was delivered to the telegraph company for transmission, Lange and Hastings were informed and believed that the mining company stock was of little or no value, and upon obtaining such information they decided to make no more payments on their contract with Pitt and Campbell, and to abandon their rights in and to the stock under the contract, and to withdraw from the transaction. On the evening of April 29th, for the purpose of intercepting the draft mailed to the Lyon County Bank before it would be received or handled by the bank, and before payment would be made thereon, Lange and Hastings went to the telegraph company's office in Oakland and told the agent in charge thereof that

they wished immediately to send to the bank at Yerington, Nev., a message in these words:

“Oakland, April 29th, 1907.

“Lyon County Bank, Yerington, Nevada.

“Draft mailed you Saturday under mistake. Do not pay any sum to Pitt or Campbell. Return draft. Letter follows.

“Hastings and Lange.”

It is found that the plaintiffs at that time said to the agent of the telegraph company that it was absolutely necessary that the message be delivered to the bank before the bank opened for business on the 30th of April, and they wished to know how plaintiffs could be absolutely assured that the message would be so delivered, telling the agent of the telegraph company that they had a contract for the purchase of shares of mining stock and that a payment was to be made before May 1st to Pitt and Campbell, mentioned in the message, through the bank, or that in default the contract to buy the stock would be forfeited. It is also found that the plaintiffs told the defendant that unless the message to be transmitted was delivered before banking hours on the 30th the draft would be paid and the money lost to the plaintiffs. The court finds that thereupon the telegraph company, through its agent, represented to the plaintiffs that the defendant would, insure the immediate delivery of the message to the bank at Yerington if plaintiffs would pay defendant \$1.45, which was in excess of the regular charges for transmitting the message from Oakland to Yerington; that plaintiffs accepted the proposal, and to insure immediate delivery paid the money, and the telegraph company, by its agent, wrote upon the message, below the date, “Deliver immediately”; that the \$1.45 paid was in excess of the regular tolls for the transmission and delivery as an unrepeated message, and that it was agreed that the defendant would immediately transmit and immediately deliver the message; that the message was on a blank form, upon the back of which was printed a statement to the effect that, to guard against mistakes or delays, the sender should order the message repeated, and for this one-half the regular rate was the charge. In addition this printed matter also stated that it was agreed between the sender of the message and the company that the company should not be liable for mistakes or delays in transmission or delivery, or for nondelivery of any unrepeated message, beyond the amount received for sending the same, nor for mistakes or delays in the transmission or delivery, or for nondelivery of any repeated message beyond 50 times the sum received for sending the same, unless specially insured, and that the company is made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination. There was also a clause that correctness in the transmission of a message to any point on the lines of the company could be insured by contract in writing, stating the agreed amount of risk, and payments of premium at prescribed rates, and that no employé of the company is authorized to vary the foregoing. Other clauses in this printed matter on the back of the message are not material to the present case. The court finds that neither Hastings nor Lange read the printed matter on the blank, and did not know its

terms, and that the agent of the defendant company did not call their attention to the printed matter; that the message was not repeated by the telegraph company, although plaintiffs directed that the message be transmitted in such manner as the rules required in order that the telegraph company would insure transmission and immediate delivery of the message to the bank; that in April and May, 1907, telegraphic communication between Oakland and Yerington was by telegraph lines over the Western Union from Oakland, Cal., to Wabuska, Nev., which was the terminus of the Western Union line for Yerington messages, and thence by telephone over the line of the Yerington Electric Company to Yerington; that the Yerington Electric Company at that time operated the only telephone or telegraph line between Wabuska and Yerington, and, in order to transmit the telegram by telegraph or telephone beyond Wabuska, it was necessary that it be forwarded from Wabuska over the line of the Yerington Electric Company to Yerington; that each of the companies received all messages offered by the other company for further transmission, subject to the stipulations on the telegram blanks so far as applicable, each company charging therefor its own separate tolls; that the Yerington Electric Company's office and the Western Union Telegraph Company's office were both in the Southern Pacific Railroad Company station at Wabuska, and that the telephone instrument of the Yerington Electric Company in said office was within a few feet of the telegraphic instruments of the Western Union Company; that the Southern Pacific Company employed an agent at Wabuska to attend to its railroad business, and that, by agreement between the railroad company and the telegraph company, the agent was employed to handle the telegraph business of the Western Union Company at Wabuska—that is, to receive messages transmitted to that point over the lines of the Western Union Company and transmit the messages received by him, and by arrangement between the railroad company and the Yerington Electric Company, the agent of the railroad company was employed to handle the telephone business of the Yerington Electric Company at Wabuska, and to receive and transmit all messages for transmission; that the telegraph company did not promptly, on the evening of April 29th, transmit the same to Wabuska, Nev., and did not deliver the message to the Yerington Electric Company, but failed to deliver the message to Wabuska until May 2d, and failed to deliver the message to the Yerington Electric Company until May 2d; that, if the telegraph company had acted with promptness, the message would have been received before the bank received the draft, but that, because of the gross neglect on the part of the telegraph company, the message was not delivered to the Lyon County Bank until the 2d of May; that on the 30th of April, between 8:30 and 9 o'clock a. m., the bank received the draft, and thereafter, pursuant to its arrangement with the plaintiffs, treated the draft as gold coin, paid over the amount to Pitt and Campbell under the terms of the contract, and on account of the payment under the terms of the contract, to be made before May 1st, credited plaintiffs for the amount so paid upon the contract; that the bank then forwarded the draft to the drawee for payment, and in due time the draft was paid; that the bank was wholly without knowledge of

the message, or desire on the part of the plaintiffs that the payment should not be made. It is further found that the plaintiffs made no further payments on the purchase price of the shares of stock, but abandoned the contract with Pitt and Campbell, and forfeited and lost all moneys paid thereon; that the 625,000 shares of stock of the mining company have been practically valueless since the 29th of April, 1907, and that, by reason of the gross negligence of the telegraph company in failing to transmit and deliver the telegraphic message as it agreed to do to the bank, plaintiffs lost the amount of the draft.

[1, 2] The contentions of the defendant with respect to the contract between Lange and Hastings and Pitt and Campbell are that it was an absolute agreement to buy the mining stock, and that the forfeiture clause at the end of the agreement was intended to provide an additional remedy for the benefit of the vendors; that the provision in the contract that "thereupon" all rights of each of the parties should cease relates, not to the default of Lange and Hastings, but to the return of the stock, which was not shown to have been returned; that the contract, even if construed to be an option, was a continuing offer to sell, which was accepted when the plaintiffs mailed the bank draft before filing the telegram. But as we read the whole contract, and gather from it the intentions of the parties, none of these points is sound. The language of the contract was that Pitt and Campbell agreed "to sell and deliver" and Lange and Hastings "to buy and take and receive" upon the terms and conditions which followed. The terms included payment in gold coin at times specified; the conditions required deposit by Pitt and Campbell in escrow with the bank certificates to be indorsed in blank, and that an escrow agreement should be made between Pitt and Campbell and Hastings and Lange and the bank, whereunder the bank would hold the shares to be delivered to Hastings and Lange immediately upon the payment by Hastings and Lange of the last payment called for under the provisions of the agreement. Furthermore, in case of default by Lange and Hastings in making any of the payments, these things were to follow: (1) The bank was authorized to deliver all the shares deposited to Pitt and Campbell; (2) all payments theretofore made—that is, all payments which had been made by Hastings and Lange prior to the default—were forfeited to Pitt and Campbell; and thereupon, that is to say, when default occurred immediately the authorization to deliver became effective, forfeiture accrued, and all rights of Hastings and Lange and Pitt and Campbell under the contract ceased and became determined.

The evident purpose of the parties was to make an agreement, optional in its character, and so plain in its terms that, if Hastings and Lange should default in making any of the payments, the agreement itself would at once provide a direct and complete adjustment and final determination of their business relationship under the contract. Such contracts are not unusual in mining sections, where the investor takes the chance that upon developing the property involved he may find his hopes rewarded and feel justified in making the deferred payments, in order to receive the deed for the mining property in escrow; but, should he find the property has not developed as he hoped

for, he may default and, beyond losing all he has expended in development, is released of further obligation in the premises, and the owner is compensated by the forfeiture of payments already made, and is fully reinvested with the property itself. They are quite different from such a contract of sale of real estate as we find in *Stewart v. Griffith*, 217 U. S. 323, 30 Sup. Ct. 528, 54 L. Ed. 782, 19 Ann. Cas. 639. The practical effect of such an arrangement is to give the right to the purchaser to determine from time to time whether he will pay further installments, and so keep up the contract, or forfeit what he has already paid in, give up all rights, and avoid further liability. *Ramsey v. West*, 31 Mo. App. 676; *Williamson v. Hill*, 154 Mass. 117, 27 N. E. 1008, 13 L. R. A. 690.

We take the further view that, when Hastings and Lange defaulted, by the terms of the contract there arose a duty on the part of the bank to turn over the stock to Pitt and Campbell, and also all payments which Hastings and Lange had theretofore made. The escrow agreement, while specially referred to, was in itself really separate from the contract between Hastings and Lange and Pitt and Campbell, who were the only parties to the contract, which defined when their respective rights thereunder would cease. Abandonment and forfeiture gave Pitt and Campbell right to their stock. The obligation of the bank to turn over the stock and forfeit payments was then a matter between the bank and Pitt and Campbell; the bank's duty not at all lessened, however, by the cessation of the rights of each of the parties to the main contract. The bank by its relation was holding as a trustee, with authority to turn over by express agreement of both parties.

[3] We cannot sustain defendant's point to the effect that, assuming that the Pitt and Campbell contract was one of option, nevertheless the telegraph company would not be liable because the option was a continuing offer, which was accepted by the mailing of the draft to the bank, the agent of Pitt and Campbell, for the purpose of receiving payments, and that such acceptance could not subsequently be withdrawn. The finding of the court is that, after the execution of the contract and on the same day, Hastings and Lange arranged with the bank to pay the amount of the draft sent to the bank by them at the bank in gold coin to Pitt and Campbell, for plaintiffs, pursuant to the terms of the contract, and also that the bank, on the day that it received the draft, did pay in gold coin to Pitt and Campbell the amount of the draft, pursuant to its arrangements with Hastings and Lange. It is clear to us that the bank was the agent of Hastings and Lange for the purpose of paying the gold upon the draft, and possession of the draft, without further act looking toward payment to Pitt and Campbell in gold coin, would be possession for Hastings and Lange. The bank was subject to the control of Hastings and Lange with respect to the draft until gold coin had been advanced by it under its previous understanding with Hastings and Lange, and if the bank had received the telegram in due time the changed purpose of the plaintiffs would have been made known in ample time.

[4] We pass to the defenses based upon the stipulations upon the back of the message blank. It is pertinent to bear in mind that this

action has little to do with any mistake in transmission of a telegraph message. The cause of action arises out of delay on the part of the telegraph company in transmission and delivery. Repetition of the message would have availed nothing, as no complaint is made that there was any mistake in the verbiage of the message. The legal duty of the telegraph company was to send the message with reasonable promptness at the regular rates and to deliver it. In *Box v. Postal Telegraph-Cable Co.*, 165 Fed. 138, 91 C. C. A. 172, 28 L. R. A. (N. S.) 566, the Court of Appeals for the Fifth Circuit said that the regulation of the company with respect to repeated messages, while purporting to be made to guard against mistakes or delays, should be construed to refer to such mistakes and delays as could be corrected or avoided by repetition and comparison; otherwise, a delay caused by the conduct of the company in negligently failing to send or to attempt to send the message would come within the rule. "It is difficult," said the court, "to believe that this stipulation was intended by the parties to be applicable to a case in which the conduct of the company made it impossible for the message to be repeated." As bearing upon the question we cite *Purdum Naval Stores Co. v. Western Union Telegraph Co.* (C. C.) 153 Fed. 327; *Postal Telegraph-Cable Co. v. Nichols*, 159 Fed. 643, 89 C. C. A. 585, 19 L. R. A. (N. S.) 870, 14 Ann. Cas. 369; *Pacific Postal Telegraph Co. v. Fleischer et al.*, 66 Fed. 899, 14 C. C. A. 166. Cases like *Primrose v. Western Union Telegraph Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883, and *Coit v. Western Union Telegraph Co.*, 130 Cal. 657, 63 Pac. 83, 53 L. R. A. 678, 80 Am. St. Rep. 153, and others cited, which involved mistakes in the language of messages sent, are not authority upon the point here presented.

[5, 6] We do not believe that it was necessary that there should have been a written contract of insurance. A contract to insure specially the correctness in the transmission of a message must be made in writing; but there is no regulation which requires a written contract to insure the delivery of an unrepeatable message. We think a fair implication is that an oral contract may be made between the sender of a message and the telegraph company, whereby the company, for a consideration paid, may insure the prompt transmission and delivery of a message. Nor is the defendant to be relieved of liability under stipulation affecting liability because it was necessary to forward the message over the lines of the electric company from Wabuska to Yerington. The findings show that the telegraph company never used the electric lines to forward the message to Yerington until May 2d. There was, therefore, no delay on the telephone line. But, assuming that there is doubt of this, it could not help defendant, as the agreement made was specially to deliver the message at Yerington. *Postal Telegraph, etc., Co. v. Harriss*, 56 Tex. Civ. App. 105, 121 S. W. 358, 122 S. W. 891.

[7] It is said that under no circumstances should the court have found that the telegraph company was guilty of gross negligence in the delay in transmission and delivery. Again we must hold against the defendant. The facts show that the situation of the plaintiffs was

in great detail explained to the defendant's agent at the time that the telegram was delivered at Oakland for transmission, and that plaintiffs did all that they were advised to do to insure immediate delivery of the message. But, notwithstanding their special efforts and the assurances of the telegraph company, there was a failure to deliver until more than three days had gone by. In our opinion, the circumstances proved gross negligence. *Western Union Telegraph Co. v. Cook*, 61 Fed. 624, 9 C. C. A. 680; *Union Construction Co. v. Western Union Telegraph Co.*, 163 Cal. 298, 125 Pac. 242; *Pierson v. Western Union Telegraph Co.*, 150 N. C. 559, 64 S. E. 577; *Redington v. Pacific Postal Telegraph Co.*, 107 Cal. 317, 40 Pac. 432, 48 Am. St. Rep. 132.

[8] The claim for interest upon the amount awarded as damages rests upon the argument that the telegraph company, for an extra compensation, having insured the immediate transmission and delivery of the delayed message, was bound to pay plaintiffs as indemnity the amount of the draft on a day certain, in the event that the message was delayed, and that one of the implied terms of such an agreement was the obligation to pay interest as damages by reason of failure to indemnify, without regard to whether the loss by such delay was or was not a liquidated sum. In our opinion, the real question between the parties to the litigation was simply whether the defendant was originally liable for \$11,250, that being the amount of the draft paid against the wishes of Lange and Hastings as expressed in the delayed telegram. The message having been under special contract with the defendant, the liability of the defendant was either in the sum named or nothing. The loss which Lange and Hastings suffered was the exact amount of the draft, and since no benefit of any kind accrued to the plaintiffs there was no offset to be allowed as against that loss. By section 3287 of the Civil Code of California:

"Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt."

Under this statute plaintiffs should recover interest at least from the date of the presentation of their written claim to the defendant for damages in the sum of \$11,250, filed with the defendant June 26, 1907. *Curtis v. Innerarity*, 6 How. 146, 12 L. Ed. 380.

The judgment will therefore be modified, so as to include therein interest on \$11,250, the principal of plaintiff's demand, from June 26, 1907, and, as so modified, it will be affirmed.

AMERICAN TRADING CO. v. NORTH ALASKA SALMON CO.

(Circuit Court of Appeals, Ninth Circuit. February 11, 1918. Rehearing Denied April 1, 1918.)

No. 2974.

1. APPEAL AND ERROR ⇨1003—REVIEW—WEIGHT OF EVIDENCE.

On writ of error, assignment that the verdict is contrary to the evidence presents nothing for review; there having been no request that the jury be instructed to return a verdict for the plaintiff in error on the ground of the absence of any evidence to the contrary, for the appellate court cannot weigh the evidence.

2. TRIAL ⇨260(1)—INSTRUCTIONS—REFUSAL.

The refusal of requested instructions, substantially covered by those given, is not error.

3. TRIAL ⇨252(13)—INSTRUCTIONS—EVIDENCE TO SUPPORT.

Where plaintiff disposed of some of the canned salmon purchased from defendant for a valuable consideration, which it retained, plaintiff's instruction in an action against defendant on account of the defective quality of the salmon, based on the hypothesis that the whole of the salmon purchased was worthless and unfit for food, is properly refused.

4. TRIAL ⇨56—EXCLUSION OF CUMULATIVE EVIDENCE.

Where plaintiff had already proven by competent witnesses that much of the salmon purchased from defendant had been condemned and ordered destroyed as unfit for food, and that fact was not denied by defendant, the exclusion of the records of judicial proceedings wherein the destruction was ordered was proper; it being unnecessary to burden the record with additional evidence of that fact.

5. SALES ⇨176(4)—ESTOPPEL—INSPECTION.

Where a seller of do-over salmon guaranteed that it should equal the pack of previous years, and the buyer, though the contract provided for inspection before delivery, and that after swells and rusty tins were removed no reclamation of any nature should be allowed, made no extensive inspection, despite its knowledge that a large percentage of do-over salmon is always bad, the seller is not estopped from defending on the ground of the buyer's failure to inspect the salmon before receiving it, it not appearing that the two cases sent the buyer at its expense for issuance as samples to customers for resale were not fair samples, for such estoppel must be on the theory that defendant made misrepresentations, either with fraudulent intent or so carelessly and negligently as to amount to constructive fraud.

6. APPEAL AND ERROR ⇨977(5)—REVIEW—DENIAL OF NEW TRIAL.

In federal courts, the refusal of the trial judge to set aside a verdict or grant a new trial is not subject to review on writ of error.

In Error to the District Court of the United States for the Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Action by the American Trading Company (Pacific Coast), a corporation, against the North Alaska Salmon Company, a corporation. There was a judgment for plaintiff for nominal damages, and it brings error. Affirmed.

The plaintiff in the court below, the plaintiff in error here, was engaged in the brokerage business, and for several years prior to 1911 had purchased the greater part of the output of do-over salmon known as the Archer brand, produced by the defendant, which was engaged in the business of canning Alaska

salmon. "Do-over" salmon is salmon which has been cooked twice, on account of prior defective cooking or defective cans. On November 16, 1911, the parties entered into a written contract for the sale by defendant to the plaintiff of all the defendant's pack of the season of 1912 of "do-over grade red Alaska salmon labeled 'Archer,' not to exceed 5,000 cases." The contract provided as follows: "Delivery is to be made within 30 days after arrival of vessels from Alaska, and goods to be paid for on presentation of warehouse receipt or delivery documents." "Archer brand of salmon to be overhauled in San Francisco by sellers, and all swells and rusty tins to be taken therefrom, after which no reclamation of any nature will be allowed." "Buyers have privilege of inspecting salmon before taking delivery. Sellers guaranteeing goods to be equal to the 1911 pack." "The salmon under this contract is sold subject to being packed and safely landed in San Francisco."

The counts of the plaintiff's complaint on which the case was tried were the second and the fourth; demurrers to the others having been sustained. The second count, after setting forth the contract, alleged that as a part of the contract it was understood and agreed by the parties that said Archer brand salmon would be merchantable, edible, and suitable for human consumption, and of the condition and quality that would entitle it by law to be brought into the city and county of San Francisco, and thereafter sold; that the defendant shipped to San Francisco and delivered to the plaintiff 5,000 cases of the do-over salmon of the Archer brand, and the plaintiff received the same without inspecting or examining it, and relying on the defendant's representations and the samples which had been furnished, which samples had been examined by the plaintiff and ascertained to consist of edible salmon fit for human consumption, and merchantable, and equal in quality and condition to the 1911 pack; that shortly after the delivery to plaintiff of the 5,000 cases of Archer brand, and in reliance upon said samples and representations, and in ignorance of the actual quality and condition of said salmon, plaintiff paid defendant therefor \$16,961.30, the entire purchase price thereof; that the said 5,000 cases were unmerchantable, unedible, tainted, putrid, and unfit for human consumption, and adulterated within the meaning of the Pure Food and Drugs Act of Congress of June 30, 1906 (34 Stat. 768, c. 3915 [Comp. St. 1916, §§ 8717-8728]), and the act of the Legislature of California of March 11, 1907 (St. 1907, p. 208), that at or shortly after the time of the shipment and delivery of said salmon, and prior to the time of the commencement of this action, the defendant well knew of the condition and quality of said merchandise, but has failed, neglected, and refused to return or pay the plaintiff said \$16,961.30, or any part thereof. The fourth count sets forth the written contract, and the warranty therein contained that the salmon should be equal to the 1911 pack; that samples were submitted according to the custom which had prevailed between the parties for several years; that the samples examined by plaintiff were fully equal to the 1911 pack of the Archer brand, and were edible and fit for human consumption; that, relying on the defendant's representations, plaintiff accepted delivery and paid the purchase price thereof; that the salmon delivered was not equal to said samples, and that the defendant is estopped from alleging or maintaining that the plaintiff is precluded from advancing a claim for damages for breach of the contract for failure to make such claim within ten days after the removal of swells as provided for in the contract, by reason of defendant's representations respecting the samples.

The court instructed the jury in substance that the provision in the contract that, after the removal of the swells and rusty tins, no reclamation of any nature will be allowed, did not mean that reclamation might not be had for defects, if they existed at the date of delivery, that could not be so discovered or detected; that it was the duty of the defendant, under the terms of the contract and the law, to deliver to the plaintiff salmon which at the time of delivery was substantially capable, taking the shipment as a whole, of being used for human consumption, and that if the jury should find that the salmon was not at that time substantially of a character that, over and above the percentage of defective cans usually found in goods of that description, was in condition for human consumption, and that the plaintiff could not have ascertained at the time of the delivery that such was its condition except by

opening the cans, the plaintiff is not precluded from recovery for such defects, "and your verdict should be in its favor for the difference between the market value which the salmon would have had at the time of its delivery to plaintiff, had it been of the quality called for, and its actual value as delivered." The court further instructed the jury that, if the salmon as a whole had no value as a merchantable commodity, there would be an entire failure of consideration, and in that event they should return a verdict in favor of the plaintiff for the return of the full purchase price thereof. The court further instructed the jury that, if they found that the salmon was at the time of the delivery substantially equal in quality and condition to the salmon delivered in 1911, their verdict should be in the defendant's favor, but, if they found otherwise on that issue, the plaintiff would be entitled to a verdict for the excess, if any, of market value which the salmon would have had, had the warranty been complied with, over its actual market value in the condition in which it was delivered. The jury returned a verdict for the plaintiff, and assessed its damages in the sum of \$1.

Samuel Knight and F. E. Boland, both of San Francisco, Cal., for plaintiff in error.

Otto Irving Wise, Wise & O'Connor, and Richard S. Goldman, all of San Francisco, Cal., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The plaintiff contends that the verdict and judgment are contrary to the evidence and to the court's instructions. The assignments of error on which the contention is based are that the verdict is contrary to the evidence, in that the evidence shows that the salmon here involved was unfit for human consumption; and that there was an utter failure of consideration for the money paid by the plaintiff, and that the verdict and judgment were contrary to the evidence, in that the evidence showed that the plaintiff was damaged in a sum exceeding the amount paid as the purchase price. Those assignments present to us nothing for review, since this court cannot weigh the evidence, and determine whether the verdict was contrary thereto; there having been no request that the jury be instructed to return a verdict for the plaintiff on the ground of absence of any evidence to sustain a contrary verdict. Our province on a writ of error is limited to the review of errors in law committed by the trial court. We have nothing to do with the evidence, further than to consider its relevancy to rulings of that court to which exceptions have been duly reserved. "An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised and passed on in the court below." *Missouri Pacific Ry. v. Fitzgerald*, 160 U. S. 556, 575, 16 Sup. Ct. 389, 393 [40 L. Ed. 536]; *Mercantile Trust Co. v. Hensey*, 205 U. S. 298, 306, 27 Sup. Ct. 535, 51 L. Ed. 811, 10 Ann. Cas. 572; *Federal Mining & Smelting Co. v. Hodge*, 213 Fed. 605, 130 C. C. A. 197; *Dinet v. Rapid City, S. D.*, 222 Fed. 497, 138 C. C. A. 93; *J. H. Lane & Co. v. Maple Cotton Mills*, 226 Fed. 692, 141 C. C. A. 448; *Goelet v. Matt J. Ward Co.*, 242 Fed. 65, 155 C. C. A. 9.

[2] Error is assigned to the refusal of the court below to instruct the jury that if they should find that a substantial part of the salmon was decomposed, or in process of decomposition, at the time when it was brought to San Francisco and delivered to plaintiff, that the sale

was void, on the ground that by the federal Food and Drugs Act, and by the act of the state of California of similar nature, the importation into the state of adulterated food is prohibited, and that if the jury should find that a substantial part of the salmon in question was decomposed when delivered to plaintiff, and that the plaintiff received the same in ignorance of its true condition, then the plaintiff is entitled to a verdict for the amount paid by it for the salmon, and that, in view of the statutes before mentioned, the plaintiff could not be compelled to accept salmon which was adulterated within the meaning of those acts, even if plaintiff failed to inspect the same before receiving delivery, and that, if the jury should find that the salmon delivered was not substantially equal to the 1911 pack of the Archer brand, then the defendant has failed to comply with the contract, and the plaintiff is entitled to recover the excess, if any, of the value which the salmon would have had at the time to which the warranty referred, had the warranty been complied with, over the actual value of the salmon at that time; that the jury was not concerned with the determination of the question whether or not do-over salmon is an article of commerce that must be treated with suspicion; that the contract warranted that the salmon in question, no matter what the general character or reputation of do-over salmon had been, would conform to the standard of the pack of the same brand of the previous year; and that the question for the jury was whether the pack of 1912 delivered to plaintiff was equal in quality to the pack of the same brand of 1911. The answer to these assignments is that the court in substance gave the requested instructions, as will be seen by reference to the foregoing statement of the case.

[3] It is assigned as error that the court refused to instruct the jury that, even in the absence of implied warranty and opportunity to inspect as to quality, it was the duty of the defendant to furnish salmon that was at least merchantable or salable, and capable of being used, the presumption being that both parties to the contract were acting honestly, and refused to instruct as follows:

"So that upon this issue, after considering all the evidence, if you find therefrom that the salmon received by the plaintiff was worthless and unfit for the purpose for which it was purchased, and was incapable of being used for human consumption, it will be your duty to return a verdict for the plaintiff for the amount paid for this salmon, with interest to the present time."

The difficulty in the way of giving that instruction was that a considerable portion of the goods so received by the plaintiff was fit for use, and was salable, and was sold for \$3,940, of which the plaintiff received and retained at least the net amount of \$2,590, all of which was retained by the plaintiff and was not tendered to the defendant, nor was any offer made to rescind the contract. It is not contended that the contract was void at its inception, or that the defendant had knowledge when the goods were shipped that any particular portion of them was unfit for consumption; the evidence being that "do-over salmon was a doubtful commodity," and as plaintiff's own agent testified, one who buys do-over salmon "expects to find a certain percentage bad." It was owing to this fact that such salmon had been

regularly sold at from 40 to 50 per cent. less than salmon which had not been reprocessed.

[4] Error is assigned to the refusal of the court to admit in evidence the judgment rolls of certain proceedings in the federal courts of California, Kentucky, Missouri, and Indiana, wherein, on the libels of the government, portions of the salmon so purchased by the plaintiff had been condemned and ordered to be destroyed as unfit for food. We find no error in the exclusion of this evidence. The plaintiff proved by competent witnesses, and the fact was not denied by the defendant, that the salmon referred to in the suits had been destroyed by the authorities as the result of the suits so referred to. No question was made of the truth of that testimony, and it was clearly unnecessary to burden the record with other evidence to the same effect.

[5] The plaintiff contends that the defendant was by its conduct estopped from basing any defense to the action upon the plaintiff's failure to inspect the salmon before receiving it, and that the court below erred in refusing to charge the jury that if they should find that the defendant misled the plaintiff by leading it to believe that the salmon was edible and as good as the do-over salmon of prior years, and that the plaintiff was thereby induced to omit inspection, and that the salmon did not comply with the representations so made, or with the samples furnished, but was unfit for human consumption when delivered, then the defendant could not assert that the plaintiff was bound to inspect, and could not rely on the defense of its non-inspection, "and your verdict should be for the plaintiff." This request was made under the theory of the fourth count, in which the plaintiff sought to recover damages.

We think the requested instruction was properly denied, for the reason that the evidence in the case was not such as to justify a verdict for the plaintiff on the ground of estoppel. Estoppel in this case must rest upon the theory that the defendant made representations either with fraudulent intent, or so carelessly and negligently as to amount to constructive fraud, and that the plaintiff must have relied thereon to its injury. The only testimony as to the manner in which the samples were selected from the pack of 1912 is that of the defendant's general superintendent, who said that he took only one can from a case, indiscriminately, and did not attempt to pick out any particular cans for sample purposes, and that the samples from external appearance and weight were the same as the others. There is no evidence that the samples were submitted by the defendant, or received by the plaintiff, as furnishing evidence to the plaintiff of the quality and condition of the 5,000 cases so purchased. The plaintiff's own evidence is that the samples were obtained for issuance to its customers for purposes of resale, that the defendant was asked to send samples for that purpose, and that 2 cases were sent at the plaintiff's expense. And although the plaintiff's manager of its canned goods department testified that he opened not less than a dozen tins out of the 144 tins so sent, and that the condition of those tins was very satisfactory, that fact was not of itself sufficient to justify the jury in reaching the conclusion that the samples sent were not fair samples of

the pack. One of the plaintiff's witnesses testified that about two months prior to the trial he opened 417 tins of the 2,100 cases in the warehouse at San Francisco, avoiding the swells and rusty tins, and found about 30 per cent. bad. Another witness for the plaintiff testified:

"We expected to find some bad cans of salmon in do-over grades in all lots, and in other lots we find very few, sometimes more. It is impossible to state the average number of bad cans that are found in a shipment of do-over salmon. I have seen it run as high as 60 per cent."

[6] It is suggested that the court below erred in not setting aside the verdict and ordering a new trial. It is well settled that in the United States courts the refusal of the trial judge to set aside a verdict or grant a new trial is not subject to review. In *Great Northern Ry. Co. v. McLaughlin*, 70 Fed. 669, 17 C. C. A. 330, we held that a court of error cannot review evidence to determine the correctness of a verdict, saying:

"The relief from such mistakes, if any are made, is to be sought in applications to the trial court for a new trial"

—and citing *Mills v. Smith*, 8 Wall. 32, 19 L. Ed. 346, where the court said:

"This court have no right to order a new trial because they may believe that the jury may have erred in their verdict on the facts. If the court below have given proper instructions on the questions of law, and submitted the facts to the jury, there is no further remedy in this court for any supposed mistake of the jury."

We find no error. The judgment is affirmed.

THE TALUS.

(Circuit Court of Appeals, Fifth Circuit. January 25, 1918.)

No. 3119.

1. SEAMEN \Leftrightarrow 23—WAGES—PART PAYMENT AT INTERMEDIATE PORTS.

Under Seamen's Act March 4, 1915, c. 153, § 4, 38 Stat. 1165 (Comp. St. 1916, § 8322), which requires payment to every seaman of one-half part of the wages which he shall have then earned at every port where the vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, a seaman at any such intermediate port is entitled to demand one-half his wages earned during the voyage to that time, less lawful payments previously received; but advance payments made by a foreign ship to foreign seamen in a foreign port, where the law of the country permits it, are lawful payments within this provision, and to be deducted, section 11 of the act (Comp. St. 1916, § 8323), prohibiting such advances under penalty, being applicable only to American seamen and to foreign seamen while in American ports.

2. CONTRACTS \Leftrightarrow 101(1)—VALIDITY—LAW GOVERNING.

The usual rule is that, where a contract involves no moral turpitude, but is *malum prohibitum* only, if it is valid where made, it will be held valid in the courts of the United States elsewhere than where it was made, although it would be invalid if made there.

3. SEAMEN ⇐24—PART PAYMENT OF WAGES "EARNED."

The word "earned," as used in Seamen's Act March 4, 1915, c. 153, § 4, which requires payment to every seaman of one-half part of the wages which he shall have then earned, at intermediate ports, is used in the sense of owing, and to describe wages for which the seaman has done the work whether then due or not.

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

Appeal from the District Court of the United States for the Southern District of Alabama; Robert T. Ervin, Judge.

Suit in admiralty by Erik Sandberg and others against the British ship Talus; John McDonald, claimant. Decree for libelants, and claimant appeals. Reversed.

For opinion below, see 242 Fed. 954.

Joseph N. McAleer, James H. Kirkpatrick, and Palmer Pillans, all of Mobile, Ala. (M. V. Hanaw, of Mobile, Ala., of counsel), for appellant.

Alex T. Howard, of Mobile, Ala., for appellees.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. This is an appeal from a final decree in admiralty against the appellant, as claimant of the ship Talus, and in favor of certain seamen for the amount of wages alleged to be due them. The libel was originally filed on behalf of six seamen, the court below dismissed the libel as to two, and from its decree in this respect no appeal was taken by them. In favor of the remaining four a decree was rendered for the respective amounts found due them, and from this part of the decree, the appeal was taken by the claimant.

The facts were stipulated in the record, and the appeal presents for decision the proper construction of section 11, in connection with section 4, of the act of Congress approved March 4, 1915 (38 Statutes at Large, 1164, 1185), entitled "An act to promote the welfare of American seamen in the merchant marine of the United States, to abolish arrest and imprisonment as a penalty for desertion and to secure the abrogation of treaty provisions in relation thereto, and to promote safety at sea." The sections involved are those which prohibit the making of certain advances to seamen before the commencement of the voyage for which they ship, and which require that half their earned wages be paid, upon arrival of the ship in any port where it receives or delivers cargo, with certain limitations.

The Talus was a British ship, which sailed from the port of Liverpool to Mobile upon the voyage in question. The libelants were British subjects, and the advances, which are questioned, were made to them in Liverpool at the time they were shipped and were valid under the laws of Great Britain. The District Judge disallowed the advances in reckoning the amount due libelants, and it is conceded that, had the advances been taken into account, or if only wages earned by appellants while the ship was in the port of Mobile had

been considered, there would have been nothing due libelants at the time of their demand, and that the libel should stand dismissed, and, on the other hand, that if wages earned from the time of sailing from Liverpool are to be considered, and if the advances there made were properly ignored by the District Court, the decree as there rendered should be here affirmed.

[1] Section 4 of the act of March 4, 1915, commonly known as the "La Follette Act," is found on page 1165 of volume 38 of the Statutes at Large, and is as follows:

"Sec. 4. That section forty-five hundred and thirty of the Revised Statutes of the United States be, and is hereby, amended to read as follows:

"Sec. 4530. Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the wages, which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended and all stipulations in the contract to the contrary shall be void: Provided, such a demand shall not be made before the expiration of, nor oftener than once in five days. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. And when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall then be due him, as provided in section forty-five hundred and twenty-nine of the Revised Statutes: Provided further, that notwithstanding any release signed by any seaman under section forty-five hundred and fifty-two of the Revised Statutes any court having jurisdiction may upon good cause shown set aside such release and take such action as justice shall require: And provided further, that this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement."

Section 11 of the same is found on page 1168 of the same volume, and the material subdivisions of the section are the following:

"(a) That it shall be, and is hereby, made unlawful in any case to pay any seaman wages in advance of the time when he has actually earned the same, or to pay such advance wages, or to make any order, or note, or other evidence of indebtedness therefor to any other person, or to pay any person, for the shipment of seamen when payment is deducted or to be deducted from a seaman's wages. Any person violating any of the foregoing provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than \$25 nor more than \$100, and may also be imprisoned for a period of not exceeding six months, at the discretion of the court. The payment of such advance wages or allotment shall in no case except as herein provided absolve the vessel or the master or the owner thereof from the full payment of wages after the same shall have been actually earned, and shall be no defense to a libel suit or action for the recovery of such wages. If any person shall demand or receive, either directly or indirectly, from any seaman or other person seeking employment, as seaman, or from any person on his behalf, any remuneration whatever for providing him with employment, he shall for every such offense be deemed guilty of a misdemeanor and shall be imprisoned not more than six months or fined not more than \$500. * * *

"(e) That this section shall apply as well to foreign vessels while in waters of the United States, as to vessels of the United States, and any master, owner, consignee, or agent of any foreign vessel who has violated its provisions shall be liable to the same penalty that the master, owner, or agent of a vessel of the United States would be for similar violation.

"The master, owner, consignee, or agent of any vessel of the United States, or of any foreign vessel seeking clearance from a port of the United States, shall present his shipping articles at the office of clearance, and no clearance

shall be granted any such vessel unless the provisions of this section have been complied with."

The appellants first contend that the decree was erroneous because they contend that section 4 of the act, in providing that the seaman is entitled "to receive on demand from the master of the vessel to which he belongs one-half part of the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo, before the voyage is ended," only requires the master to pay one-half of the wages earned by the seaman from the time of the arrival of the ship in such a port until the demand. We think the plain purpose of Congress was to allow the seamen the benefit of half his earned wages, less payments, upon each occasion upon which the statute permits him to demand them from the commencement of the voyage to the time of demand, and that the words of the statute "then earned" are not limited by the succeeding words "at every port," but that the function of the latter is to describe the place of legal demand only. Absence of punctuation between the words "then earned" and the words "at every port" is of little persuasiveness as against the evident intent of Congress. The probable brief duration of a ship's stay in intermediate ports and the small amount of probable wages there earned by the seamen, would make the required payments of little value to them.

The appellant's further contention is that the District Court erroneously refused to consider as a proper deduction from the earned wages of libelants certain advances made them by the master in Liverpool, when they were engaged. The statute says that a seaman is to be paid on demand "one-half part of the wages which he shall then have earned." That previous lawful payments should be first deducted, is conceded. Otherwise the law might require the master to pay to the seaman before the voyage was complete more than the amount stipulated to be paid for the whole voyage.

[3] The word "earned" is used in the sense of owing. Congress avoided the use of the word "due," as there might, by the terms of the contract between the ship and the seaman, be no wages due till the end of the voyage. The use of the word "earned" was to describe wages, for which the seaman had done the work, whether then due or not, and not to fix the amount of what was owing and half of which was to be paid, regardless of previous lawful payments. The question remains whether advances made the libelants by the master in Liverpool are legal payments. Had they been made in an American port, though by a foreign ship and to foreign seamen, the language of section 11 of the act would have invalidated such advances as payments. *Patterson v. The Eudora*, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002. The question is whether the language of the section prohibits the making of advances in foreign ports by foreign ships to foreign sailors. The case cited is limited in its effect and language to advances made within the territorial jurisdiction of the United States.

It is competent for Congress to prescribe conditions of entry to and clearance from its own ports by foreign vessels, since it may ex-

clude them altogether. The section under construction, however, does more than that. Subdivision (e) provides that this section—

“shall apply, as well to foreign vessels while in waters of the United States, as to vessels of the United States, and any master, owner, consignee, or agent of any foreign vessel who has violated its provisions shall be liable to the same penalty that the master, owner, or agent of a vessel of the United States would be for similar violation.”

If this section of the act applies to advances made by a master, owner, or agent of a foreign ship in a foreign port, its effect would be to render such master, owner, or agent guilty of a misdemeanor and subject him to prosecution and punishment, if found in this country, for an act done without the jurisdiction of this country, and which was a lawful act where done. The competency of Congress to so enact is of such grave doubt that a court would not construe the language of an act to that effect, unless forced so to do. The language of section 11 does not require such an unreasonable construction. Indeed, the words of subdivision (e) of the section, “shall apply as well to foreign vessels, while in waters of the United States, as to vessels of the United States,” would seem to imply the contrary. We think the reasonable construction of the section is that it covers only such advances as it was within the competency of Congress to criminally punish the making of, viz. advances made within the territorial waters and jurisdiction of this country by whomever made and to whomever paid. This gives the section a legitimate field of operation. It was the purpose of Congress to protect American seamen, as far as it had jurisdiction to act. In doing so, in order to avoid discrimination against American ships, it was necessary to include foreign ships and sailors under like circumstances. There was, however, no policy to be subserved in the interest of foreign sailors, so far as the title to the act shows, and the debate upon it in Congress.

In protecting American sailors on American ships in foreign ports, the same question of discrimination against American ships would be encountered. Congress might have treated it, by imposing as a condition upon the entry to and clearance from American ports of both foreign and domestic vessels, that all advances, which were made to seamen in a foreign port before the voyage began, should be agreed by the ship to be disregarded in settlements required by the law to be made with seamen in the ports of this country. Instead of doing so, it went further and provided that every advance, prohibited by the act, including those made by the agents, owners, or masters of foreign ships, should be punishable as a misdemeanor. Its determination to make the criminal penalty cover all advances prohibited by the section indicates that its intention was to limit the scope of the prohibited advances to its undoubted competency in that respect; i. e., to such as were made within its undoubted jurisdiction to punish crimes. It also prevents a construction that would separate the penalty provision from any class of the prohibited advances, and so sustain the law in other respects as to the class of advances to which the penalties are legally inapplicable, since the penalty provision is as wide as the prohibition itself and covers every advance, whether made by a domestic or foreign ship which is prohibited by the terms of the act.

Probably Congress felt that the sanction of criminal penalties would be more effective than the prescribing of mere civil conditions, and for that reason confined its legislation to advances made under conditions which gave it jurisdiction to punish the making of them criminally. The provisions of the section, when so construed, are broad enough to fully protect American sailors in American ports, and possibly in foreign ports, and it was not essential to the end in view to include advances to foreign sailors on foreign ships in foreign ports. The debates in the Senate show no wider purpose to have been in the purview of the legislators. The abrogation of existing treaties was necessary, though the scope of the act was confined to advances made in American ports, both for the purpose of transferring wage disputes on foreign vessels to the courts of the United States from the consular courts of the treaty nations, as provided for in section 4 of the act, and to enable the provisions of the law with regard to arrests for desertion to be executed, without conflicting with existing treaties. Provisions in the act to that end do not support appellees' contention.

It is further contended that, though the statute is not itself applicable to advances made in foreign ports to foreign seamen by foreign ships, it outlines a policy against the making of such advances anywhere, and that, pursuing that policy, the courts of the United States will not recognize such advances. The case of *Arden Lumber Co. v. Henderson Iron Works*, 83 Ark. 240, 103 S. W. 185, is cited by appellees in support of this contention. The policy of the United States respecting advances to seamen is only exhibited by the section of the act in question and the corresponding sections of its predecessors, and, in all these acts, as we construe them, this policy was confined to advances made to American seamen and to foreign seamen, only while in American ports. No policy against the making of advances to foreign seamen in foreign ports by foreign ships, where the law of the country permits it, can be deduced from them; nor do the debates in Congress upon the La Follette bill show a wider purpose than the protection of American seamen against advances, the inclusion of foreign ships and seamen being incidental only and to avoid discrimination against American ships.

[2] The usual rule is that, where a contract involves no moral turpitude, but is *malum prohibitum* only, if it is valid where made, it will be held valid in the courts of the United States elsewhere than where it was made, when rights are predicated upon it, though it would be invalid if made there. *Ward v. Vosburgh* (C. C.) 31 Fed. 12; *Lehman v. Feld* (C. C.) 37 Fed. 852; *Wilhite v. Houston*, 200 Fed. 390, 118 C. C. A. 542; *Berry v. Chase*, 148 Fed. 625, 77 C. C. A. 161.

Our conclusion is that the District Court erred in its construction of the Act and in disallowing the advances. The decisions of the District Courts are in conflict. The case of *The State of Maine* (D. C.) 22 Fed. 734, supports the views we have expressed. The cases of *The Rhine* (D. C.) 244 Fed. 833, and of *The Delagoa* (D. C.) 244 Fed. 835, and possibly the case of *The Ixion* (D. C.) 237 Fed. 142, adopt the view taken by the District Judge in this case.

It follows that the decree of the District Court must be reversed and

the cause remanded, with directions to that court to enter a decree dismissing the libel as to all the libelants and taxing appellees with the costs of the appeal; and it is so ordered.

McGOWAN v. ARMOUR.

(Circuit Court of Appeals, Eighth Circuit. January 26, 1918.)

No. 4892.

1. EVIDENCE \Leftrightarrow 178(6)—SECONDARY EVIDENCE—ADMISSIBILITY—LETTER.

In an action for alienation of her husband's affections, where plaintiff testified that, after reading a letter written by defendant addressed to her husband, the husband destroyed the same, secondary evidence of the contents of the letter is admissible.

2. EVIDENCE \Leftrightarrow 378(4)—DOCUMENTARY EVIDENCE—LETTER—ADMISSIBILITY.

A letter purporting to have been written by defendant to plaintiff's husband, whose affections it was charged defendant had alienated, is inadmissible, where neither the handwriting nor the signature was identified as that of defendant, for a letter does not prove itself, and must be shown to have been written by the person against whom it is produced, or by some one authorized to act in his behalf.

3. EVIDENCE \Leftrightarrow 317(2)—ADMISSIBILITY—HEARSAY.

In an action for alienation of her husband's affections, testimony by plaintiff as to alleged statements made by defendant to the husband, and by him communicated to plaintiff, is inadmissible, being hearsay.

In Error to the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Action by Clara T. Armour against Mabel Estelle McGowan. There was a judgment for plaintiff, and defendant brings error. Reversed.

Frank McNulty, of Aberdeen, S. D. (Howard Babcock, of Sisseton, S. D., on the brief), for plaintiff in error.

Daniel J. Conway, of Sioux Falls, S. D. (Muller & Conway and Walter H. Shurtleff, all of Sioux Falls, S. D., on the brief), for defendant in error.

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

AMIDON, District Judge. This is an action at law by Clara T. Armour for alienation of her husband's affections, brought against Mabel Estelle McGowan as defendant. It resulted in a verdict in favor of plaintiff for \$25,000.^p On condition that a new trial would otherwise be granted, the court was authorized to reduce this to \$10,000. Judgment was entered for that amount, to review which defendant brings error.

Plaintiff and her husband were itinerant mattress cleaners. The husband had been addicted to the excessive use of intoxicating liquors, going on protracted sprees from time to time. He had taken the Keeley cure without any permanent results. These habits of his had led to serious differences between him and his wife, and numerous threats, both oral and in writing, on her part, to separate from him.

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

Shortly before this suit was brought they separated, after the husband had been on a protracted debauch. There is one child, a daughter about 12 years of age. Defendant, Mrs. McGowan, is a widow, having three daughters, and is a person of considerable means.

Plaintiff in error relies mainly upon two groups of assignments challenging rulings as to the admissibility of evidence.

[1, 2] 1. The first relates to an alleged letter written by defendant to plaintiff's husband. Plaintiff testified that she found the letter in her husband's pocket during his temporary absence from the room; that he returned just as she was finishing reading it, snatched it from her hand, and tore it up, throwing part of it into the wastebasket, and part of it out of the window. There was sufficient proof to show that the letter had been destroyed, so as to make secondary evidence of its contents admissible, provided only that the letter itself, if it had been present in court, would have been admissible. The only evidence as to the genuineness of the letter as a document written by defendant consists in the statement of plaintiff that she thought she would know defendant's writing, and her statement that the name at the end of the letter was Mrs. M. E. McGowan. The plaintiff did not testify that the letter was in Mrs. McGowan's handwriting, or that the signature was hers. Without any further proof, and over an objection which clearly challenged the foundation which had been laid, plaintiff was permitted to testify to the contents of the letter. This was clearly erroneous. A letter does not prove itself. In order to make it evidence it must be shown either to have been written by the person against whom it is produced, or by some one authorized to act in his behalf. *Consolidated Grocery Co. v. Hammond*, 175 Fed. 641, 645, 99 C. C. A. 195; *Nichols v. Kingdom Iron Ore Co.*, 56 N. Y. 618; *Wigmore on Evidence*, § 2131, p. 2891; 14 *Ency. of Evidence*, p. 742. Nothing of this kind was shown in respect to the letter in question. Receiving this proof was therefore error, and it was highly prejudicial in its character.

[3] 2. Plaintiff was asked to state what her husband told her the defendant had said to him. In the main no attempt was made to lay a foundation for this hearsay evidence. It was not produced as expressive of the husband's feeling, or as so intimately connected with any act of his as to be part of such act within the verbal act rule. On the contrary, it was elicited as a mere narrative by the husband of a past conversation between him and defendant. There are several other features of this evidence which lay it open to suspicion. One is that it was a mere formula of words which plaintiff testified her husband repeated to her on three different occasions in almost identically the same language. Another circumstance is that this formula is said to have been uttered by defendant to plaintiff's husband at their second meeting. Their first meeting was a pure business call, to obtain mattresses for repair. At this the plaintiff herself was present. Plaintiff testified that her husband told her that at their second meeting a few days later, the defendant made this remarkable statement to him:

"Well, he said that she had told him that she thought he was entirely too nice to go around the country doing work like that; that if he would leave

me, and get a divorce from me, that she had plenty of money, and she could take care of him; that he did not have to work like that."

All the authorities agree that evidence of this kind is open to grave suspicion, and should be received only after the most careful scrutiny. Counsel cites, as the authority which was mainly influential in the trial court, the decision of *Hardwick v. Hardwick*, 130 Iowa, 230, 106 N. W. 639. There the plaintiff in an alienation case was permitted to testify as follows:

"Q. What did George" (plaintiff's husband) "say to you about that time in relation to his father, if anything?"

"A. Why, he told me, * * * one night after we had retired, that his father wanted him to leave me."

This, however, was given as explanatory of a violent outburst of love and weeping on the part of plaintiff's husband. The case is regarded as an extreme one, but it furnishes no support for the evidence which was received in the present case. It needs only a casual inspection of that evidence to see that it is doubly diluted hearsay. It is what she said he said she said. It constituted the groundwork of plaintiff's whole testimony. Mr. Wigmore states the rule accurately, and cites the authorities, at section 1730 of his work on Evidence as follows:

"The existence of an emotion—hatred, malice, affection, fear, and the like—is usually evidenced by conduct or by utterances indirectly indicating the feeling that inspires them. But a declaration directly asserting the existence of the emotion is admissible, under the present exception, like a statement of any other kind of mental condition. * * * A special application is also found in actions for alienation of affections, * * * where the state of affections of the wife to the husband, or of the husband to the wife, becomes material. Here, the declarations of the person as to her or his own state of affections are admissible under the present principle."

Mr. Armour's statements, indicative of his own feelings, could be testified to by any person who heard him make such statements. It is also true that any statements made by defendant indicative of her feelings towards Mr. Armour might be given in evidence by any person who heard her make such statements. The vice of the evidence which was received in the present case is that plaintiff, who was testifying, did not hear the defendant make the statements. The statements were made to her husband. Her husband, however, was not a witness. He never told the court under oath, and subject to cross-examination, what the defendant's statements were to him. On the contrary, defendant's statements were all run through one more conduit, namely, the plaintiff. She was permitted to tell what her husband told her that defendant had said to him. It is entirely plain that this went beyond any permissible rule. Anybody who heard Mrs. McGowan make statements expressive of her affections for Mr. Armour could testify as a witness before the court to those statements. That, however, is as far as the hearsay rule has been relaxed in such cases. The vice of the evidence received by the trial court is that it was passed through one more messenger, and that messenger was plaintiff, whose mind was clouded by every motive of interest and passion to distort the hearsay statements which she claimed to report.

In the quest for Armour's feelings, he was converted into a general agent of the defendant to make the most damaging admissions on her behalf. To permit that was to lose sight of substantial justice in the pursuit of a dangerous and purely incidental matter. To say that the vice of this practice can be cured by admonitions to the jury as to the restricted purpose for which the evidence is received is to indulge a purely academic view of the lay mind. The verdict that was rendered in the present case is the best proof of the fallacy of such confidence.

The errors to which we have called attention were fundamental, and, in our judgment, resulted in a complete miscarriage of justice.

The judgment is reversed, and a new trial ordered.

MEYER & CHAPMAN STATE BANK v. FIRST NAT. BANK OF CODY. *

(Circuit Court of Appeals, Eighth Circuit. January 24, 1918.)

No. 4758.

1. APPEAL AND ERROR ⇨211—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—DISMISSAL.

Where the court, without any intimation which would enable either party to anticipate such a termination on its own motion, at the close of plaintiff's case, entered judgment for defendant, dismissing the complaint on the merits, plaintiff may secure review of the dismissal, though it had made no request for findings of fact and a declaration of law in its favor.

2. BANKS AND BANKING ⇨114—ACTS OF CASHIER—LIABILITY OF BANK THEREFOR.

Where the cashier of defendant bank represented to plaintiff, who had previously rediscounted paper for defendant, that a note was part of the assets of the defendant, and plaintiff discounted the note, defendant, having received the proceeds, cannot escape liability on the ground that the note did not in fact belong to it.

In Error to the District Court of the United States for the District of Wyoming; John A. Riner, Judge.

Action by the Meyer & Chapman State Bank, a corporation, against the First National Bank of Cody, a corporation. At the conclusion of plaintiff's case the court entered judgment in favor of defendant, dismissing the complaint, and plaintiff brings error. Reversed, with directions to grant new trial.

"This was an action by the plaintiff, Meyer & Chapman State Bank, against the defendant, First National Bank of Cody, to recover \$10,000 as for money loaned. It was tried to the court without a jury, pursuant to written stipulation. At the conclusion of plaintiff's case the court entered judgment in favor of defendant, dismissing the complaint upon the merits. Plaintiff brings error. Plaintiff insists that it was entitled to judgment upon the uncontroverted facts. This requires a full statement of the evidence.

W. J. Deegan was defendant's cashier. He had been accustomed to obtain rediscounts of paper held by his bank, both by the plaintiff, the Meyer & Chapman State Bank, and by Mr. Chapman, its president. On May 5, 1913, he wrote a letter to Mr. Chapman, personally, signed by himself, as cashier, on the letter head of his bank, inclosing a note of \$10,000, executed by Aaron Holm to the Holm Transportation Company, dated May 1st, due in 6 months, secured by 200 shares of the stock of the Holm Transportation Company as

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*Rehearing denied May 10, 1918.

collateral. The note was indorsed by the payee. In the letter he expressed his wishes as follows:

"I have no disposition whatever to 'ride a willing horse to death,' but this loan is larger than we are allowed to carry, and should you feel that you could not carry this, in addition to what you are now carrying, you might return any of the notes that I have previously sent you, or such portion thereof as you felt was necessary to make up the amount of this one. * * *

"There is not much possibility that this loan would be taken up at its maturity, but the interest would be paid and a note furnished at that time, and in fact it would probably be about 18 months before this loan would be entirely taken up, and I would guarantee the payment of the principal at that time, and the interest, at the end of every 6 months period.

"This would make a little more permanent investment than the notes I have sent you, and, so far as the security is concerned, I think it is absolutely good.

"If this would be agreeable to you, you might make the remittance to the Merchants' National Bank, as usual, and I will agree not to send you any more paper, as I feel now that I am crowding the limit, and exceeding anything that I expected to ask for at the time I was talking to you."

A few days after this letter was received, namely, May 8th or 9th, Mr. Chapman called Deegan by phone, and stated that he personally had no funds to invest, but that the plaintiff, Meyer & Chapman State Bank, had the money. Deegan then said, "I do not think we will need this money over 30 days." Mr. Chapman said that would suit him much better and that the plaintiff bank would make the loan for that time. Mr. Deegan confirms this conversation, and says, in answer to a question as to what he stated to Mr. Chapman as to how long the money would be required, "I told him probably not to exceed 30 days." As the result of this conversation, and immediately following it, Mr. Chapman, as president of the plaintiff bank, took the letter, the note, and the collateral to Mr. Alden, plaintiff's cashier, and told him "we would let the First National Bank of Cody have the money," and to place it in the Merchants' National Bank of Billings for the First National Bank of Cody. On May 9th plaintiff's cashier wrote the Merchants' National Bank of Billings as follows: "Please charge our account ten thousand dollars (\$10,000), and credit the same to the account of the First National Bank of Cody, Wyoming, and oblige." At the same time he sent notice to defendant that he had caused this credit to be given.

On May 12th the cashier of the Merchants' National Bank of Billings wrote the First National Bank of Cody as follows: "We are crediting your account \$10,000, this amount having been remitted by Meyer & Chapman State Bank, Red Lodge, for your credit."

The \$10,000 credit given defendant by the Merchants' National Bank of Billings was drawn out between May 12, 1913, and June 24, 1914, so that on the latter date the account was overdrawn \$810.49. These are the uses made of the credit:

"In two cases currency was remitted to the First National Bank of Cody; in two cases funds were remitted to the United States National of Omaha for the credit of the First National of Cody; in one case, for interest on a demand note; in one case, in payment of a collection; in one case, exchange charges; and in all other cases, the exchange of checks upon Cody, Wyo., which were sent them and charged to their account in the usual course of business."

This is the testimony given by the cashier of the Merchants' National Bank of Billings as to the manner in which the fund was used.

Mr. Deegan was an officer of the Holm Transportation Company, and interested in its affairs. In explanation of "how he happened to get that note," he testified on cross-examination by defendant as follows:

"A. I got that note at the office of the Holm Transportation Company and I remitted it from my own office; that is, I sent—I naturally took it there to remit it.

"Q. You didn't get it out of the property of the bank? A. No, sir.

"Q. It never was the property of the Cody National Bank? A. No, sir.

"Q. It was never discounted at the Cody National Bank? A. No, sir.

"Q. And was given to you by the Holm Transportation Company to forward to Mr. John Chapman? A. Yes, sir.

"Q. It was never a part of the property of the First National Bank of Cody?
A. It never was."

The evidence showed that the loan had not been paid, except an installment of interest. The bill of exceptions shows that the trial commenced on April 5, 1916. There was an adjournment at noon, and in the afternoon considerable testimony was taken on behalf of plaintiff. The findings and judgment all bear date on April 5th, so we conclude that the entire trial was commenced and completed on that day. Objection had been made by counsel for defendant to numerous exhibits that were offered in evidence, by plaintiff, and the court reserved its ruling. Immediately upon plaintiff's resting its case, the court rendered the following decision, without any motion on behalf of either party, but of the court's own motion:

"The Court: Mr. Enterline, you have not established your case. I will overrule the objection made this morning to Exhibit No. 1, and admit that, and admit all the correspondence, and the evidence, and taking it altogether it shows beyond all question to my mind that in the first place there is no guaranty by this bank, whatever your remedy may be against Mr. Deegan. Mr. Deegan was your witness, and went on the stand, and swore positively, and the testimony stands before the court uncontradicted, that this note and the securities given with it as collateral were never the property of the First National Bank of Cody. The First National Bank of Cody never paid the interest. The interest was paid by the Holm Transportation Company, he testified, and the bank book shows that the Holm Transportation Company was credited with the full amount of this note. So by your own testimony you have made, I think, a complete defense for the First National Bank of Cody. "Without discussing it further, and without arguing it, I will overrule the objections to the exhibits you have offered, and admit them, and direct a judgment to be entered for the defendant."

So far as the record shows, neither party had any reason to expect this sudden disposition of the cause. Neither party had presented any requests to the court, and, as the court had not signified its intention to render its decision, there was no opportunity for the plaintiff to present any requests for findings of fact or declarations of law in its favor.

W. L. Walls, of Cody, Wyo., and E. E. Enterline, of Billings, Mont., for plaintiff in error.

William A. Riner, of Cheyenne, Wyo., for defendant in error.

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

AMIDON, District Judge (after stating the facts as above). [1] It is first objected by defendant that this court cannot consider any question of fact, as there was no request by the plaintiff for findings of fact and a declaration of law in its favor as foundation for an exception. Such would be the rule under ordinary circumstances. Security National Bank v. Old National Bank, 241 Fed. 1, 154 C. C. A. 1; Felker v. First National Bank of Cincinnati, 196 Fed. 200, 116 C. C. A. 32. But upon the peculiar facts of this case we do not think the rule is applicable. The case was suddenly terminated on the court's own motion, without any reason, so far as the record shows, for either party to anticipate such a termination, and without any opportunity to counsel to present requests, and judgment was immediately entered upon the same day in accordance with this decision. Upon such a state of facts we think the case must be treated the same as it would be if plaintiff had presented requests for findings of fact and a declaration of law in its favor, and reserved a proper excep-

tion to their denial. We are the more ready to do this because there is really no essential conflict in the evidence.

[2] Upon the merits we think the evidence shows without substantial conflict that plaintiff loaned the defendant \$10,000 for 30 days upon the security of the Holm note with its collateral. Defendant applied that money to its own use, and has never repaid it. It is not important whether the Holm note was in fact the property of defendant. The question is: How did defendant's cashier present the matter to plaintiff at the time the loan was made? The evidence clearly shows that he represented the paper as a part of the assets of defendant's bank, and that he offered it as collateral for a loan to his bank. Defendant cannot escape the repayment of money, which it received and used, upon a showing that the note which it offered as collateral to the loan in fact did not belong to it. Whether that was so or not, the loan was certainly made to it. It received the money and used it upon a promise to its cashier to repay it within 30 days. That it has failed to do, and, upon the evidence before the court, the plaintiff was entitled to recover.

The judgment is reversed, with directions to grant a new trial.

THE PIERREPONT.

(Circuit Court of Appeals, Second Circuit. December 20, 1917.)

No. 37.

COLLISION \Leftrightarrow 95(4)—FERRYBOAT AND TUG LEAVING SLIP—FAULT.

As a tug with a tow on a short hawser, going at four or five miles speed, passed out from a slip on the Brooklyn front of East River and from behind a covered pier, which obstructed the view to the north, a ferryboat was approaching diagonally from that direction to enter her slip, and was close by. The tide was ebb; the tug stopped or backed, but her bow was turned to the southward by the tide; the ferryboat reversed, but did not change her helm, nor succeed in stopping her headway, and struck the tug on the starboard side, near the bow, at nearly right angles. *Held*, that the case was not one to which the starboard hand rule applied, because there was not time for the vessel to navigate on that assumption, but was of special circumstances, within article 27 of the Inland Rules (30 Stat. 102, Comp. St. 1916, § 7901), and that, the fault of the tug not being in issue on appeal, the ferryboat was chargeable with contributory fault for not at once porting her helm, which under the conditions would probably have taken her clear of the tug.

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

Suit in admiralty for collision by the Edward G. Murray Lighterage & Transportation Company, owner of the tug Murray, against the ferryboat Pierrepont; the Union Ferry Company of New York & Brooklyn, claimant. Decree holding both vessels in fault, from which respondent appeals. Affirmed.

This is an appeal from a decree dividing the damages upon a libel by the owners of the Murray for a collision between the Murray, towing a barge,

and the ferryboat Pierrepont. The collision occurred on the east side of the East River, between Pier 32 and the Old Dominion pier on the Brooklyn side. The District Judge held both vessels at fault and divided the damages.

Pier 32 extends from the bulkhead line some 464 feet into the East River. It is 70 feet in width and covered with a shed, which obscures vision to the north, except for the last 8 or 10 feet. On the day in question two or three barges and the steam tug Downer were moored to the outside of the pier, lapping over the pier end on the southerly side. There were also boats along the south side of the pier. Rudolph's coal wharf projects from the shore between the Old Dominion pier and Pier 32 at an angle to Pier 32 and its south side forms the north side of the north ferry rack. The south side of the south ferry rack is formed by the Old Dominion pier. As a result of the angle at which Rudolph's pier projects from the shore, the exit between the end of Rudolph's pier and the south side of Pier 32 is about 105 feet. At the point of Rudolph's pier lay the Rudolph, a steam lighter about 30 feet in beam, and along the south side of Pier 32 there were several vessels moored, probably all about the same width. The passageway between these boats was therefore not much over 40 or 50 feet. The Murray had gone into the bulkhead on the south side of Pier 32 to pick up a barge, which she took in tow upon a hawser of some 10 or 12 feet. She emerged out of the slip, not keeping close to the south side of Pier 32, because of the boats moored there. She came out under one bell at about 4 or 5 miles an hour, but did not drift down with the full of the ebb tide until near the end of the pier, where she began to feel its effect. Meanwhile the ferryboat, Pierrepont, in order to make her slip on the same ebb tide, had come to the north of Pier 32. Under a port wheel she had turned and was about to come down into her slip, with the tide at an angle to the pier itself. The result was that neither vessel saw the other until the Murray emerged from behind the shed on the pier. At that time the ferry blew her alarms and backed, and the Murray either backed or stopped her way, which of the two is in dispute. The Pierrepont did not change her helm and did not succeed in stopping all her way; the Murray, under the influence of the tide and perhaps of her helm, had headed slightly down stream, so that when the vessels came together they were not far from a right angle in their relative headings. The bow of the Pierrepont struck the Murray about 15 or 20 feet abaft her stem, just under her pilot house, with such force that eventually she sank.

Only the Pierrepont appeals from the decree below.

Pierre M. Brown, of New York City, for the Pierrepont.
James A. Martin, of New York City, for the Murray.

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

LEARNED HAND, District Judge (after stating the facts as above). It seems to us quite clear that the case is not one of the starboard hand rule. The vessels were not on steady courses, and had not made each other out in time to navigate with respect to each other, on that assumption. The *John Ruge*, 234 Fed. 861, 148 C. C. A. 459; The *Wm. A. Jamison*, 241 Fed. 950, 154 C. C. A. 586; The *Washington*, 241 Fed. 952, 154 C. C. A. 588. The case was therefore one of special circumstances, under article 27 of the Inland Regulations, and each vessel was bound to be controlled by the particular situation with which it was confronted. We are absolved from any consideration of the fault of the Murray, since she does not challenge upon this appeal the finding against her. The only question is of the Pierrepont's fault.

The District Judge found her at fault for failing to port her helm when she first made out the Murray coming out from behind the shed.

His theory was that at that time, if she had hard-aported, being quick in the swing as her quartermaster swore, she would have cleared the Murray, since in fact she struck her but 15 or 20 feet abaft the stem as it was. The Pierrepont was a side-wheeler, and therefore would answer her helm so long as she retained any way. To back, therefore, did not relieve the master from care for his helm.

Three courses seem to have been open to the Pierrepont when the crisis presented itself, either to keep her helm amidships, as she did, to hard-aport and swing down stream, exposing her port quarter to the Murray, or to hard-astarboard. Of these three it seems to us clear that no prudent master would have hard-astarboarded, since this would have brought him either into the barges on the end of Pier 32 or between the Murray and the barges moored to the south side of that pier. Neither of these courses was prudent or permissible. To hard-aport would in all probability have avoided the collision. The Murray had at least stopped her engines, and her own crew swore that she was backing, though this is disputed by the captain of the Rudolph, who saw no quickwater under the stern, and who was in a good position to see. In either case we think that the Pierrepont would have cleared her, if she had ported, as the District Judge found she should have done.

There remains, therefore, only the question whether, in so porting, the ferryboat's exposure of her port quarter was a danger which presented a case of decision in extremis, and justified the master in keeping his helm amidships as he did. We do not think that any such danger presented itself. The speed of the Murray was slight at the outset; she probably had never acquired a headway of more than 4 or 5 miles an hour, and, as we have said, she had at least stopped her engines, so that she was drifting only with her acquired way. Had her stem come in contact with the ferry it would necessarily have touched only the wide fender at the side, and could not have done any serious damage to the vessel itself. It seems to us that prudent navigation required the Pierrepont under the circumstances at once to hard-aport, and that the District Judge was right in holding that her failure to do so was a fault which contributed to the collision.

Decree affirmed, with costs.

ROSENTHAL v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. February 23, 1918.)

No. 4888.

1. BANKRUPTCY Ⓒ486—OFFENSE—FALSE SWEARING.

One guilty of false swearing in a bankruptcy proceeding is punishable under Bankruptcy Act July 1, 1898, c. 541, § 29b(2), 30 Stat. 554 (Comp. St. 1916, § 9613), denouncing the offense of false swearing in bankruptcy proceedings, instead of under Penal Code (Act March 4, 1909, c. 321) § 125, 35 Stat. 1111 (Comp. St. 1916, § 10295), which is the general statute applicable to prosecutions for perjury, for the Bankruptcy Act provides a lighter punishment and a shorter period of limitations than the general

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statute, and for one offense there can be only one prosecution and conviction.

2. CRIMINAL LAW ⚡565—LIMITATIONS—EVIDENCE.

In a prosecution for false swearing in a proceeding in bankruptcy, a conviction cannot be supported where defendant pleaded not guilty, and the only showing that the offense occurred within the limitation of one year prescribed by Bankruptcy Act, § 29d (section 9613) was the unsupported statement of the district attorney as to when defendant was sworn in the bankruptcy proceeding.

3. WITNESSES ⚡387—EVIDENCE—EXAMINATION OF WITNESSES.

In such a prosecution it was improper to allow the government, in examining a hostile witness, to bring out on cross-examination the whole of his testimony given before the referee in bankruptcy; it not appearing it was done for the purpose of refreshing his memory.

Smith, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Joseph Rosenthal was convicted of false swearing in bankruptcy, and he brings error. Judgment reversed, with directions to grant new trial.

Douglas W. Robert, of St. Louis, Mo., for plaintiff in error.

Vance J. Higgs, Asst. U. S. Atty., and Arthur L. Oliver, U. S. Atty., both of St. Louis, Mo.

Before SANBORN and SMITH, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge. [1] The defendant, plaintiff in error, was indicted in two counts for false swearing, in a proceeding in bankruptcy, before the referee in bankruptcy. Each of the counts is for the same alleged offense; one count being evidently drawn under section 29b(2) of the Bankruptcy Act, and the other under section 125 of the Penal Code. There can only be one prosecution and conviction for one offense, and Congress undoubtedly was of the opinion that false swearing in bankruptcy proceedings is not equal in enormity to the crime of perjury, as the punishment for false swearing in a proceeding in bankruptcy is less severe, and the time within which the prosecution must be instituted two years less than that for the crime of perjury under section 125 of the Penal Code. It was so held in *Wechsler v. United States*, 158 Fed. 579, 86 C. C. A. 37; *Kahn v. United States*, 214 Fed. 54, 130 C. C. A. 494; *Ulmer v. United States*, 219 Fed. 641, 134 C. C. A. 127. We therefore hold that the defendant could only be prosecuted under section 29b(2) of the Bankruptcy Act, and not under section 125 of the Penal Code.

[2] Section 29d of the Bankruptcy Act provides:

“A person shall not be prosecuted for any offense arising under this act unless the indictment is found or the information is filed in court within one year after the commission of the offense.”

A careful examination of the record fails to show any evidence whatever when the alleged false testimony was given by the defend-

ant. The only reference to the date of defendant's testimony before the referee was in a colloquy with the court, as follows:

"The Court: I am asking the question as to whether it is admitted or denied that he testified (meaning the defendant).

"Mr. Robert (counsel for defendant): We deny that he testified in any proceeding before Referee Coles.

"The Court: I think your record shows that he testified on the 29th day of July, 1915.

"Mr. Oliver (U. S. Attorney): It says the oath was administered to him and he gave testimony.

"The Court: 29th day of July, 1915, testified, stands on proof."

This was not admitted by counsel for defendant; therefore the only proof as to the date of the commission of the alleged offense was the unsupported statement of the district attorney. This was clearly not evidence, and, as the plea of "not guilty" was a denial of every material allegation in the indictment, the failure to prove by competent evidence that the alleged offense was committed within one year prior to the finding of the indictment is fatal, and necessitates a reversal.

[3] Another error committed was the admission of the testimony of Lipschitz, the main witness for the government, without whose testimony there was practically no evidence to justify a verdict of guilty. While, in view of his testimony, as given before the referee, it was proper to permit him to be examined as a hostile witness, and as one whose testimony at the trial was a surprise to the government, it was improper to read to him all of his testimony before the referee, by way of cross-examination, and ask him, as every question and answer was read before the jury, "Did you not on the former occasion testify as follows?" This was not for the purpose of refreshing his memory, but was in fact introducing his testimony, in an examination before the referee under section 21 of the Bankruptcy Act (Comp. St. 1916, § 9605). This was error. *Commonwealth v. Jeffs*, 132 Mass. 5; *Chamberlayne on the Modern Law of Ev.* § 3507.

For the errors indicated, the judgment of the court below is reversed, with directions to grant a new trial.

SMITH, Circuit Judge, dissents.

W. D. REEVES LUMBER CO. v. LEAVENWORTH.

LEAVENWORTH v. W. D. REEVES LUMBER CO.

(Circuit Court of Appeals, Fifth Circuit. February 2, 1918.)

No. 3117.

1. ATTACHMENT \Leftrightarrow 6—WRIT—SCOPE OF.

Under Code Miss. 1906, § 129, declaring that the remedy by attachment shall apply to all actions or demands founded upon any indebtedness or for the recovery of damages for the breach of any contract, express or implied, attachment is a proper remedy in an action for the wrongful cutting and removal of timber, where the declaration showed a

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state of facts from which could be implied a promise by defendant to pay the stated value of the timber cut.

2. ABATEMENT AND REVIVAL Ⓒ—12—PENDENCY OF SUIT IN STATE COURT.

The pendency of an action in the state court is not pleadable in bar or abatement of proceedings concerning the same matter in the federal court having jurisdiction.

3. APPEAL AND ERROR Ⓒ—501(4)—REVIEW—PRESENTATION OF GROUNDS IN COURT BELOW.

The refusal of a requested charge cannot be reviewed on error, where the record did not show reservation of any exceptions.

In Error and Cross-Error to the District Court of the United States for the Northern District of Mississippi; Henry C. Niles, Judge.

Action by George Leavenworth, as executor of the estate of J. H. Leavenworth, deceased, against the W. D. Reeves Lumber Company and another, begun in state court, and removed to the federal court. There was a judgment for plaintiff, and defendant named brings error, while plaintiff assigns cross-error. Affirmed.

D. A. Scott, of Clarksdale, Miss. (E. M. Yerger, of Clarksdale, Miss., on the brief), for plaintiff in error.

Gerald Fitz Gerald, of Clarksdale, Miss. (Maynard & Fitz Gerald, of Clarksdale, Miss., on the brief), for defendant in error.

Before WALKER and BATTS, Circuit Judges, and BEVERLY D. EVANS, District Judge.

WALKER, Circuit Judge. This suit was brought by attachment in a court of the state of Mississippi against the W. D. Reeves Lumber Company and the estate of W. D. Reeves, deceased, and was removed to the United States District Court by the W. D. Reeves Lumber Company. The declaration contained two counts. The first count alleged the wrongful cutting and removal by the defendant of trees of specified values on land belonging to the plaintiff, and sought to recover the amount of such values. The second count was for the recovery of the penalty prescribed by a Mississippi statute for the wrongful cutting down and removal of trees. The recovery was on the first count.

[1] A motion was made to quash the writ of attachment, so far as the plaintiff's demand for the actual value of the timber cut was concerned. Error is assigned on the action of the court in overruling this motion. Under the Mississippi statute the remedy by attachment may be resorted to in any action for the recovery of damages for the breach of contracts, express or implied. The averments of the first count of the declaration showed a state of facts from which could be implied a promise by the defendant to pay the stated value of the trees cut. We think the decisions of the Supreme Court of Mississippi, construing and applying the statute mentioned, support the action of the court in overruling the motion. *Mhoon v. Greenfield*, 52 Miss. 434; *Evans v. Miller*, 58 Miss. 120, 38 Am. Rep. 313; *Nethery v. Belden*, 66 Miss. 490, 6 South. 464; *Commission Co. v. Crook*, 87 Miss. 451, 40 South. 20, 1006; Code Miss. 1906, § 129.

[2] The W. D. Reeves Lumber Company interposed a plea which alleged the institution of a suit in a state court by the plaintiff against W. D. Reeves; in which was sought a recovery for the cutting and removal of the same trees for the value of which recovery is sought in this suit, and an injunction restraining Reeves from cutting and removing any timber and from removing any already cut, the rendition of a judgment or decree in that suit granting the injunction prayed for and ordering the taking of an account for the trees cut, and that by reason of the beneficial ownership by W. D. Reeves of all of the capital stock of the W. D. Reeves Lumber Company the two defendants were really one and the same. A demurrer to this plea was sustained.

So far as the cause of action asserted in the first count of the declaration in the instant suit is concerned, the plea shows no more than the pendency in a state court of another action previously brought by the plaintiff, based on the same cause of action, for the cutting and removal of the same trees. It does not show that there has been a recovery of any amount in the former suit, which, for aught that appears, is still pending and undetermined in that regard. Assuming that the allegations show the identity of the respective defendants in the two suits, the plea does not show a defense in bar or abatement of the pending suit. The pendency of an action in the state court is not pleadable in bar or abatement of proceedings concerning the same matter in the federal court having jurisdiction. *McClellan v. Carland*, 217 U. S. 268, 282, 30 Sup. Ct. 501, 54 L. Ed. 762; *Gordon v. Gilfoil*, 99 U. S. 168, 178, 25 L. Ed. 383; *Wilcox & Gibbs Guano Co. v. Phoenix Ins. Co.* (C. C.) 61 Fed. 199; *Barnsdall v. Waltemeyer*, 142 Fed. 415, 73 C. C. A. 515.

[3] The only cross-assignment of error which was insisted on in argument is based upon the refusal of the court to give a charge requested by the plaintiff. The record does not show that an exception was reserved to that action of the court.

The conclusion is that the record does not show the commission of any reversible error.

The judgment is affirmed.

ALTHEIMER & RAWLINGS INV. CO. v. ALLEN, Collector of
Internal Revenue.

(Circuit Court of Appeals, Eighth Circuit. February 28, 1918.)

No. 4918.

INTERNAL REVENUE ⌘9—CORPORATION TAXES—"GROSS INCOME."

Under Corporation Tax Act Aug. 5, 1909, § 38 (36 Stat. 112, c. 6), imposing an annual excise tax of 1 per cent. on the net income of corporations in excess of \$5,000, and declaring that the net income shall be ascertained by deducting from the gross income expenses, losses, and interest actually paid on indebtedness not exceeding the amount of paid-up capital, a corporation engaged in the brokerage business, which bought and carried securities for customers on margins, receiving interest pay-

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

ments from them on account of the margins, must list all such interest as part of its gross income, and in computing its net income cannot, though it incurred indebtedness for the purchases and paid interest on the balances due, deduct interest on such indebtedness in excess of the amount of its paid-up capital, for such indebtedness was that of the corporation, and not its customers.

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

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action by the Altheimer & Rawlings Investment Company against E. B. Allen, Collector of Internal Revenue for the First District of Missouri. There was a judgment for defendant (246 Fed. 270), and plaintiff brings error. Affirmed.

David Goldsmith, of New York City, for plaintiff in error.

William H. Woodward, Asst. U. S. Atty., of St. Louis, Mo. (Arthur L. Oliver, U. S. Atty., of St. Louis, Mo., on the brief), for defendant in error.

Before HOOK and SMITH, Circuit Judges, and TRIEBER, District Judge.

HOOK, Circuit Judge. This is an action by the Investment Company to recover from the collector of internal revenue an alleged excess of taxes assessed for the years 1909, 1910, and 1911 under the Corporation Tax Act of August 5, 1909 (36 Stat. 112, § 38) and paid under protest. The trial court decided against the plaintiff.

The facts were stipulated. The plaintiff is a Missouri corporation engaged in a stock and bond brokerage business, with a paid-up capital of \$300,000. The tax imposed by the statute was an annual excise tax equivalent to 1 per cent. upon the entire net income of the corporation in excess of \$5,000 received by it from all sources during the year. See *Anderson v. Forty-Two Broadway Co.*, 239 U. S. 69, 36 Sup. Ct. 17, 60 L. Ed. 152. The statute provides that the net income shall be ascertained by deducting from the gross income from all sources (1) expenses, (2) losses, and (3) interest actually paid on indebtedness, not exceeding the amount of paid-up capital outstanding at the close of the year. The controversy is over the deduction under the third clause for interest paid on indebtedness.

The stipulation recites that plaintiff's business consisted in part of the purchase for customers of bonds and other securities, which it carried for them on margin or part payment. It charged and received from them interest on the unpaid balances. In buying the securities for its customers, plaintiff itself paid but part of the price "on said purchases," and paid interest on the balances it owed. In these transactions the interest received by plaintiff from its customers exceeded the interest it paid. In making its tax returns, plaintiff deducted from the interest it received the entire amount of the interest it paid and listed the balance as gross income. The Commissioner of Internal Revenue, in reforming the returns, listed all interest received as gross income, and limited the amount of deduction for interest paid

according to the statutory restriction in respect of the amount of plaintiff's capital stock.

The plaintiff contends that, when it borrowed money to carry the securities for its customers, the indebtedness it incurred was theirs, and that the interest it received from them on their own unpaid balances was, so far as required, paid for them on such indebtedness. In other words, it is urged in effect that plaintiff was a mere conduit for the transmission of sufficient of the interest received from its customers to discharge the interest accruing on the sums it borrowed, and hence only the excess remaining in its hands was income. It is recited in the stipulation that plaintiff owed and paid interest on part of the purchase price "on said purchases" so carried by it for its customers. The recital is ingeniously framed, but it does not justify the assumption that plaintiff's extensive business was conducted otherwise than according to the familiar customs of stock and bond brokers. The suggestion upon which plaintiff's contention rests that it bought the stocks and bonds on time, and that the sellers extended credit to plaintiff as agent for its customers and received interest from them indirectly, is quite inadmissible. In the usual course of the business, which it should be assumed the plaintiff followed, the seller of securities is paid in full by the broker, and is not thereafter interested in the relation between the latter and his customer. Doubtless, if the broker's capital is insufficient to carry his customers, he borrows money from time to time for the purpose, and in that sense he may be said to borrow "on the purchases." But the borrowing is from any available financial source, and is not for the customer personally, but is in the broker's own behalf. A recognized source of profit to the broker is in the difference between the interest rate he charges his customers and that which he pays on moneys borrowed to carry them. He deals in debits and credits for a profit. The borrowing by the broker supplements the capital employed in his business, and in the case of a corporation subject to the excise tax the deduction from gross income for interest paid on its indebtedness is limited to interest on an amount of indebtedness not exceeding its paid-up capital stock outstanding at the close of the year. In this particular the plaintiff's borrowing to carry its customers was not unlike that of a mercantile corporation, whose capital is insufficient for the volume of its business. It should be noted that this case arose before the amendment of October 3, 1913 (38 Stat. 166, § 2, G, b).

The judgment is affirmed.

MORGAN, Warden of U. S. Penitentiary, v. WARD et al.^o

(Circuit Court of Appeals, Eighth Circuit. February 1, 1918.)

No. 4915.

CRIMINAL LAW ⇨1216(1)—HABEAS CORPUS—RELEASE PENDING APPEAL—EFFECT.

Where petitioners, pending appeal in habeas corpus proceedings, were on their own application released, though they failed to enter into the recognizance required by court rule 33, subd. 3 (150 Fed. xxxvi, 79 C. C. A. xxxvi), such period cannot be counted as part of the period of imprisonment, on the theory that, as they failed to give recognizance, they were subject to arrest at any time, for it was as much their duty to enter into the recognizance as for the court to require it.

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Habeas corpus by Dan A. Ward and W. A. Greenwood against Thomas W. Morgan, Warden of the United States Penitentiary at Leavenworth, Kan. There was a judgment discharging petitioners, and respondent appeals. Reversed, with directions.

L. S. Harvey, Asst. U. S. Atty., of Kansas City, Kan. (Fred Robertson, U. S. Atty., of Kansas City, Kan., on the brief), for appellant.

I. J. Ringolsky, of Kansas City, Mo. (M. L. Friedman, Ringolsky & Friedman and Harry L. Jacobs, all of Kansas City, Mo., on the brief), for appellees.

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

AMIDON, District Judge. Appellees are prisoners in the federal penitentiary at Leavenworth, Kan. This is a proceeding by habeas corpus for their release. The case has been here once before on a like application. 224 Fed. 698, 140 C. C. A. 238. On the going down of the mandate from our judgment then, the defendants surrendered themselves to the warden of the penitentiary, and were again incarcerated. While the case was pending here they were at large. Subdivision 3 of rule 33 of this court (150 Fed. xxxvi, 79 C. C. A. xxxvi) provides:

"Pending an appeal from the final decision of any court or judge discharging the prisoner [on habeas corpus], he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required."

On the former appeal appellees gave no recognizance as required by this rule. They now claim that though they were in fact at large for 543 days during the pendency of that appeal, they were constantly subject to arrest because they were released without requiring the recognizance. Acting upon this theory they applied to the trial court again for release, when the time arrived that they would have been entitled to their discharge, if they were treated as having been incarcerated during all the months that they were at large while the

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

^oRehearing denied May 10, 1918.

case was pending before this court. The court accepted their theory, and again released them. The warden appeals.

The ruling was wrong. Pending former appeal, the prisoners were released by order of the court. That order was unconditional. If the warden desired its modification to comply with the rule, he could only apply to the court for that relief. While the order was in force it was binding upon him. If he had attempted to rearrest the prisoners, simply because the judge by an oversight failed to require the recognizance, he would have been in contempt of court. Giving the recognizance was not a matter of jurisdiction, but quite a subordinate matter of practice. The prisoners were released on their own application, and it was as much their duty to give the recognizance as it was that of the trial court to require it. It would be allowing them to take advantage of their own wrong, if they were now permitted to treat the time when they were outside the penitentiary as if they had been in fact incarcerated. The claim that the order was a nullity, and that they were at all times subject to arrest and constructively incarcerated, is mere legal camouflage. Imprisonment in the penitentiary is a reality. It cannot be taken by absent treatment. While not directly in point the following cases throw light upon the question. *Ex parte Espalla*, 109 Ala. 92, 19 South. 984; *Miller v. Evans*, 115 Iowa, 101, 88 N. W. 198, 56 L. R. A. 101, 91 Am. St. Rep. 143; *State v. McClellan*, 87 Tenn. 52, 9 S. W. 233; *Ex parte Bell*, 56 Miss. 282.

The original sentence was for two years' imprisonment and to pay a fine of \$500. The fine for \$500 was beyond the limit of the statute, which provides for a fine not to exceed \$300. The defendants deposited \$500 with the trial court. That court directed that \$300 be paid to the warden, and \$200 be retained to abide the decision of this court. The defendants are entitled to a return of the \$200.

The decision is reversed, with direction to the trial court to take such proceeding as shall be necessary to secure the return of the prisoners to the custody of the warden to serve the remainder of their sentence.

BONNER v. FIRST NAT. BANK OF ATHENS.

(Circuit Court of Appeals, Fifth Circuit. February 11, 1918.)

No. 3051.

1. BANKRUPTCY ⇐161(1)—PREFERENCES—WHAT CONSTITUTES.

A mortgage executed by the bankrupt more than four months before the petition was filed, which under the state law was valid against creditors other than lien creditors, is not, though recorded within the four-month period, open to attack under Bankruptcy Act July 1, 1898, c. 541, § 60, 30 Stat. 562, as amended by Act June 25, 1910, c. 412, § 11, 36 Stat. 842 (Comp. St. 1916, § 9644), relating to preferential transfers.

2. BANKRUPTCY ⇐184(2)—TRANSFERS—ATTACK BY TRUSTEE.

A mortgage given by a bankrupt more than four months before the filing of the petition, which under the state law was valid against creditors other than those having a lien, is not, though recorded within the four-month period, subject to attack by the trustee, who, under Bankruptcy

Act July 1, 1898, c. 541, § 47a, 30 Stat. 557, as amended by Act June 25, 1910, c. 412, § 3, 36 Stat. 840 (Comp. St. 1916, § 9631), takes the status of a lien creditor as of the time petition was filed; the mortgage having been recorded before the rights of any lien creditors attached.

In Error to the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge.

Action by Thomas D. Bonner, trustee in bankruptcy, against the First National Bank of Athens. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Francis Marion Etheridge, Joseph Manson McCormick; and Henri Louie Bromberg, all of Dallas, Tex., for plaintiff in error.

H. B. Marsh and H. E. Lasseter, both of Tyler, Tex., and A. B. Watkins, of Athens, Tex. (R. W. Simpson, N. A. Gentry, and A. G. McIlwaine, all of Tyler, Tex., on the brief), for defendant in error.

Before WALKER and BATTIS, Circuit Judges, and FOSTER, District Judge.

WALKER, Circuit Judge. [1, 2] By the judgment presented for review the asserted right of a trustee in bankruptcy to recover property transferred by the bankrupt by a mortgage executed more than four months before the petition in bankruptcy was filed, but recorded within that time, was denied. The averments of the petition did not show that the mortgage was invalid under the law of Texas, in which state it was made. Under the law of that state it was not necessary to record the mortgage to make it valid against creditors other than lien creditors. Meyer Bros. Drug Co. v. Pipkin Drug Co., 136 Fed. 396, 69 C. C. A. 240. It has been settled by authoritative rulings that under section 47a of the Bankruptcy Act, as amended in 1910 (36 Stat. 838, 840), the trustee in bankruptcy takes the status of a lien creditor as of the time the petition in bankruptcy is filed, and that under section 60 of that act, as the same has been amended, such a mortgage as the one in question in this case does not constitute a voidable preference. Martin v. Commercial National Bank, 245 U. S. 513, 38 Sup. Ct. 176, 62 L. Ed. —, January 14, 1918; Carey v. Donohue, 240 U. S. 430; Martin v. Commercial National Bank, 228 Fed. 651, 143 C. C. A. 173. The mortgage was recorded before the right as a lien creditor of any one other than the mortgagee attached, and is not subordinated to the subsequently attaching right of the trustee.

The judgment under review is supported by the rulings mentioned. It is affirmed.

CHICAGO TOWEL CO. v. ROUSSO.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1918.)

No. 2492.

1. PATENTS ⇐328—VALIDITY—INVENTION—ANTICIPATION.

The Rouso patent, No. 1,157,046, claims 1 to 6, for improvements to towel cabinets designed for supplying in public places individual towels for successive users, which consisted of an elevated shelf, on which the towels rest, and a retaining rod which passing through grommets of the

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

towels as they lie on shelf rises above the stack of towels and then forward and downward past the shelf into a receptacle where the towels fall as used, *held* valid showing invention and not to have been anticipated by the prior art.

2. PATENTS \Leftrightarrow 328—INFRINGEMENT.

The Rousso patent, No. 1,157,046, for improvements in towel cabinets designed for supplying in public places individual towels for successive users, *held* infringed as to claims 1, 2, 3, and 5 by defendant's device in which a chain was substituted for retaining rod.

3. PATENTS \Leftrightarrow 237—INFRINGEMENT—WHAT CONSTITUTES.

Complainant's invention for improvements in towel cabinets, which contemplated a rod arising from the shelf on which the towels were laid and then forward and down into a receptacle so as to hold and guide the towels therein when used, is infringed by a device in which a chain was substituted and made to furnish the same purpose of the rod by reason of a high door in front of the shelf; this being true though there is an advantage in the use of a chain whereby the towels were all fastened together.

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

Bill by Jacques Rousso against the Chicago Towel Company. There was a decree for complainant, and defendant appeals. Modified and affirmed.

The appeal here concerns United States patent No. 1,157,046 to Rousso October 19, 1915, for improvements in towel cabinets designed for supplying in public places individual towels for successive users. The patent shows a device in which there is an elevated shelf on which towels are laid flat. Each towel has near its front edge an eyelet or grommet through which there extends upward from the forward part of the shelf a rod, which, passing through the grommets of the superposed towels, rises above the towels, then forward and downward past the shelf, then downward into a receptacle where the towels fall as used, but are retained on the rod until they are removed by some authorized person who with key or other device releases them from the rod in order that the used towels may be disengaged therefrom and fresh ones strung upon it and placed upon the shelf. The object is to hold the towels in engagement with the rod, so they will remain in proper place until used, and to prevent loss of towels. The user takes hold of the top towel of those on the shelf, lifts it over the gooseneck-shaped rod, uses it, and having used it drops it, whereupon the rod guides it to the receptacle for soiled towels, where it remains in engagement with the rod until removed as stated.

Claims 1 to 6 are in issue and are as follows:

"1. In a device of the class described, a towel support; and a retaining member extending upwardly from said support and then downwardly sufficiently to constitute a suitable guide for a towel while in use, substantially as described.

"2. In a device of the class described, an elevated towel support; and a retaining member extending upwardly from said support and then downwardly sufficiently below said support to constitute a suitable guide for a towel while in use, substantially as described.

"3. In a device of the class described, an elevated towel support; and a retaining member extending upwardly from said support and then downwardly sufficiently below said support, said retainer being provided below said support with a substantially vertical portion of considerable length to constitute a suitable guide for a towel while in use, substantially as described.

"4. In a device of the class described, an elevated towel support; and a retaining member extending upwardly from said support, then outwardly and downwardly sufficiently below said support, then inclined rearwardly and downwardly under said support and then downwardly substantially vertically

to constitute a suitable guide for a towel while in use, substantially as described.

"5. In a device of the class described, a towel support; and a retaining member extending upwardly from adjacent the outer edge of said support and then downwardly sufficiently to constitute a suitable guide for a towel while in use, substantially as described.

"6. In a device of the class described, a towel support; and a retaining member extending upwardly from adjacent the outer edge of said support, then outwardly and downwardly sufficiently below said support, then inclined rearwardly and downwardly under said support and then downwardly substantially vertically to constitute a suitable guide for a towel while in use, substantially as described."

The defenses urged are noninvention, invalidity on the prior art, and non-infringement.

The decree found the six claims valid and infringed. o

Cromwell, Griest & Warden, all of Chicago, Ill., for appellant.

Joshua R. H. Potts, Egbert Robertson, Brayton G. Richards, and Arthur A. Olson, all of Chicago, Ill., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above).

[1] The prior art shows a number of structures designed to serve individual towels and to hold them in engagement until released, in order to prevent loss. British patent No. 12,176, to Cassels et al., October, 1907, shows the stack of towels supported on a shelf with a rod extending upwards through the rear part of the shelf and through rings or eyelets in the towels. The towels are so folded that the free end of the lower towel hangs down through an opening in the shelf, and the towels are so interfolded that when the user seizes the down-hanging end of the lowest towel of the stack, and draws down the towel, he thereby draws through the opening the end of the next upper towel, leaving that towel likewise ready to be grasped by the next user, and so on until all the towels on the shelf have been used. The used towel, when released by the user, drops down the straight rod, remains in engagement with it at the bottom until the soiled towels are removed. New ones properly folded are placed in position as before.

United States patent to Way, No. 858,931, July, 1907, shows a coin-operated device where the towels hang suspended by rings or eyelets in the towel on a horizontal rod near the top of a box. On depositing the coin the nearest towel so suspended is moved slightly forward on the rod and slides down and downwardly and forwardly inclined continuation of the rod, falling on the bottom of the box. The user reaches into an opening in front of the box, grasps the towel, brings it out, and having used drops it, and it continues its course down the rod and rearwardly into a receptacle into which the rod guides it.

Rouso in his specification points out that his device may also be coin-operated, though he does not specify the mechanism whereby this may be done. Rouso differs from these others in that his towel-retaining member—the rod—rises from the shelf on which the towels rest, passes through the grommets in the forward part of the towels as they lie on the shelf, and above the stack of towels, and then forward and downward below the shelf as described, so that the user grasps and raises up the upper towel, brings it forward, and then downward.

In Cassels' device the rod passes through the rear part of the towel, and it is the lower towel that is grasped and drawn downward, while in Way's the towels do not lie on any shelf, but are all suspended on the rod, and there is no rod rising upward through and above the towels, but the forward towel is moved further forward so that it drops downward upon a shelf or box bottom. While Rousso cannot claim invention in the use of a rod on which the towels are strung and which holds the towels while and after they are used, yet there is a degree of invention as well as of merit in his adaptation of the rod in the combination he describes. We find nothing in the prior art where the rod is so shaped and adjusted that the upper towel of a stack on the shelf must be taken, lifted up and then forward and downward, and is then dropped down into the receptacle, being at all times held on the rod in the manner that Rousso has described.

It is insisted that one Straub conceived a towel rack which shows features of Rousso, and for which United States patent No. 1,038,984, was granted him September 17, 1912. This device shows, secured to a wall of the room a pair of brackets on which is fastened a plate or board a convenient distance from the wall, and on each end of the plate within the inside line of the brackets there is a bail which when locked in position is of inverted U-shape. The bails may be opened and closed very much as they are in letter or bill files in common use. The towels are strung onto these bails hanging over the plate between it and the wall, and the user may take a towel thus suspended, raise it and make use of it, and then drop it down on the front side of the bail where it hangs suspended over the forward edge of the plate, and there remains until removed, unless indeed a user takes one of the soiled forward hanging towels and makes use of it, returning it either to the front, or swinging it over the bails to the rear; the towels after their use begins hanging on both sides of the plate, and the forward towel being in truth the more convenient for the user to grasp. But assuming that the user of the Straub device takes the towel from the rear side, he lifts it upward and forward and drops it down; but he leaves it suspended over the forward edge of the same plate in precisely the same manner as are the towels on the other side. There is in fact no shelf in Straub's in the sense that there is a shelf in Rousso's device, for it is only the edge of his towel which rests on the plate; the towels themselves hanging down both before and after their use. These differences are substantial and eliminate Straub's structure from the prior art. The District Court rightly held the claims valid.

[2, 3] The issue of infringement is not free from difficulty. In appellant's device there is no rod employed as a towel-retaining means, but the towels are threaded upon a chain, the ends of which are locked together. The bunch of towels, presumably so prepared and threaded on the chain at the laundry, are laid flat on an elevated shelf of a cabinet. The chain, passing down through the eyelets of the stack of towels, drops loosely to the bottom of the cabinet. But the chain on the other side does not likewise fall down loosely from over the top of the towels, but on the contrary is carried and held upward above the level of the towel stack, and then forward, and from this point to which it is carried forward it drops down loosely toward the bottom of

the cabinet. The bringing and holding of the chain upward and forward is accomplished by means of a front door of the cabinet which extends part way down from the top, and at the upper edge of which door there is a rod extending parallel with and across the front door an inch or so forwardly from the front of the door. The top of the door is higher than the stack of towels, and the chain rises and is held above the towels, over the top edge of the front door and over this projecting rod. Just below the lower edge of this door the front of the cabinet extends outwardly quite a distance, forming an open top for the extended part, with its front side sloping downward and backward to the front plane of the cabinet, and forming a sort of chute open at its top and leading into the cabinet. The user lifts a cover which is over the top of the cabinet, grasps the upper towel, raises it to the height of the front door, and then forward as far at least as the rod upon the door, and having made use of the towel drops it, and it falls by its own weight into the top of the forwardly projecting chute and backward toward or into the cabinet, remaining all the time attached to the chain. When the towels have been used the laundryman or an attendant removes the bunch, chain, and all, replacing them by clean towels strung and locked upon another chain.

There is evidently advantage and utility in such a chain system, but it may not with impunity be incorporated in a device which infringes the patent of another. While Rousso's patent contemplates a rod as the towel-retaining member, it is apparent that a rope or chain or the like may be so disposed as to be the mechanical equivalent of the rod. Where, as here, the chain is positively held so that it comes up from the level of the shelf through the towels, and is by means of the door held higher than the towels and by means of the rod carried forward, we find that the chain has been so employed as to be the equivalent of the upward, forward and downward bend of Rousso's gooseneck rod, and performs its identical function in substantially the same manner.

But it is claimed that one Fetherolf, prior to Rousso's invention date, designed and used a device showing this chain method for securing and serving individual towels, and that, if appellant's device infringes Rousso, Rousso's patent is in turn thus anticipated in this prior use. Without undertaking to review the evidence on this subject, we are satisfied that the District Court which heard the witnesses properly concluded that the Fetherolf prior use was not sufficiently shown to overcome the validity of Rousso's patent.

We are not required to determine, and we do not decide, that the employment of a chain or similar device for stringing and locking the towels necessarily infringes on Rousso's gooseneck-rod combination; but we do find that, employed as it is in the particular device of appellant, held while in use upward and forward, it is the equivalent of Rousso's gooseneck rod, and presents in appellant's device the full combination of certain of Rousso's claims, thereby infringing.

We find that the infringement is predicable on claims 1, 2, 3, and 5, but not on claims 4 and 6. These last include the element of an extension rearward of the guiding rod, after passing below the level of the shelf. We find nothing in appellant's chain as it hangs over the rod and into the chute, which is the equivalent of the rearward

guide afforded by Rousso's rod as described in these claims. The rearward movement of the towel in appellant's device is accomplished, not by the chain which hangs loosely from the rod across the door, but by the downward and rearward slant of the chute into which the towels drop. Claims 4 and 6 are therefore not infringed.

The decree will be modified in accordance with the views here expressed, and as so modified affirmed, with costs.

WENDELL et al. v. AMERICAN LAUNDRY MACHINERY CO. et al.

(Circuit Court of Appeals, Third Circuit. January 17, 1918.)

No. 2303.

1. PATENTS \Leftrightarrow 81—VALIDITY—PRIOR PUBLIC USE—BURDEN OF PROOF.

In an attack upon a patent, the patentee may in the beginning stand upon the grant, which is prima facie evidence of the patent's validity; and the burden of overcoming this evidence of validity by proof of invalidity, because of prior public use and sale, devolves upon the one attacking the patent, which burden he must sustain by evidence so clear that it leaves no room for doubt. If he proves sale of the patented device and use by the public more than two years before the application, by evidence of this character, the statute relieves him from proving the inventor's intention thereby to abandon his invention to the public, and establishes an inference of abandonment before the grant of the patent, which unless successfully controverted by the patentee, invalidates the patent subsequently granted. The burden is then cast upon the patentee to controvert this inference by establishing by full, unequivocal, and convincing proof that such use and sale was not of the completed and commercially operative device subsequently patented, and also that such use and sale was not absolute and unconditional, but was principally and primarily for the purpose of perfecting the incomplete invention by tests and experiments.

2. PATENTS \Leftrightarrow 81—VALIDITY—PRIOR PUBLIC USE.

Evidence that machines of the design of a later patent were manufactured, advertised, and some 20 or 25 sold to the trade generally, prior to two years before the application for the patent, some of which machines were still in use, no changes having been made in them, except in minor details of construction, which did not affect the principle of their organization and operation, *held* sufficient to invalidate the patent, for prior public use.

3. PATENTS \Leftrightarrow 328—VALIDITY.

The Wendell patent, No. 1,137,438, for an ironing machine, *held* void, for prior public use of the machine for more than two years before the application.

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

Suit in equity by Theresa S. Wendell, administratrix of Fred C. Wendell, deceased, and The Willey Company, Incorporated, against the American Laundry Machinery Company and the Locust Laundry Company. Decree for defendants, and complainants appeal. Affirmed.

For opinion below, see 239 Fed. 555.

J. Bonsall Taylor and E. Hayward Fairbanks, both of Philadelphia, Pa., for appellants.

Frederick F. Church, of Rochester, N. Y., for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This is an appeal from a decree of the District Court dismissing the plaintiff's bill charging infringement of Letters Patent No. 1,137,438, issued to the administratrix of the inventor, Fred C. Wendell. 239 Fed. 555.

Wendell was an inventor of laundry machines or ironing mangles. For some time prior to the year 1909, he had been developing the machine of the patent in suit. This machine irons and dries flat laundry work, such as sheets, pillow slips, towels, napkins, etc., and consists essentially of two steam heated rotatable drums or cylinders superposed one above the other, to which the article to be ironed is fed and over which it is carried by a series of belts or aprons, whereby the article is ironed on one side and then reversed and ironed on the other. In connection with this organization, there is means for supporting, driving and exerting pressure on the various drums, rolls and aprons.

The Willey Company, a corporation created to exploit the Wendell machine, began the manufacture, advertisement and sale of that machine in 1909, continued it through 1910 and 1911, and for a period after the death of Wendell on December 9, 1912.

As Wendell had not applied for a patent for his invention, his administratrix employed an expert machinist to develop in association with a patent solicitor the necessary matter for a patent application. On February 1, 1913, she applied for the patent which was granted later and is now in suit. She then constituted The Willey Company exclusive licensee.

The patentee and the licensee brought this action against the American Laundry Machinery Company as maker, and Locust Laundry Company as user, of a machine which they charge infringes claims 1 to 5 inclusive of the Wendell patent.

While the case covered the usual range of issues as to validity and infringement, it was principally tried and was finally decided on the single issue of the patent's invalidity because of public use and commercial sale of the patented device more than two years prior to the application for the patent. R. S. Sec. 4886. As that issue was purely one of fact, and, as determined, was conclusive of the controversy, we shall limit our inquiry to it, or rather, to the phase of it raised on the appeal.

[1] The plaintiff's exception to the decree below is not directed against the facts, which are either admitted or else proved by undisputed evidence, but is directed against the inferences which the court drew from them, raising questions of the burden of proof and sufficiency of the evidence.

The rule of burden of proof in such cases is so well established and was so fully discussed by the learned trial judge, that elaboration is not necessary. Stated very briefly, it is this: In an attack upon a

patent, the patentee may stand on the grant of letters patent, which is prima facie evidence of the patent's validity. In the beginning, no further burden is imposed upon him. The burden of overcoming this evidence of validity by proof of the patent's invalidity because of prior public use and sale, devolves upon the one attacking the patent. This he must sustain by evidence so clear that it leaves no room for doubt. *Coffin v. Ogden*, 85 U. S. 120, 21 L. Ed. 821; *Miller v. Handley* (C. C.) 61 Fed. 101; *Interurban Co. v. Westinghouse Co.*, 186 Fed. 166, 108 C. C. A. 298; *Morgan v. Daniels*, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. Ed. 657. If he proves sale of the patented device and use by the public more than two years before the application, by evidence of this character, the statute relieves him from proving the inventor's intention thereby to abandon his invention to the public, and establishes an inference of abandonment of the invention before the grant of the patent, which, unless successfully controverted by the patentee, invalidates the patent subsequently granted. But this inference may be controverted by the patentee, upon whom is then thrown the burden of establishing by full, unequivocal, and convincing proof that such use and sale was not of the completed and commercially operative device subsequently patented, and also that such use and sale was not absolute and unconditional, but was principally and primarily for the purpose of perfecting the incomplete invention by tests and experiments. *Swain v. Holyoke Machine Co.*, 109 Fed. 154, 48 C. C. A. 265; *Id.*, 111 Fed. 408, 49 C. C. A. 419; *Smith v. Sprague*, 123 U. S. 249, 8 Sup. Ct. 122, 31 L. Ed. 141; *Delemater v. Heath*, 58 Fed. 415, 7 C. C. A. 279; *Egbert v. Lippmann*, 104 U. S. 333, 26 L. Ed. 755; *American Ballast Co. v. Davy*, 220 Fed. 887, 136 C. C. A. 453. And just here arises the remaining issue as to the sufficiency of the evidence upon which the trial court found abandonment by prior public use and sale.

[2, 3] We have given very careful consideration to the evidence in this case. As a recital of it would serve no useful purpose, we shall confine ourselves to a statement of our conclusions.

The critical date is February 1, 1911, being a date two years prior to the date of the application for the patent. The defendants called the president of The Willey Company and proved by him that his corporation had advertised for sale and had sold machines of the design of the Wendell patent under the trade name of "Royal Calendar" as early as 1909, and had manufactured and sold to the trade generally between twenty and twenty-five machines before February 1, 1911. For prior public use and sale, the defendants relied upon three machines: One was installed in the Elite Laundry and paid for in 1909; another in the Cambridge Laundry in 1910; and another in the Pilgrim Laundry in the same year. They proved that these three machines had been in continuous commercial use from the dates of their installation to the hearing of this case. The plaintiff endeavored to show in rebuttal, that these machines were sold for experimental purposes, and introduced testimony that alterations were made in them at different times, that they were unsatisfactory both to the inventor and to the purchasers, and that none of the machines put out by The

Wiley Company before February 1, 1911, was "an absolutely perfect machine until sometime after February 1, 1911." The alterations that were made had relation to the adjustment of aprons and the substitution of spring pressure for pneumatic pressure on the rolls, and to other details, which did not change or affect the principle of the organization and operation of the machine as subsequently patented. Therefore, within the sense of *American Ballast Co. v. Davy*, 220 Fed. 887, 136 C. C. A. 453, and 220 Fed. 890, 136 C. C. A. 456, and *Star Mfg. Co. v. Crescent F. & S. Co.*, 179 Fed. 856, 103 C. C. A. 342, these alterations must be deemed merely incidental and cannot save the claims in issue from the legal effect of prior public use and sale within the meaning of the statute.

There was no evidence produced by the plaintiff from which the inference might be drawn that the machines of Wendell's design, sold to the public and used prior to February 1, 1911, were put out for experimental purposes, *Elizabeth v. Paving Co.*, 97 U. S. 126, 24 L. Ed. 1000; or for any purpose other than that of commercial profit. In fact, the indisputable inference to be drawn from the testimony is, that the machines were advertised and sold in the ordinary course of commerce as completed machines ready for operative use in the business for which they were designed.

We are of opinion that the claims in suit are invalid, and therefore direct that the decree below be

Affirmed.

RELIANCE CONST. CO. et al. v. HASSAM PAVING CO. et al.

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

No. 3026.

1. PATENTS ⇌319(1)—INFRINGEMENT—MEASURE OF DAMAGES.

Where the owner of a patented process granted exclusive licenses within designated territories to auxiliary companies, who exploited and used the process therein, the royalty charged such companies is not a fair measure of the damages for which an infringer is liable.

2. PATENTS ⇌287—INFRINGEMENT—LIABILITY OF MUNICIPAL CORPORATION.

A municipal corporation, which contracted for the laying of pavement on its streets by an infringing process, is liable jointly with the contractor for damages for the infringement.

3. PATENTS ⇌324(1)—SUIT FOR INFRINGEMENT—APPEAL—ACCOUNTING—NOTICE OF HEARING.

A city, against which, with other defendants, a decree for infringement was rendered, which stipulated with respect to and had actual notice of the hearing before the master, at which its officers appeared and testified, was not prejudiced by the failure to serve formal notice upon it at the time of the hearing, and where it made no objection before the master, or in the court below, cannot raise the objection of want of notice for the first time in the appellate court.

4. PATENTS ⇌287—INFRINGEMENT—LIABILITY OF SURETY FOR INFRINGER.

A surety company, which in aid of an infringing paving contractor executed a bond to indemnify the city, for which the pavement was to be laid, against liability for infringement, thereby became a party to the infringement, and jointly liable therefor.

Appeal from the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Suit in equity by the Hassam Paving Company and the Oregon Hassam Paving Company against the Reliance Construction Company, the city of Hood River, and the National Surety Company. From the final decree, defendants appeal. Affirmed.

Ralph R. Duniway, of Portland, Or., for appellants.

Carey & Kerr, of Portland, Or., and Louis W. Southgate, of Worcester, Mass., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. This appeal presents only the question of the amount of damages awardable for the infringement of letters patent No. 861,650, issued July 30, 1907, to the Hassam Paving Company, a corporation of Massachusetts, for an invention entitled "process for laying pavement," and the question of the liability of the three defendants to the suit—the city of Hood River, on whose streets the infringing pavement was laid, the Reliance Construction Company, the corporation by which it was laid, and the National Surety Company, which guaranteed to hold the city harmless against damages for infringement. The complainants were the patentee and the Oregon Hassam Paving Company, a corporation of Oregon, to whom the patentee had granted an exclusive license to use, and to vend the right to use, the patented invention within the state of Oregon. After decreeing an injunction, the court below referred the cause to the master for accounting. The master found that the profits of the Construction Company were \$2,362.40, but found that a reasonable royalty for the use of the patented process was 25 cents per square yard, and that on that basis \$4,527.73 was recoverable as damages. The master's report was affirmed, and the final decree was that the complainants recover from the defendants and each of them \$4,527.73 damages, with costs and disbursements.

The Construction Company assigns error to the rejection of a portion of its overhead expenses in fixing the amount of the profits which it derived from the contract. In the view which we take of the case, it is unnecessary to consider that question. The profits are ignored in the final decree, which is for damages based solely on a reasonable royalty chargeable for the infringement, following *Dowagiac Mfg. Co. v. Minnesota Plow Co.*, 235 U. S. 641, 35 Sup. Ct. 221, 59 L. Ed. 398.

[1] It is contended that the royalty should have been fixed in the sum of 15 cents, instead of 25 cents, per square yard, and the contention is based upon the fact that 15 cents was the amount charged by the patentee to the licensee, and by the patentee to other subsidiary companies, to whom it gave similar licenses. We agree with the master that the evidence shows that the royalty of 15 cents a yard was charged by the patentee, not to the public generally, but to construction corporations, to whom it gave licenses, and that that sum should not be taken as a proper measure of damages in the case of an infringement of the patented right. It is obvious that the sum charged

by the patentee as royalty to auxiliary companies, who receive exclusive licenses for a designated territory, and who invest capital and incur the expense of preparing plants, and enter into the business of supplying the patented article, would be an inadequate royalty and measure of damages for infringement. The patentee, in consideration of the benefit which it obtains from the act of co-operation of an auxiliary company, in introducing the patented improvement and exploiting it, thereby securing a far greater return for the use of its invention than could be obtained by dealing with individual users, may well afford to fix a low rate of royalty to such licensees. For the infringer in this case to pay the licensee damages measured in the figures of a royalty of 15 cents would not meet the demands of justice.

The evidence is that the customary profit of the licensee for laying the patented pavement was 45 cents per square yard, and that such was its charge for permission to use the process. We are not advised of the terms of the license contract, further than that it gives to the licensee the exclusive right to use, and to license others to use, the patented invention within a designated territory, and that the patentee is to receive therefor a royalty in the sum of 15 cents per yard. What the respective rights of the appellees are as to damages recovered for infringement is not disclosed. On a basis of 15 cents as a reasonable royalty for damages in this case, if the licensee is entitled to receive and retain the sum paid for damages, the patentee would receive nothing for the use of its patent. If, on the other hand, it is payable to the patentee, the licensee would receive nothing for the invasion of its exclusive rights under the license. We agree with the court below that the master's finding "is as favorable to the defendants as they can reasonably ask or expect."

[2] The city of Hood River contends that it is not a joint infringer, and that no recovery of damages can be had against it in a suit in equity, citing and relying upon *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000. The court in that case applied the law as it was before Act July 8, 1870, c. 230, §. 55, 16 Stat. 198, 206, authorizing courts of equity to allow damages in addition to profits, and held that, although the city, by letting a contract to put down a pavement which infringed the complainant's rights, had made itself liable to damages for using the patented improvement, damages were not recoverable in that suit, which was a suit in equity, and that profits only could be recovered therein, and that, since the city had paid the contractor for the pavement the same price that it would have been required to pay the patentee, it derived no profits. In the present case the city paid the contractor considerably less than it would have been required to pay the licensee of the patent. But, as damages are recoverable as provided in the act of July 8, 1870, the city having been a joint trespasser with the Construction Company, recovery against it is not limited to the actual profits it derived, but may include damages, and should be measured in the sum which is fixed as damages against the Construction Company. The liability arises in tort, and not on contract, and the municipal corporation is liable as any other infringer.

Allen v. Mayor, 17 Blatchf. 350, Fed. Cas. No. 232; Asbestine Tiling & Mfg. Co. v. Hepp (C. C.) 39 Fed. 324; Painter v. Napoleon Tp. (D. C.) 156 Fed. 289, 292; City of Akron v. Bone, 221 Fed. 944, 137 C. C. A. 514.

[3] The city of Hood River contends that it has been deprived of its right to appear and offer testimony before the master, that summons to appear before the master was served only on its codefendants, and that it had no notice of the proceeding. To this it is sufficient to point to the fact that on March 27, 1916, 30 days before the date set for the hearing before the master, all the defendants stipulated that the parties proceed with the accounting under the decree; that on the hearing the counsel who represented the other defendants were, so far as the record shows, also counsel for the city of Hood River; and that the mayor and some of the councilmen of the city appeared and gave testimony before the master. The city therefore had actual notice, and if, indeed, there was failure to give technical notice of the time and place of the hearing to "each of the parties or their solicitors," as required by rule 60 (198 Fed. xxxvi, 115 C. C. A. xxxvi), the city of Hood River, whose officers were aware of the hearing, should, if it was thought that the city's rights had been prejudiced thereby in any way, have made timely objection, either before the master or to the court upon the coming in of the master's report, or later by a motion to set aside the order of confirmation. The objection in this court comes too late.

[4] The National Surety Company contends that it was not a proper party to the suit, and that the decree is erroneous in that it awards the appellees a judgment for damages against it. The Surety Company was held jointly liable with the other infringers for the reason that it aided and abetted the Construction Company and assisted in inducing the infringement by executing the indemnity bond to hold the city harmless against damages for infringement of the patent. It is the general rule that defendants may be united in an infringement suit wherever there is a joint wrongdoing, or where there is privity or connection between them, or where they aid and abet the infringement. Thompson-Houston Electric Co. v. Ohio Brass Co., 80 Fed. 712, 26 C. C. A. 107. See, also, the opinion of Mr. Justice Bradley in American Bell Telephone Co. v. Albright (C. C.) 32 Fed. 287.

It is urged that the appellees have no cause of action against the Surety Company on the indemnity bond, and this is true. But here the suit is not on the indemnity bond, but it is for the tort of the Surety Company in aiding and abetting the infringement, whereby it became a joint infringer. In American Bank Protection Co. v. Electric P. Co. (C. C.) 181 Fed. 350, it was held that directors of a corporation cannot be held individually liable for infringement of a patent by the corporation merely because they had signed a paper agreeing to save harmless from infringement suits purchasers who had previously bought the infringing devices. It was because they had not executed the indemnity contracts until after the full accomplishment of the infringement, and because the court expressly found that the indem-

nity contracts were never used to induce infringement, that the court held that the directors were not liable as joint infringers.

The decree is affirmed.

PITTSBURGH IRON & STEEL FOUNDRIES CO. v. SEAMAN-SLEETH CO.

(Circuit Court of Appeals, Third Circuit. December 14, 1917. On Petition for Rehearing, January 29, 1918.)

No. 2228.

1. PATENTS \Leftrightarrow 328—VALIDITY AND INFRINGEMENT—ALLOY OF IRON.

The Speer and Forster patent, No. 1,071,364, claim 1, for an alloy of iron named "Adamite," covers a new article of manufacture, different from, but having characteristics of, both cast iron and steel. Such claim was not anticipated, is not invalid for insufficiency of description, and discloses novelty and patentable invention; the product being extremely valuable for the manufacture of rolls. Evidence considered, however, and *held* insufficient to establish infringement, but to show that defendant's product, while having an approximate similarity of analysis and performance, possesses physical characteristics which distinguish it from Adamite, and in fact is not Adamite.

2. WORDS AND PHRASES—"COMBINED CARBON."

The term "combined carbon," as used in the metallurgy of iron and steel, means carbon in union with some one or more metallic constituents in the iron alloy.

Buffington, Circuit Judge, dissenting in part.

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

Suit in equity by the Pittsburgh Iron & Steel Foundries Company against the Seaman-Sleeth Company. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 236 Fed. 756.

Frederick W. Winter, of Pittsburgh, Pa. (Frederick P. Fish, of Boston, Mass., of counsel), and Thomas Patterson, H. V. Blaxter, and F. N. Barber, all of Pittsburgh, Pa., for appellant.

Charles M. Clarke, of Pittsburgh, Pa. (James I. Kay, of Pittsburgh, Pa., Francis T. Chambers, of Philadelphia, Pa., and Ralph C. Powell, of Pittsburgh, Pa., of counsel), for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The bill charges infringement of Letters Patent No. 1,071,364, issued August 26, 1913, to James Ramsey Speer and William L. Forster, assignors of the plaintiff, for "Alloy of Iron." The defenses are invalidity and non-infringement. The District Court found for the defendant on both issues and dismissed the bill. 236 Fed. 756. The plaintiff took this appeal.

[1] The case has to do with an alloy of iron, which, in addition to iron, contains seven ingredients in small and varying proportions. They are carbon, silicon, chromium, nickel, phosphorus, manganese and sulfur. All these ingredients are found both in the product manufactured by the plaintiff under the patent and described to the trade as "Adamite" and in the alleged infringing product of the defendant made and marketed under the name of "Phoenix Metal."

The patent contains two claims, the second prescribing ingredients in precise proportions, the first, in proportions within given ranges. The first claim only is in issue. The patentees say:

"We claim—1. *As a new article of manufacture*, an alloy comprising essentially silicon .10% to 2.00%; chromium .5% to 1.50%; nickel .25% to 1.00%; sulfur, *not exceeding* .05%; phosphorus, not exceeding .12%; manganese, not exceeding .45%; total carbon 1.25% to 3.50%; and iron approximately sufficient to complete the 100%."

Alloys containing the ingredients of the claim appeared in the manufacture of iron and steel long before the patent. These several ingredients were known to possess definite characteristics or properties, which, when brought together in alloy, bore upon one another and upon the ultimate product in well defined ways. The patentees discovered no new chemical properties or functions in them. Variations in their proportions produced variations in their chemical effect upon one another, and in the chemical and physical characteristics of the product. Thus when a given property, as hardness, toughness, strength, was desired, the founder obtained it by employing in alloy the particular ingredients which the metallurgist had taught him would produce that property and by pursuing methods of heating which he had largely taught himself. The learning of the metallurgical engineer and the skill of the founder, though separate and distinct, were inseparably combined in producing the result.

Men of these classes in vast numbers had been working together many years before the patent, and by thousands of tests and experiments and by manifold achievements, had made the metallurgy of iron and steel a broad and highly developed field. A claim to monopoly of any part of that field by one entering it at this late day can be sustained only by clear proof of discovery of something there not before found, of an invention of something not before there. Such is the claim of the patentees.

The thing which the patentees claim to have invented is an alloy, which is "a new article of manufacture"—in a sense, a new metal. Its base is iron, but the metal is neither cast iron nor steel, though possessing characteristics of both. It resembles cast iron in its lack of the quality of elongation, in its resistance to abrasion and in its high carbon content; it resembles steel in its tensile strength, toughness, capacity to be worked or forged, and in the form of its carbon content. It is claimed that it bridges the gap between irons and steels—having chemical characteristics more nearly approaching the former, with physical properties equal to if not excelling the highest grades of the latter. It has been termed a metallurgical paradox. The name given it is—"Adamite."

The validity of the patent depends upon the ability of the plaintiff to establish two facts: First, that Adamite is a new metal; and, second, that the formula of the claim will produce it. The first is the basic fact, for the formula of the claim, both as to ingredients and proportions, is not altogether new. When we speak of Adamite as a new metal, we mean new in the sense of being different from, not merely a variation of, an old metal, as steel differs from cast iron.

We shall not discuss in this opinion the highly technical subject-matter of the patent the full significance of which is difficult to grasp without elaborate presentation, but shall content ourselves with a statement of the conclusions upon which, after close study, we base our decision.

[2] The striking thing or central characteristic in the chemistry of the patent alloy is its carbon content, both as to quantity and form. In quantity it lies well within the range of cast iron, but in form, it is that of steel. Its form is mainly combined carbon. That term, as used in the metallurgy of iron and steel, means carbon in union with some one or more metallic constituents in the iron alloy, for instance, iron carbide or the double carbide of iron and chromium. The method of obtaining very high carbon in combined form, by the given proportions of carbon combining and metal hardening ingredients of the patent alloy, in conjunction with the skill of the founder, is a matter of less concern just here than the fact that in the alloy of the patent, high carbon combined is chemically obtained, and that it contributes to and in a measure produces characteristics not before shown in any metal.

Aside from the chemistry of its composition, Adamite has characteristics of structure and performance which distinguish it scientifically and commercially from other metals. It has the quality of intense hardness and toughness (steel characteristics) coupled with an extraordinary ability to withstand abrasion, especially under heat (cast-iron characteristic). These are procured without the use of the expensive ingredients, chromium and nickel, in large quantities, by depending primarily upon high carbon, the cheapest hardening element—and using it in excess of what was considered permissible in a product having steel characteristics. Its tensile strength is more than twice that of ordinary soft steel. While possessing the stiffness of cast iron with its casting characteristic, it has the hardness and toughness of steel with the ability to be forged, rolled and worked like steel.

It is testified that when made into rolls it does from two to four times the work of other rolls in use when it came on the market and lasts from two to four times as long, thereby increasing output and decreasing cost of production and operation.

The fact that Adamite possesses these qualities and that they are qualities of merit, is evidenced by the tribute paid by the art in very substantial royalties and in a steadily increasing consumption at prices markedly higher than those asked for rolls of other metals.

While the defendant has met the case with much evidence that the art contained a vast number of alloys of varying degrees of hardness, toughness and strength, produced by the energetic agents of carbon.

chromium and nickel free from patent restraint, it has not shown that these characteristics or properties existed in the measure, in the combination, and in the peculiar relation in which they are found in Adamite. It has not shown that Adamite does not possess the characteristics claimed for it, or that any product possessed them before. In fact, there is evidence in abundance that there is such a product as Adamite; there is no evidence that there is no such product.

The alloy being novel, the next question is whether it was the result of an inventive conception. It was manifestly not an obvious combination. While its proportions were reached after many experiments, they were the result to which the experiments were directed. Somewhere in their progress lay a conception of the thing achieved. If the thing is otherwise a patentable invention it does not fail for lack of a definite point at which the conception appeared.

Aside from the question of patentable invention, the validity of the patent is challenged on the ground that its disclosure is insufficient. In this we find for the patent. The charge of insufficiency of disclosure is based doubtless upon the lack of disclosed mechanical detail, made necessary by the fact that the skill of the founder in pursuing foundry practice is called upon to supplement the metallurgical disclosure of the patent. It is impossible to disclose in a patent the founder's peculiar skill, and being no part of the invention, it is not required to be made a part of the patent disclosure.

That the disclosure is sufficient when read by one skilled in the art, is evidenced by the fact that when followed with skill; the product of the patent is obtained. When followed by one unskilled or when something else is obtained, the validity of the patent ceases to be a matter of concern.

The remaining question as to the patent's validity is whether the disclosed invention had been anticipated by alloys of the same formula in the prior art.

The defendant found in the prior art and produced in evidence formulæ and analyses of many iron and steel products, which were either within the analysis of the patent alloy or as close to it as is the analysis of the product of the defendant upon which the plaintiff bases its charge of infringement. These analyses appeared in patents, publications, and in the records of steel manufacturers kept in the regular course of their business. They are Hadfield Patents, Nos. 732,365 and 735,666; the Borchers Article; the Totten Patents, No. 872,483; 878,691; 947,263; Isaac G. Johnson Co.; Crucible Steel Co.; use of Mayari ore by Carpenter Steel Co., Maryland Steel Co., Reading Iron Co., and the defendant.

To the voluminous evidence upon the defense of anticipation we have given careful study. We find it unnecessary to discuss the evidence in this opinion for the reason that all of it is fatally deficient in one essential, namely, in failing to show that the products of the several prior art analyses were Adamite.

While showing products of varying characteristics and recording faithfully the progress of the art of steel making, the alleged anticipating alloys nowhere showed or even suggested when made or pub-

lished that they were Adamite or were metals which possessed in structure or performance the Adamite characteristics of cast iron and steel, or suggested to the art either the existence of such a metal or how to make it. If any one of the alleged anticipating alloys was Adamite, that fact, so far as the record shows, was not known to those who produced it or used it, and not being recognized as a new product with its distinctive characteristics, its production was purely an accident without profit to the art and without value as an anticipation. We are satisfied, therefore, that Adamite has not been anticipated by alloys, which, while accidentally of the same analyses, were not shown to be the "article of manufacture" of the patent.

We are of opinion that Adamite is what it is said to be, namely, "a new article of manufacture," different from but similar to both cast iron and steel, that its production involves invention, and that claim 1 of the patent is valid.

We now approach the question of infringement. The patentees admit that as metallurgy is not an exact science, any use of the patent formula within the wide range of each element will not necessarily produce Adamite (otherwise they are forced to admit anticipation), and that Adamite is produced only when one skilled in the art follows the formula with a proper regard to the correlation of its several elements. This being admitted, then certainly a person may pursue the formula and not get Adamite. Then he does not infringe. Or he may pursue the formula and get Adamite. Then he does infringe. The principal question upon the issue of infringement, therefore, is, not whether the defendant's product was of the analysis of the patent, but whether the defendant's product was the product of the patent, namely Adamite. This being the question, it may be inquired into along three lines:

1. Whether the formula of the defendant's alleged infringing alloy was the patent formula;
2. Whether it was outside the patent formula because of its higher percentage of sulfur; and
3. Whether the product of the defendant, either within or without the formula of the patent, was Adamite.

The analyses of the defendant's metal, offered as evidence of infringement, were not literally within the formula of the patent. They were within the formula as to percentages of all ingredients except that of sulfur. As to percentages of that ingredient they were uniformly and radically higher. The defendant maintains that this difference saves it from infringement; the plaintiff charges that the defendant used an excess of sulfur as a supplement to a low percentage of chromium (though such low percentage was within the chromium proportion of the patent); that this sulfur excess was the equivalent of any deficiency in the chromium of the patent alloy, and constituted infringement. Upon this point there was sharp controversy among the experts. But whatever may be the solution of this metallurgical question, the thing which we want to know is—what did the defendant get from what it used. If it got Adamite, then we must decide the question of equivalents in order to determine whether it got

it in the way the patent taught. If it did not get Adamite, it is immaterial whether an excess of sulfur was or was not an equivalent of any part of the patent percentage of chromium, for then it did not infringe.

The parties to this litigation are rival manufacturers of rolls. The essentials of a good roll sought by all roll manufacturers are hardness, resistance to abrasion, strength to withstand prodigious strains, and durability. Each had striven independently and in its own way to make improvements in these qualities. Each had succeeded. They had worked, as it now appears, on diametrically opposite lines. The plaintiff, through the patentees, employed chromium and chromium alone as an element to overcome the natural inclination of carbon to crystallize and to fix and hold it in combined form (omitting for the moment the influence of the element of silicon). The patentees did not employ sulfur for that purpose. They defined in their patent what elements were "essential" to produce that chemical result. Sulfur was not one of them. In fact they considered sulfur an impurity and repudiated it as an element or chemical to produce any desired result. They recognized it as a necessary evil and arranged to overcome it. They dealt with sulfur in iron because it was there and because it was impossible to eliminate it economically. They regarded it as a nuisance and an element not to be *used* but to be gotten rid of so far as could be done. Therefore, in their formula, the patentees placed sulfur at a low maximum (.05%), and called for its reduction to almost the vanishing point.

In making its rolls, the defendant pursued just the opposite practice. It recognized a merit in sulfur. It considered that (in its business at least) the merit of sulfur offset its objectionable quality and proceeded to make use of it. It did not reduce the normal sulfur content of its raw material, but, long before the patent (March, 1911), it actually increased sulfur above the normal content of the ore by deliberately adding iron pyrites to its alloy. It used a percentage of sulfur that was from two to four times the permissible maximum of the patent proportion. It did this to obtain an effect which was not then widely known sulfur would produce. That effect was double: first, it hardened and made smooth the surface of the roll, and second, (whether the defendant knew it or not,) it acted to hold the *carbon in combined form* not merely on the surface but *throughout the section*, and produced the result (which the defendant did know) of hardening the whole metal, the very quality which later the patentees sought, and obtained perhaps in a greater degree, by the use of chromium. If sulfur in the proportion used by the defendant did hold carbon in combined form and did thereby harden the metal of the section, the defendant achieved the result in a way different from that disclosed by the patentees, for the patentees' way was by the use of chromium.

But the defendant did not long rely upon sulfur alone for the hardening of its metal, because it was well known that chromium would overcome the opposite effect of silicon and hold carbon in combined form and harden metal. Therefore, as a combined chemical and commercial expedient, the defendant began as early as September, 1911,

(six months after resorting to sulfur and two years before the Ad-amite patent,) to use an iron ore known as Mayari ore, because, unlike any other iron ore, it contained in its natural state the alloying elements of chromium and nickel. It used this ore with these two chemical elements in order to obtain in the metal of its rolls the very hardening effect which chromium was then known to produce, and the toughening effect which nickel was known to produce. By hundreds of assays of metals made through two years before the patent, the defendant showed that, in the manufacture of its rolls, it used the chromium and nickel content in Mayari ore in varying proportions, (sometimes within the proportions afterwards given in the patent,) together with sulfur in much higher proportions than the sulfur proportion of the patent formula.

The natural chromium of Mayari ore was used to supplement the high sulfur of its previous practice, and the *two* became the agents employed by the defendant long before the patent to do the thing which those two ingredients were then known to do, namely, hold carbon combined and thereby harden metal. It is claimed by the defendant that it began this practice of roll metal making long before the patent and consistently pursued it down to the bringing of this suit. It is not disputed that the defendant began it before the patent and practiced it beyond the date of the patent in a manner which metallurgically and commercially was a distinct advance in the art.

Having shown that for their purpose sulfur is bad, certainly the patentees cannot complain of its use by another who finds that for his purpose it is good. The defendant says in effect:

"Sulfur is bad for some purposes, but I have found that it combines carbon and hardens metal. Therefore, for my purpose sulfur is good. I will use it in large quantities. Chromium does the same thing. Everybody knows that. I will use chromium too. I will vary the proportions of one or the other or of both of these ingredients in my alloy until I get the hardness I want. Nobody told me to do this. Certainly the patentees did not."

As we have said, the defendant had used chromium and sulfur in varying proportions to combine carbon and procure hardness for some years before the patentees obtained the patent whereby carbon is combined and hardness obtained essentially by chromium and in no degree by sulfur. Their licensee now complains that in continuing its early chromium-sulfur practice beyond the date of the patent, in different proportions, the defendant employed an equivalent of the alloy of the patent, and infringed. The charge arose in this way: After using Mayari ore for three years with nickel and chromium running on an average of about .30% and .50% respectively, and in the relation of about three parts nickel to five parts chromium, with sulfur at about .16% the defendant, on August 17, 1914, raised the percentages of nickel and chromium to about .65% and .90% respectively, and lowered sulfur to about .13% on the average; and again, in 1915, the defendant lowered sulfur to about .12% and used nickel and chromium on an approximate *parallel* of about .80%. *In this the plaintiff charges the defendant with infringement.* It supports its claim of infringement by the argument, though the defendant's increase of chro-

mium and nickel was not in the relative proportions of these two elements as they are taught by the patent formula, (two parts of chromium to one of nickel,) that the substantial amount of sulfur made up for the low amount of chromium, (though itself within the patent range,) and they together produced the result which chromium would produce alone if used in the larger proportion of the patent formula, and that therefore the use of sulfur in connection with chromium was a fair equivalent of the latter element in the larger proportion of the patent.

This contention is without force as an argument of infringement, unless it is accompanied with evidence that the product of such an equivalent was Adamite. If the product was something else, whether as good or not so good, it did not infringe even if the formula used were the equivalent of that of the patent. The grant of Letters Patent to Speer and Forster did not deprive the defendant of its right to continue its long established use of high sulfur, or its almost equally long use of chromium and sulfur to harden roll metal by combining carbon; nor did it restrict the defendant to the precise proportions in which it had before used those two elements; nor did it prevent it using them in higher proportions, even under the plaintiff's theory of equivalency, when the resultant product is not Adamite. It is then pertinent to inquire—What was the defendant's alleged infringing product? The plaintiff says it was Adamite, and proceeds to prove it in two ways, first, by analyses of the alloy, and, second, by its performance.

In seeking to establish infringement by proof that the analysis of Phoenix Metal (the defendant's product) was within the range of the patent analysis, the plaintiff fell into the identical fault in which the defendant fell in its effort to prove anticipation by analyses. There the plaintiff stoutly complained that the defendant treated the case as purely one of analyses; that it utterly ignored the physical characteristics of the products, and thus failing to show that the products of those analyses were Adamite, failed to show anticipation. In this we have found the plaintiff was right. Now the plaintiff, in its endeavor to prove infringement, pursued precisely the same fatal course by treating that issue as one of analyses, utterly ignoring the physical characteristics of the alleged infringing products, and likewise failing to show that the products were Adamite.

The physical characteristics of true Adamite are many and pronounced. This we must believe, for the patentees say so. The range of analysis, however, is broad and uncertain, with corresponding uncertainties in the resultant product. Within a given range, plaintiff's expert testified that he would "expect" "approximately" the product of Adamite, but it was also testified that within the lower and upper ranges of the claim, the lines of demarcation between Adamite and steel on the one hand and between Adamite and cast iron on the other, are hard to determine, because in one range the metal "shades off" into steel and in the other it "shades off" into cast iron. Hence it is certain that some products within the broad range of the analysis of the patent will not be Adamite; while others may be Adamite not

with fixed but with many variations of characteristics. The central question of infringement, therefore, is, whether the product of the defendant is Adamite within *any* of its variations.

For proof that Phoenix Metal is Adamite, the plaintiff relies, as we have said, first, upon approximate similarity of analyses, and second, upon approximate similarity of performance. The plaintiff has shown by its own witness that identity of the two metals cannot be established by proof even of identity of analyses; and it is very certain that similarity of performance does not establish identity of the metals. Phoenix Metal may perform as well as Adamite, yet be an altogether different metal. Evidence of similarity of performance, however, has probative value; this we have considered.

The plaintiff's proof of performance goes to the lasting qualities of the two metals, due to similarity in their great strength. Yet, even when endeavoring to prove identity of metals by similarity of strength, the plaintiff showed a dissimilarity in the metals by showing a dissimilarity in their strength. It proved that the tensile strength of Adamite is 70,000 to 100,000 pounds per square inch, while that of the Phoenix Metal is 45,000 to 55,000 pounds, and that of ordinary soft steel is 30,000 to 40,000 pounds. From this it appears that the tensile strength of the defendant's low chromium and high sulfur hardened product is but 50% greater than that of soft steel, while the tensile strength claimed for Adamite is about 200% greater. This radical difference in tensile strength indicates a radical difference either in the quantity or form of carbon or in both, and that the two metals are not the same.

But proof of identity of the two metals was not restricted by the nature of the metals to evidence of similarity of chemical analyses and performance. It might have extended to their physical characteristics. These are such as to make them readily distinguishable, and it is to such that we naturally look in our effort to determine whether the two metals are the same or are different. Recognizing this, the defendant did not rely alone upon the difference between the analysis of its alloy and that of the patent in defending the charge of infringement, but proceeded to show by evidence of physical facts that Phoenix Metal is not Adamite. On the other hand the plaintiff produced no evidence of physical facts in support of its charge that Phoenix Metal is Adamite.

Stated briefly, the proofs are these: The patentees say in their specification:

"We have not found it feasible or possible to produce our alloy (Adamite) commercially *in a cupola* or like furnace. * * * Also the constituent analyses as given for our alloy *cannot be obtained from the cupola* or like furnace in the case of castings of larger section. In attempting to make an alloy in a cupola the percentages of silicon, *sulfur*, phosphorus, we have found too high to get uniform results. We have found that *any such percentages* of silicon, *sulfur* and phosphorus as are contained in the metal, the tests of which are reported in the Iron Age, as above stated, *would be destructive* to the remarkable results which we have obtained and described herein."

The plaintiff made no attempt to prove that Phoenix Metal is made in the manner disclosed by the patent for the manufacture of Adamite, or that Adamite with high sulfur in alloy can be made in cupolas,

notwithstanding the statement of the specification to the contrary. The defendant, however, proved its method of manufacture, and showed that Phoenix Metal rolls,—“castings of larger section,”—with their high sulfur content, are and have always been made in cupolas and are made in precisely the way the patentees state in their specification it is impossible to make Adamite. If Adamite cannot be made in cupolas, then certainly Phoenix Metal made in cupolas is not Adamite.

The patentees claim for Adamite the qualities of cheap tool steel. Upon specific analyses they say:

“The results obtained in these cases were materials which were hard and resistant to the action of abrasion under heat, and susceptible of being forged. * * *

“We believe we have made a discovery of a new composition of metals, which in its primary or cast state, resembles cast iron in its action under cutting tools in the lathe, under the acetylene torch and in its failure to show elasticity or elongation or reduction of area over ordinary cast iron; whereas in its secondary or worked state its ultimate strength, its forging and wearing qualities class it with a steel product. * * *

“Our product is suitable for the greatest variety of uses. It may be used for castings, both large and small, where wear and resistance to heat are important factors. It may also be used for tools, such as hammers, axes, picks, shovels, saws.”

The plaintiff produced no proof that Phoenix Metal is a tool steel metal suitable for the many uses or for any of the uses for which Adamite is stated by the patentee to be suitable; that its action under cutting tools or under the acetylene torch is like that of Adamite; that like Adamite it lacks elasticity, elongation or reduction in area over ordinary cast iron; and most important of all, the plaintiff produced not the slightest proof that Phoenix Metal is forgeable. The forgeability of Adamite is one of its distinctive features. Had Phoenix Metal possessed that quality, it could easily have been proved. That Phoenix Metal does not possess it is to be inferred not alone from the plaintiff's silence but from the large sulfur content of the metal, the red shortness incident to such content, and the consequent difficulty or impracticability to forge metal with that property.

It was testified, that while both metals show unusual strength, the tensile strength of Adamite is nearly if not quite double that of Phoenix Metal. There is no evidence that the alleged infringing rolls from which turnings were taken and analyses made were of Adamite strength.

Rolls of the two metals are used at times in different stands for different purposes, according to differences in their characteristics. Rolls of Phoenix Metal are frequently used for finishing purposes, while Adamite rolls are not usually so employed, because they are much rougher, in fact, rougher even than sand iron rolls. When so employed, Adamite rolls wear rough sooner than Phoenix Metal rolls. Rolls of Phoenix Metal finish up smoother and hold their surface better than rolls made of Adamite.

In cutting rolls made of the two metals, different lathes are required. In roughing off Phoenix Metal rolls a very high grade and high speed steel tool is required until the skin is removed, then they may be finished

by a common carbon steel tool, but in roughing off Adamite rolls the high grade high speed tool has to be used throughout.

The rolls from which turnings were taken and analyses made were not subjected to these distinguishing tests.

Testimony as to physical characteristics of the two metals was given by rolling mill men who had operated rolls made of both metals. That the two metals are readily distinguishable was testified by all. The general trend of their testimony is shown by the testimony of one witness given in the margin.¹

In determining the issue of infringement, as raised and tried in this case, we are restricted to and controlled by the testimony produced in this case. How such an issue may be determined upon other evidence we venture no opinion. But from the testimony in this case, as we read it, it clearly appears, that Phoenix Metal and Adamite, while having an approximate similarity of analysis and performance, possess physical characteristics which distinguish one from the other; that these characteristics are readily susceptible of proof; that the defendant produced testimony that the metal of its rolls possessed the distinctive physical characteristics of Phoenix Metal, and that the plaintiff produced no testimony to the contrary. While charging infringement because of the approach of the analysis of Phoenix Metal to the analysis of Adamite, the plaintiff did not prove that the rolls from which turnings were taken and the analyses upon which it relies were made, had any of the physical characteristics of Adamite. In fact, the plaintiff failed to prove that Phoenix Metal is Adamite, and therefore failed to prove infringement.

The burden of proving infringement rests upon the party charging

¹ Q. You have had experience at the Page Company plant with both the Phoenix Metal and Adamite rolls, have you?

A. Yes, sir.

Q. State from your experience, what, if any, difference you have observed between those two rolls?

A. Well, I would say that the Phoenix Metal, the surface of it—we buy it in the rough, and the surface of the Phoenix Metal is a very heavily scaled roll, for it takes a very high speed tool steel to cut it. But after the surface is thoroughly clear, it has a resemblance of a spotted chilled roll. That is to say, with a roll of 1-inch of chill on an ordinary sand iron roll, while on the face of that I would have on the rolls the same appearance on the material with the Phoenix Metal as I have on the spotted chill. Now, *an Adamite roll doesn't resemble that in any way*, because the Adamite roll has a leaning towards steel. *If I cut an Adamite, I can always know it*; it has a much rougher surface; whereas the Phoenix roll has a smooth finish at all times; and its cuttings and its castings are smooth; whereas the Adamite is rough. It has a pull against the tool that causes the surface to be rough. It has, as you would term it a wave in the steel roll; you would find it in the Adamite, only not so prominent in the Adamite.

Q. And to what extent inwardly from the surface, from your observation, and dressing of these Phoenix rolls, does this condition exist?

A. Well, the Phoenix Metal, as far as we have dressed, has shown no difference whatever; and we had occasion, on one occasion, to put a part of the Phoenix roll under a scull cracker and break it, and we found the fracture to be perfect from the center out; perfect. Now, a Phoenix Metal is much coarser in grain on the inside, and towards the center is slightly coarser than the outside.

it. If the peculiar subject matter of the patent makes such proof difficult, that is its misfortune; it cannot operate against the party charged. When infringement is charged it must be proved. In this case, we think it has not been proved. Therefore, we find with the trial court upon this issue, and direct that

The decree below be affirmed.

BUFFINGTON, Circuit Judge concurred in the finding of the majority of the court that the patent in suit was valid, but dissented from the finding of the majority on the question of infringement.

On Petition for Rehearing.

WOOLLEY, Circuit Judge. In disposing of the plaintiff's petition for rehearing, we shall not enter upon a discussion of the metallurgy of the alloy of the patent and of the alleged high sulfur, low nickel-chromium infringing alloy. Such a discussion cannot easily be confined within reasonable bounds, and, if pursued, would serve no purpose other than to assure the unsuccessful litigant that the court understood the case and to show the grounds upon which it based its decision. We shall do no more than indicate in the briefest way the considerations which moved the court to its judgment.

The complainant again insistently maintains that the approximate similarity of performance of the two metals in point of strength and endurance, is proof that the two metals are identical. But proof of such similarity of performance loses much of its probative force in view of the conceded dissimilarity of chemical composition. As it is conceivable that two metals differently composed as to proportions of the same ingredients may be similar in performance yet be different in fact, the complainant asks us to give to its evidence of performance a value, greater, we think, than it is entitled to receive.

The case turns on the chemical composition of the two alloys, considered with reference, not to ingredients, but to proportions of ingredients. If their composition is different (aside from equivalents), the two alloys are different, though their performance be similar, and there is no infringement; for the invention of the patent is found in new proportions of old ingredients, and nowhere else. That is all the patent teaches; it leaves everything else to the skill of the founder.

The chemical composition of the defendant's alloy is concededly different in proportions from that of the patent, and upon this difference the defendant chiefly relies to distinguish its alloy and to meet the charge of infringement.

Just here the complainant had the task of proving that two alloys, whose ingredients are the same but are in different proportions, are one and the same alloy; a task made particularly difficult by the fact that the proportions of one ingredient are not only different but are fundamentally antagonistic. This, as pointed out in the opinion, the complainant did not succeed in proving. This is the central question of the case to which all others are incidental or cumulative, and failing in this, we think the complainant failed to prove infringement.

The apparent mistake of the court in stating that the defendant

made its metal in cupolas, and in deducing the conclusion that metal thus made could not be Adamite in view of the statement of the patent that Adamite cannot be produced (commercially) in cupolas, does not touch the main question of chemical composition of the two metals, and does not affect the complainant's lack of proof that the two metals, differently composed, are the same. The question of infringement turns not upon the appliance or the kind of furnace in which the alleged infringing product is made—for the patent claims teach nothing as to this—but upon the proportions of ingredients with which it is made. Of these, the proportion of sulfur is the critical proportion in this controversy.

In the alloy of the patent the element of sulfur is present. It is not introduced into the alloy by the patent; it is put there by nature. It is dealt with by the patent because it is there; and being there, it is not treated as an element having anything to do with the production of the alloy, and it is not used for any purpose. It is considered and treated as an impurity unavoidably present and certainly dangerous, and, for that reason the patent directs that it be reduced to a low minimum. The one thing the patent teaches about sulfur is that it must be gotten rid of, and that it must not be present above a proportion, which, by its own terms, the patent limits to .05.

In the defendant's alloy, the defendant adds sulfur to what nature supplies. Sulfur is there because it is put there. It is put there for a purpose, and for a purpose not recognized by the patent and in a proportion denounced by the patent. Because of our belief that the patent involves invention and is valid, and because of its manifest importance to the metallurgical art, we gave a full and a very serious consideration to the complainant's theory of the defendant's use of sulfur as a substitute for or an equivalent of any deficiency of the proportion of chromium in the alloy of the patent. But the theory failed in view of the undisputed fact that the defendant began the practice of using sulfur in its alloy in from double to treble the proportion taught by the patent long before the patent was applied for, and consistently pursued it to the bringing of this suit (Exhibit Book 192-225); and in view of the further fact, that while the defendant used and varied its nickel-chrome content throughout the same period, as it had a right to do, its radical change in that content, complained of as a resort to the nickel-chrome proportions of the patent, was not a change of nickel and chromium in the relation taught by the patent.

As the defendant's use of high sulfur had long been practiced together with the use of nickel and chromium in varying proportions (sometimes within the proportion of the patent subsequently granted), it was difficult to believe that the defendant's continued use of sulfur in substantially the same high proportion, was an equivalent of or a substitute for a deficiency in the chromium proportion of the patent, resorted to by the defendant as an expedient or means by which to infringe the alloy of the patent. As this was the very centre of the issue of infringement, we think the complainant failed to prove that Phoenix Metal is Adamite.

As these are the principal considerations that moved the court to its judgment, we see no occasion for allowing the plaintiff to introduce additional evidence on collateral matters.

The petition for rehearing is denied.

DAVEY TREE EXPERT CO. et al. v. VAN BILLIARD et al.

(District Court, E. D. Pennsylvania. February 4, 1918.)

No. 1601.

1. PATENTS ⇨328—VALIDITY AND INFRINGEMENT—PROCESS OF TREATING WOUNDS IN TREES.

The Davey patent, No. 890,968, for a process of treating a bruise or wound in a tree by cutting away any unsound or decayed wood and making a cavity which will drain itself, is valid and the process useful; also *held* infringed.

2. PATENTS ⇨328—VALIDITY AND INFRINGEMENT—PROCESS OF REINFORCING HOLLOW TREES.

The Davey patent, No. 958,478, for a process of reinforcing the trunks of trees having cavities therein extending to the exterior by building up within the cavity a filling in sections one above another, is invalid as to claim 1; it being too broad in view of the prior art. Claims 2, 3, 4, 5, 8, and 11 were not anticipated and disclosed invention and utility; also *held* infringed.

3. PATENTS ⇨312(1)—UTILITY OF INVENTION—PRESUMPTION AGAINST INFRINGER.

There is, as against an infringer, a strong presumption of utility in an invention which he has wrongfully appropriated for the purpose of benefiting himself.

4. PATENTS ⇨312(1)—INFRINGEMENT—INFERENCES FROM EVIDENCE.

That defendants in an infringement suit are ex-employés of complainant and familiar with the process of the patent, and are engaged in the same business, and that they fail to testify fairly and fully affords ground for an inference of controlling weight where the issue of infringement is fairly in doubt.

5. PATENTS ⇨290—SUITS FOR INFRINGEMENT—PARTIES.

The owners of a patent and an exclusive licensee thereunder may properly join as complainants in a suit for its infringement.

6. PATENTS ⇨321—INTERLOCUTORY DECREE.

On final hearing in an infringement suit, where bill of complaint was, as to one patent, sustainable except as to one claim, leave will be granted complainant to enter a disclaimer in the Patent Office and to file in court a certified copy thereof; interlocutory decree for accounting to be entered only upon such filing, and, in default of such disclaimer and filing, the bill to be dismissed as to that patent.

In Equity. Suit by the Davey Tree Expert Company, John Davey, Martin L. Davey, James A. Davey, and Wellington E. Davey against Rue J. Van Billiard and S. C. Dunkelberger. On final hearing. Decree for complainants ordered on condition.

Wm. A. Schnader, of Philadelphia, Pa., and C. P. Byrnes, of Pittsburgh, Pa., for complainants.

Arthur E. Paige, of Philadelphia, Pa., for defendants.

BRADFORD, District Judge. The Davey Tree Expert Company, a corporation of Ohio, hereinafter referred to as the company, John Davey, Martin L. Davey, James A. Davey and Wellington E. Davey, have brought their bill against Rue J. Van Billiard and S. C. Dunkelberger charging infringement of letters patent of the United States Nos. 890,968 and 958,478, and containing the usual prayers. No. 890,968 is dated June 16, 1908, and was granted to John Davey, Martin L. Davey and James A. Davey, who, July 6, 1908, assigned an undivided fourth part of their right, title and interest under that patent to Wellington E. Davey. The four owners of the patent thereafter granted an exclusive oral license thereunder to the company; the title to the patent now being held by the grantors subject to the license. No. 958,478 is dated May 17, 1910, and was granted to Wellington E. Davey, who, September 15, 1910, assigned his entire right, title and interest thereunder to the company, which now owns that patent.

[1] No. 890,968 is for a "process of treating and dressing a bruise or wound in the trunk or live branch of a live tree." The description states:

"This invention relates to an improved process of treating and dressing a bruise or wound or any decayed or unsound spot in the trunk or live branch of a live tree. The primary object of this invention is to remove all decayed and unsound wood and foreign matter from the wounded or unsound portion of the trunk or branch, and so dress the cavity formed by removing the decayed or unsound wood and foreign matter that the wound will be readily healable by nature and further decay or harm to the tree prevented."

The charge of infringement is limited to claims 3, 4, 6 and 7. Each of those claims begins with the words:

"The herein disclosed process of treating and dressing a bruise or wound in the trunk or live branch of a live tree, consisting in the formation of a cavity in the trunk or branch by removing all decayed or unsound and foreign matter at the wounded spot in the trunk or branch."

The several claims in suit are differentiated from each other as follows: Claim 3 by adding to the above quoted words the following:

"and recessing the side walls and top wall of the cavity at the outer end of the cavity to form a channel extending from the bottom of the cavity at one side of the cavity to the top wall of the cavity, thence across the said top wall to the other side of the cavity, and thence downwardly to the bottom of the cavity, and then filling the cavity."

Claim 4 by adding to the words common to all of the claims in suit the following:

"and providing the side walls of the cavity at the outer end of the cavity with recesses extending from the bottom of the cavity upwardly to the top of the cavity, and then filling the cavity."

Claim 6 by adding to the said common words the following:

"and cutting away the bottom of the cavity at the outer end of the cavity to form a downwardly and outwardly sloping surface and providing the side walls of the cavity with recesses extending from the aforesaid surface upwardly a suitable distance, and then filling the cavity."

And claim 7 by adding to the said common words the following:

"and cutting away the bottom of the cavity at the outer end of the cavity to form a downwardly and outwardly sloping surface and recessing the side

walls and top wall of the cavity at the outer end of the cavity to form a channel extending from the aforesaid surface at one side of the cavity to the top wall of the cavity, thence across the said top wall to the other side of the cavity, and thence downwardly to the aforesaid surface, and then filling the cavity."

A distinguishing and essential feature in the process of each of the claims in suit is the formation at the outer end of the cavity of a duct or V-shaped groove or channel for carrying away water which would otherwise enter the cavity and injuriously affect the health of the tree. The phrases "recessing" and "providing * * * with recesses" have relation to such groove or channel. It also appears from the description that in the patented process the bottom of the cavity is cut away at its outer end "so as to slope downwardly and outwardly." The evidence shows that the process is useful and has been employed with much success.

[2] No. 958,478 is for a "process of reinforcing trees." The description states:

"This invention relates to an improved process of reinforcing trees whose trunks have holes or cavities therein extending to the exterior and longitudinally of the trunks. The primary object of this invention is to reinforce the hollow portion of the trunk and to have the cavity filled in such a manner that a slight lateral yielding of the trunk to wind pressure against it will not result in injury to the filling. Another object is to compose the said filling of sections and to have adjacent filling-sections arranged the one above the other and to contour oppositely arranged end surfaces of the said adjacent sections to permit a slight lateral swaying of the upper of the said sections with the trunk independently of the lower of the said sections and thereby reduce to a minimum the liability of injury to the filling by wind pressure against the trunk. Another object is to render the upper of adjacent filling-sections independent of the lower of the said sections by supporting the said upper filling-section from the trunk independently of the said lower filling-section and thereby prevent the weight of the said upper filling-section bearing downwardly on the said lower filling-section. * * * Another object is to cushion adjacent end surfaces of adjacent filling-sections to accommodate some expansion of the said filling-sections toward each other without liability of cracking or injuring the said sections by a force or agency tending to result in such expansion. Another object is to prevent water being blown or driven by the wind or other force between adjacent sections of the filling at the joint formed between the said sections and to so form the said joint that any water or moisture which may have access to the oppositely arranged end surfaces of the said sections will be drained to the exterior of the trunk. Another object is to prevent any water which may obtain access to the under surface of the upper of adjacent filling-sections from entering the lower of the said filling-sections but instead to drain such water to the exterior of the said trunk. Another object is to interpose a layer of compressible and elastic material between adjacent filling-sections and to interpose layers of oiled paper or the like between the said compressible and elastic layer and the said filling-sections and thereby avoid frictional adherence of the said compressible and elastic layer to the said filling-sections and render the joint formed between the said elastic and compressible layer and the said filling-sections waterproof so as to prevent any impregnation of the said compressible and elastic layer with moisture which may find access to the adjacent end surfaces of the said filling-sections. * * * The top or upper end surface of the lower of adjacent filling-sections is shaped or contoured concavely, and the bottom or lower end surface of the upper of the said filling-sections is shaped or contoured convexly. * * * A layer of waterproof material, such, for instance, as oiled paper which will not adhere to a layer of felt or other elastic and compressible material, and which is impervious to moisture, is laid on and covers the top or upper end surface of the lower of adjacent

filling-sections. A layer F of waterproof material, such, for instance, as oiled paper which will not adhere to a layer of felt or other elastic and compressible material, and which is impervious to moisture, covers the bottom or lower end surface of the upper of adjacent filling-sections. * * * By the process hereinbefore described it will be observed that the hollow portion A of the trunk of the tree is braced by a metal-reinforced concrete filling which occupies the cavity *a* in the said portion of the trunk, and that the upper of adjacent filling-sections is supported independently of the lower of the said filling-sections so as to prevent the weight of the upper of the said filling-sections bearing downwardly on the lower of the said filling-sections and so as to prevent the transmission of any strain tending to crack or injure one of the said filling-sections from being transmitted to the other of the said filling-sections and to accommodate the renewal of either of the said filling-sections without interfering with the adjacent metal-reinforced concrete section or sections of the filling. It will also be observed that the sectional filling accommodates a slight lateral swaying of the trunk by wind pressure against it without injury to the filling, and not unimportant is the curving or sloping of oppositely arranged end surfaces of adjacent filling-sections so as to drain any moisture having access thereto to the exterior of the trunk and to facilitate a slight lateral swaying of the upper of adjacent filling-sections with the trunk independently of the lower of the said filling-sections and thereby reduce to a minimum the liability of injury to the filling by wind pressure against the trunk. It will be seen also that the interposition of packing or elastic and compressible material between adjacent end surfaces of adjacent filling-sections to thereby cushion the said surfaces accommodates some expansion of the said filling-sections toward each other without liability of cracking or injuring the said sections by a force or agency tending to result in such expansion. It will also be observed that by the joint formed between adjacent filling-sections as hereinbefore described the blowing or driving of water by the wind or other force between the said sections at the said joint is substantially prevented and any water or moisture which may obtain access to the lower end surface of the upper of adjacent filling-sections is not only prevented from entering the lower of the said filling-sections but is drained to the exterior of the trunk. * * * It is obvious that the trunk of a tree upon swaying laterally will move farther at the upper of adjacent filling-sections than at the lower of the said filling-sections, and hence to render the sectional filling most suitable for the gradual increase in the movement of the trunk upwardly from the base of the trunk during any swaying of the trunk the upper of adjacent filling-sections is made shorter than the lower of the said filling-sections."

The charge of infringement is restricted to claims 1, 2, 3, 4, 5, 8 and 11, as follows:

"1. An improved process of reinforcing a tree having a cavity which is formed in the trunk of the tree and extends to the exterior and longitudinally of the trunk, said process comprising a building up within the cavity of a filling in sections one above another.

2. An improved process of reinforcing a tree having a cavity which is formed in the trunk of the tree and extends to the exterior and longitudinally of the trunk, said process comprising a building up within the cavity of a filling in sections one above another, and contouring the upper end surface of the lower of adjacent filling-sections to permit a slight lateral swaying of the upper of the said adjacent filling-sections with the trunk independent of the lower of the said adjacent filling-sections.

3. An improved process of reinforcing a tree having a cavity which is formed in the trunk of the tree and extends to the exterior and longitudinally of the trunk, said process comprising a building up within the cavity of a filling in sections one above another and supporting the upper of adjacent filling-sections independent of the lower of the said adjacent filling-sections.

4. An improved process of reinforcing a tree having a cavity which is formed in the trunk of the tree and extends to the exterior and longitudinally of the trunk, said process comprising a building up within the cavity of a filling

in sections one above another, and supporting adjacent filling-sections from the trunk independent of each other.

5. An improved process of reinforcing a tree having a cavity which is formed in the trunk of the tree, and extends to the exterior and longitudinally of the trunk, said process comprising a building up within the cavity of a filling in sections one above another, contouring the upper end surface of the lower of adjacent filling-sections to permit a slight lateral swaying of the upper of said adjacent filling-sections with the trunk independent of the lower of the said adjacent filling-sections and supporting said upper filling-section from the trunk independent of said lower filling-section.

8. An improved process of reinforcing a tree having a cavity which is formed in the trunk of the tree and extends to the exterior and longitudinally of the trunk, said process comprising a building up within the cavity of a filling in sections one above another, and cushioning oppositely arranged end surfaces of adjacent filling-sections.

11. An improved process of reinforcing a tree having a cavity which is formed in the trunk of the tree and extends to the exterior and longitudinally of the trunk, said process comprising a building up within the said cavity of a filling in sections one over another, and covering the top of the lower of adjacent filling-sections with compressible material before building up the lower of the said adjacent filling-sections."

[3] It is claimed by the defendants that the process of each of the patents in suit lacks utility and therefore was not patentable. A decided preponderance of the evidence is to the contrary, and shows that the process of No. 958,478, like that of No. 890,968, has been practiced with much success. And aside from other considerations there is as against an infringer a strong presumption of utility in an invention which he has wrongfully appropriated for the purpose of benefiting himself. Walk. Pat. § 85.

The proofs do not show anticipation of the two patents in suit or either of them by any other patent or patents. Nor do the other printed publications in evidence contain any matter anticipatory of the subject-matter of the several claims in suit with the exception of claim 1 of No. 958,478, nor, with that exception, does the evidence disclose any prior use of the subject-matter of any of the claims in suit, or that the prior art was such as to negative patentable invention. Claim 1 of the later patent, however, seeks broadly to cover the making within a cavity in the trunk of a tree for the purpose of reinforcing it of "a filling in sections one above another." In view of the prior art this claim is too broad to be valid.

[4] The evidence, direct and circumstantial, clearly establishes infringement by the defendants of the several claims in suit. Van Biliard, it is true, denies infringement; but he has been discredited by evasiveness, inconsistencies and self-contradictions in his testimony, and by his repudiation of sworn statements previously made. Dunkelberger failed to testify or be present at the hearing, and, according to the testimony of his co-defendant, although he had undertaken to attend and was notified by telegram when the hearing would be had, stated by letter that "he didn't think he would be here." Further, both of the defendants are ex-employees of the company and familiar with the patented process in question; and were engaged in the same line of business. Such circumstances it has been held in many cases afford ground for an inference of controlling weight, where the issue of infringement is fairly in doubt.

The defendants contend that the process of No. 958,478 requires a complete separation of the filling-sections from one another; that the defendants do not completely, but only partially, separate the sections, and therefore do not infringe; and, further that the company does not effect such complete separation, and has abandoned the patented process and practices that of the defendants. This contention, while specious, I regard as unsound. Undoubtedly it is impracticable to cut out and shape the layers of oiled or tarred paper covering and separating the ends of adjacent sections in such manner as exactly to fit the irregular interior surface of the tree cavity, and in so far as the separating layers between the sections fail to reach such interior surface the soft concrete when placed above the lower section will become attached to and integral with the concrete of the lower section. There is nothing in the patent claims or description, fairly construed, inconsistent with or negating this. But wind or other force of sufficient strength to bend or deflect the trunk or branch containing the sectional filling will break asunder the comparatively thin concrete attachment between the upper and lower sections without injury to the filling, permitting it fully to perform its function as contemplated in the patent.

[5] It is urged by the defendants that the bill should be dismissed for multifariousness and misjoinder of parties. It clearly is not multifarious in any objectionable sense. Nor has there been a misjoinder. The company is the owner and holder of No. 958,478, and it has an exclusive license under No. 890,968, the four Daveys being the owners of the patent. The company as licensee was compelled to join the Daveys as owners. But though joined as owners the whole beneficial interest in this suit is vested in the company, and the presence of the Daveys as holders of the legal title to one of the patents cannot in any way complicate or embarrass the disposition of the case.

It is further urged by the defendants that under the provisions of a written contract between the company and its apprentices the latter, of whom the defendant Van Billiard was one, acquired a license by implication, after the expiration of the three year term of apprenticeship, to use the patented processes employed by the company. It was in substance provided in the contract that the apprentice should at all times during his term well and truly serve the company in its business of tree surgery; that he should not disclose any knowledge acquired by him through instructions received from the company; that he should not enter the employment of any person competing with the company in tree surgery; and that he should not engage in the treatment of trees so as to compete directly or indirectly with the company either individually or as agent of any other person, nor as a member of a partnership or a stockholder or employee of any corporation competing with the company "during the life of this agreement." It was further provided that the company should "teach and instruct said apprentice, or cause him to be taught and instructed in * * * tree surgery by the best way or means it can." I perceive nothing in the contract to justify the contention of the defendants. To sustain it would involve a forced and unnatural construction of the contract. Whatever license by implication resulted from the contract was limited to the term and purposes of the apprenticeship.

[6] For the reasons above given the bill of complaint, if a proper disclaimer be made by the complainant as to claim 1 of No. 958,478, must be sustained, except as to that claim, and the cross-bill dismissed. But this court having reached the conclusion that that claim is invalid it is proper before the taking of an account as to profits and damages under patent No. 958,478, that a disclaimer as to claim 1 should be made before the entry of a decree for such accounting; and to that end leave is hereby granted to the complainant within thirty days from the date hereof to enter a disclaimer in the patent office and to file in this court a duly certified copy thereof. In default of such disclaimer and filing of such certified copy the bill will be dismissed as to patent No. 958,478. The entry of an interlocutory decree will be postponed until the expiration of the said period of thirty days, or until the filing in this court of a certified copy of such disclaimer, whichever shall first happen.

MOTION PICTURE PATENTS CO. v. CALEHUFF SUPPLY CO., Inc.

(District Court, E. D. Pennsylvania. January 22, 1918.)

No. 1615.

1 PATENTS ⇨328—VALIDITY—PROJECTING KINETOSCOPE.

The Latham patent, No. 707,934, for a projecting kinetoscope, claim 7, is for a particular construction, which is wholly the product of mechanical skill, and is void for lack of invention.

2 PATENTS ⇨109—VALIDITY—AMENDED CLAIMS.

There is no objection to an applicant for a patent acquiescing in a rejection of his broad claims to novelty and being allowed a narrow claim to a specific construction, which was substituted by amendment.

3. PATENTS ⇨109—VALIDITY—AMENDED CLAIMS.

An applicant may amend his claims to meet the objections of the Patent Office, without a new oath, so long as the amended claims relate to the same claimed invention.

In Equity. Suit by the Motion Picture Patents Company against the Calehuff Supply Company, Incorporated. On final hearing. Decree for defendant.

Cyrus N. Anderson, of Philadelphia, Pa., and Melville Church, of Washington, D. C., for plaintiff.

Oscar W. Jeffery, of New York City, for defendant.

DICKINSON, District Judge. This controversy concerns letters patent No. 707,934, issued to Woodville Latham. This is at least the third attempt to have the validity of this patent determined. It is one generally known as the Latham loop patent. The controversy went off in the Independent Case, 200 Fed. 411, 118 C. C. A. 563, on the question of whether the patent concerned cameras or projecting machines, and in the Motion Picture Patents Co. v. Universal Co. Case on a question of license. There is no escape from meeting, in the present case, the question of validity. The fact of infringement is squarely admitted. The only claim in issue is the seventh. It is

asked that a narrow reading only be given to it, so as to cover a specific construction, the inventive merit of which is claimed to be in the fact that it is the result of a novel combination producing a new and useful result, every element in which combination is admitted (at least arguendo) to be old. It is evident that nothing short of identity in construction would demand an admission of infringement. We have the admission none the less. There is no charge or intimation of any ulterior purpose in thus sharply defining the issue, or in this absence of the disposition usually manifested by defendants to wriggle away from a successful charge of infringement. This may be due wholly to the confidence of the defendant in its averment of invalidity. We so interpret what would otherwise be a very accommodating attitude on the part of the defendant.

The defense of invalidity is based upon the proposition that every element of invention has been eliminated from the plaintiff's device, except that which is claimed to reside in the bringing together of features of construction in a combination involving invention. The problem thus presented to the constructor, as is asserted by the defense, is, however, wholly a problem in mechanics, involving no invention, but making its call solely upon the mechanical skill of the designer. It is further asserted to be the fact that the construction in which invention is claimed to reside was the actual production of the skilled mechanic, who was called by Latham to his assistance. What Latham did, it is asserted, was to give to the mechanic the idea of the construction which he wished to have made, and it was constructed for him. Had there been novelty in any of the features to be thus incorporated in the construction, or any novelty in the idea of having the several features in combination, invention would be conceded. When, however, all Latham did was to direct the mechanic to put the described device together, and the only call made upon the mechanic was to select from the storehouse of his mechanical art what was required for the purpose and to make of the construction "a good and workman-like" job, Latham cannot take out a valid patent covering the particular construction so put together, because (1) there is a total absence of invention, and (2) if there was invention in the mode of construction, it was not the invention of Latham.

Denial of the validity of such a patent is further based upon the averment that the claim to patent of this narrow scope was an afterthought not in the mind of the applicant, but originated with a patent solicitor long after the application was made and after the applicant had assigned his rights to the predecessor of the present plaintiff. The basis of this averment is that the application was filed June 1, 1896, and allowance of this narrow claim not made until August 26, 1902. In the meantime, an interference had blocked the allowance of the claims which incorporated the invention which the applicant thought he had made. The proceedings in the Patent Office resulted adversely to the applicant. This emasculated the application and left the device of the applicant devoid of every element of invention. The solicitor of the assignee of the applicant then amended the claims by inserting the one now in issue, and secured the allowance of it, and the issue of a patent limited to the specific construction described.

The thought behind this defense would compel ready acceptance, except for several facts with which we are confronted, and the significance which is usually imputed to them. In the first place, we have the fact of original construction. The patentee is not asking for much when he asks to have his claimed proprietary right to this specific construction protected. Again, he has the prima facie right imputable to the grant of letters patent. The findings of the examiners in the case of an application which has received real consideration of its claims, particularly if the findings be such as make demands upon the knowledge possessed by experts or those who have technical knowledge, command respect, and may well be accepted as persuasive. Still again, the juridical history of this patent may be thought to carry the implication that its validity has received judicial recognition in fact, although not made in form the subject of a judicial finding. Still yet again, the persistency with which this device has held its place in a rapidly developing art, offering large rewards to any one who had a good substitute to offer, loudly proclaims its worth and value. Whatever impression is made upon the mind by the averments that the device is the product of another than the patentee, and that the making of the claim in issue was an afterthought, is sought to be removed by a denial of their truth.

The fact issues thus raised will be later discussed, but on the whole the showing made by this plaintiff might well support a finding that the prima facie right arising out of the patent had not been overcome. This might well be, or, with the trial judge at least, was, the impression first received. After an analysis of this presentation of the plaintiff's case, this first impression wholly disappears, or is at least dimmed beyond the point of recognition of its presence. This second thought comes with even the most hasty glance over the disclosures of the prior art. Edison is the acknowledged father of the motion picture art. His camera and his means of getting upon the film the pictures to be projected upon the screen are still its basis and its backbone, and no essential advance has been made upon his contribution to the art. He fully and finally met all the conditions of the problem with which he was confronted.

The problem which Latham had before him, and which he supposed he was meeting on virgin ground, presented one condition of difficulty with which Edison was not confronted. This arose out of the increased length of the film. Edison had to do with film rolls from which the film could be directly fed to a position in front of the camera, and kept there for the required interval of time. The inertia and momentum of heavy reels made this impracticable. Latham though he was the first to meet this difficulty by having the supply reel deliver the film, not directly to the feeding mechanism, which carried it to and held it before the window, but delivered it through the medium of an excess of supply which formed a loop, and to have the feeding mechanism get the film from the slack of this loop. In this way all tug upon the supply reel was avoided. A resort to the same method prevented the intake reel from tugging at the film. This and one other feature, of which we next speak, constituted the whole

of the advance upon the prior art, which Latham proposed to himself.

We are, of course, for the present, ignoring the claim of the patent now in issue. So true is that the mechanics, who constructed the Latham device, who were familiar with the construction of the Edison device, followed the construction of the latter so nearly that the latter, viewed as a camera, and not as a projecting machine, was a reproduction of the Edison camera plus the loop feature. In their general purpose cameras and projecting machines are as much like each other as the two ends of a blow pipe. In the one the course of travel is from the object to be pictured to the film, and in the other the impression on the film is thrown upon a screen. There is, however, this difference in the conditions under which they operate. The film will take an impression in much less exposure time than the human eye requires, for it to be impressed with a vision of what is upon the screen. This difference in time may be roughly expressed as 500 to 1. At all events, the difference is very great. It thus becomes apparent that several things are required of successfully operating projecting machines in that part of their construction which we are now considering. These loops must be formed; they must be maintained without variance in quantity of slack; there must be no slip due to lost motion in the movement of the film; the movement of each picture on the film must be kept in step with the halt before the window and the action of the shutter, undisturbed by any shrinkage of the film or other causes of lack of synchronism, and the halt before the window when the shutter is open and the movement of the film when the shutter is closed must be so regulated as that the eye of the spectator will have time to do its work, in accomplishment of which purpose the halt period should exceed the traveling period in time.

Edison met all of these needs, which were his needs, by (among other things) providing perforations or round holes spaced along each edge of the film which met corresponding spuds in his feeding machinery. When the film passed through the projecting machine, a like mechanism would bring and hold the picture in proper position before the window, unaffected by shrinkage in the film, because this would be inappreciable as affecting the space relation between the picture and the perforations, which determined its placement, however apparent the shrinkage might be in the film as a whole.

The new feature of the problem, which was met by introducing the loop, Latham thought was of his devising. The other feature, which brought a problem in optics, he sought to solve in a way which he believed to be his own, and, had he been the first to apply the principle, this feature would unquestionably have involved invention. Prior to his application, he had not thought of the use of a shutter so constructed as that the period of time, at which the film was halted for the illumination and display of the picture, would exceed the intervals of time between the halts. The shutter which he had used gave the lesser period of time to the position of illumination. He reversed this in his application, and it would not be unfair to claim that he appreciated the value of this increase in the period of il-

lumination. His claim of originality in this was, however, rejected in favor of Armat. With this feature eliminated from his claims, and with the loop and all the other elements in his combination admitted to be old, the plaintiff is brought to the position in which the present defendant places the plaintiff. That position is that it has been driven from every tenable ground on which it has sought to defend the validity of this patent, and now seeks to defend it on the untenable ground that it may reassert an exclusive proprietary right to a particular construction which is wholly the product of mechanical skill.

As we understand counsel for plaintiff, it does not shrink from assuming this position, but confidently accepts the issue implied in this denial of invention. This takes out of the case the question of estoppel and of *res adjudicata*. We do not follow the line of argument which seems to admittedly lead to the conclusion that there is no distinction between the two with respect to the conditions of their application, nor do we accept that conclusion. That a judgment only concludes parties and privies in person or estate is an acceptable proposition, but it apparently has no application to the facts of this case. Nor do we see that either *res adjudicata* or estoppels are appropriate terms here. The latter is more nearly so than the former. The plaintiff cannot claim here anything, its claim to which was rejected in the Patent Office, for the simple reason that it has no patent upon which to base the claim, and the claims, so far as allowed, must be so read as to make them consistent with the findings upon which other claims were rejected. So far as what are enumerated as facts are facts—including the fact that the Latham patent was heralded as a loop patent, and then this feature abandoned as the supporting base of the claim of validity; the fact that in the application validity was claimed on the feature of relative duration of film movement and rest, and this eliminated by the proceedings in the Patent Office; the fact that “the characterizing difference” which gave inventive novelty to the combination was at one time ascribed to one feature and at another time to another feature—all prepare the mind (as the taking of inconsistent positions always does) for the ready reception of the thought that the most recent position taken is the product of an afterthought, and because of this is likely to be as untenable as each of those previously taken.

Neither these facts nor any of them invoke the application of the *res adjudicata* doctrine (except to the extent that the applicant is concluded by the ruling denying any of his claims to be patentable), nor do any of them suggest estoppel in the sense of any accurate use of that term. Their effect is psychological, rather than legal. They do have, however, an effect none the less real. This brings into consideration the other fact that all projecting machines in use embody the essential combination which plaintiff claims as its exclusive property. This loudly proclaims utility. Indeed, this is properly found as against this defendant from the fact of infringement alone. It may be, and such use usually is, evidence of inventive novelty; but the latter finding is not necessarily required to be made.

The juridical history of the Latham patent disclosing, as it does, the failure of attempt after attempt to establish its validity, coupled with the fact of its open infringement by many users, provokes the comment made by a witness in another case that any claim of exclusive right under it was a joke, and turns the argument, to be drawn from general use, against it. This is true, without crediting the suspicion that the Joly patent afforded a reason for the employment of the tactics to which the plaintiff resorted, by seeking to prefer the Latham to the Armat patent, because the former preceded Joly and the latter did not.

[2] In this connection, consideration may be given to two other facts in redemption of the promise made to refer to them. One is, upon which some stress is laid, that the mechanic whom Latham called to his aid, and not Latham, was the inventor of the combination which is claimed under the Latham patent. This may be the real fact, but there is nothing on which to base such a finding in face of the prima facie validity of the grant to Latham. The other is that the present claim 7 was inserted in the application after its filing, and so framed as to read upon the machines which came to the knowledge of Latham after his application had been filed.

We are not in accord with the thought advanced by either the plaintiff or defendant with respect to this feature of the case. We do not see that the plaintiff is confronted by the horns of the dilemma upon which the defendant seeks to impale it. It does not follow that claim 7 must either have been in the original application, and to be considered as rejected, or not have been in it, and to be without a supporting oath. We see no objection to the applicant acquiescing in a rejection of his broad claims to novelty, and being allowed a narrow claim to a specific construction, which was substituted by amendment.

The true ground of objection is that voiced by Judge Hand in the Independent Case. The point he made was that, if neither the original application nor any of its claims referred to a camera, no camera construction would infringe the patent, and, on the other hand, that if the application and its claims were so changed as to refer to the invention of a camera (to which invention no reference had before been made), the claim to the invention of a camera would be a claim to a new invention, requiring a supporting oath. The change made here in the claims resulted, not in the claim to a new invention, but in the restriction of the claim from a broad one, which could not be allowed, to a narrow one, which was allowed. We do not see that plaintiff is bound to find in his original claims one which is substantially the same as his amended claim, if, as we find, his original application did cover his amended claim, in the sense that it included that claim and more.

[3] We further do not see, however, that claim (13) 6 is the same as the present 7. The former included the thought of "illumination and rest" as a characteristic feature. Why otherwise the emphasis upon broken gearing? This element in the combination was awarded to Armat and properly dropped from claim 7. What we do find is that, if claim 7 had originally accompanied the Latham application, it would have been germane and (if there was no other reason for

rejection) would have been allowed, and that in consequence we see no objection to its introduction by amendment. This means no more than that an applicant may amend his claims to meet the objections of the Patent Office (without a new oath), so long as the amended claims relate to the same claimed invention as the application, and do not lay claim to a new invention.

We would have more confidence in the soundness of the conclusion, to which we have arrived, if counsel for defendant had specifically planted the defense upon the ground upon which we are led to place it. It was so planted (*inter alia*) in the oral argument, and may be found embraced in the argument advanced in the printed brief submitted; but it is not in the latter as strongly emphasized, or at least given the importance, and surely not the controlling effect which we ascribe to it. Besides this, as already stated, there is much in the plaintiff's case to incline the judgment in its favor. The argument of counsel for plaintiff is very persuasive, even if not convincing, and the testimony of Mr. Marvin is so admirably put in form and clearness as to be very appealing. There is room, also, for the thought that, had the infringing machine in the Independent Case been a projecting kinoscope, instead of a camera, Judge Hand would not have dismissed the bill, and there is room for a like thought in the Universal Case, if there had been an absence of the license feature. This, of course, does not necessarily follow; but there is significance in the fact that in each of these cases the defense avoided resting the defense wholly upon, and did not secure a ruling of, the invalidity of the patent.

The very illuminating dissenting opinion of Judge Coxe leaves room for no other thought than that, as the Independent's defense had been presented, he was convinced of the plaintiff's right to a decree of validity. Had there been, however, in that case, as here, an entire absence from the plaintiff's case of those features upon which Judge Coxe placed emphasis, we do not know what would have been his view.

We would hesitate long before we would have sufficient confidence in the soundness of a conclusion, which differed from any of those indicated, to announce it. No trier of causes can, however, escape the duty of frankly avowing the conviction which has settled down upon his mind and pronouncing the judgment to which it leads. He may express his views with the diffidence which the occasion demands, but he must nevertheless express them, and they must be his. He cannot surrender his convictions in deference to the views of others, unless he had been persuaded out of his convictions, or the views of others are authoritative, or otherwise controlling. If the present case had been presented as the Independent Case appeared to Judge Coxe, we could see no escape from the conclusion reached by him. When, however, we have out of the case every element of invention, except such as is claimed to reside in a particular mechanical construction, we can see no invention in the selection of well-known mechanical means to secure the result desired.

To paraphrase the language of the seventh claim, if we assume to have described the idea of feeding the film, including the loop feature,

of intermittently feeding it so as to get an interval of pause in front of the window sufficiently long to supply the required degree of illumination, and of taking in and reeling up the film after the picture had been shown, so as to avoid strains, just as when it was fed, together with all the ideas which are involved in a successful operation, it would seem that we had the essentials of the invented thing described. Any one not a mechanic, who had such an invention in mind, might describe it to a mechanic to be constructed; and if we add to the knowledge of this invention that every mechanical element which could enter into the construction (each and every physical part of its construction) was something known to every mechanic, how could there be said to be any invention in the form of construction adopted? As means of feeding and retiring the film, beaters, friction rollers, claws, hooks, holes, and no holes, sprocket wheels, etc., were all open to him from which to make his choice and selection. One mechanic might select one means; another mechanic might give the preference to another means. The fact that the group of mechanical appliances which one employed might make a more efficient embodiment of the thing meant to be constructed than the grouping as made by another would surely not confer the rewards due to invention upon either. To hold otherwise would seem to put it in the power of any constructor of a machine to forestall the inventor.

Granted that Edison had an equal right with Latham to employ the loop, and that, with the loop feature added, the Edison machine is identical with the Latham machine, how can Latham be given a patent on his particular construction without making Edison an infringer, if he added loop; and how could he be an infringer, because of the construction features of his machine, when in these respects the Latham machine was a copy of the Edison? We thus feel driven to the conclusion that the Latham patent is invalid for want of invention, so far as claim 7 is involved, and that the bill of complaint should be dismissed, with costs.

Reluctance to reach a conclusion different from that reached by the experts of the Patent Office, after all the consideration which they gave to this application, or to even seem to differ with those who have had this patent under judicial consideration, has led us into this over-long statement of the view entertained and discussion of the point upon which it is ruled.

EDMANDS v. PERLMAN.

(District Court, E. D. Pennsylvania. January 25, 1918.)

No. 1667.

1. PATENTS Ⓒ328—INFRINGEMENT—ELECTRICAL SURGICAL BAKER.

The Edmands and Hoyt patent, No. 775,105, for an improvement in electrical surgical bakers, as limited by the claims as finally allowed by the Patent Office, covers only the specific construction described, which is a unitary structure consisting of two sections, each in the form of the segment of a circle and united by a hinge at their upper ends, and is

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

not infringed by a structure comprising three sections, united by two hinges.

2. PATENTS ⇨240—INFRINGEMENT—IMPROVER OF PATENTED DEVICE.

A second inventor may invent an improvement on a patented device, and secure a patent upon his improvement; but he has thereby by no means transferred the ownership of the device first patented to himself, but is an infringer if he uses it without authority.

In Equity. Suit by Alberta F. Edmands against Henry Perlman, doing business as the Crown Electric Hot Pack Company. On final hearing. Decree for defendant.

Monroe Buckley, of Philadelphia, Pa., and George P. Dike, of Boston, Mass., for plaintiff.

Daniel J. McBride, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. [1] The question really involved in this proceeding is one of infringement. This, at least, is the only question which need be considered. It, however, turns upon the scope of plaintiff's claims. The patent with which we are concerned was issued to Walter S. Edmands and Charles A. Hoyt, and bears the number 755,105. It relates to a claimed improvement in electrical surgical bakers. A very general statement of the thought which prompted the suggestion of the plaintiff's device is that it was to have some convenient means of subjecting the human body to the influence of light and heat electrically generated. Claims 1 and 3 are in issue. It is to be observed that the claim is for an improvement.

The substantial thought advanced on behalf of the plaintiff is that the claims of the patent are to be read in the light of the prior art. The prior art supplied only wholly dissevered sections which might be brought into proximity to the parts of the body to be subjected to electrical light and heat rays, and be supported in such position by a rack or stand, or other like contrivance.

The patentees conceived the idea of making a unitary structure of the two sections, by uniting them by means of a hinge, thus securing adjustability of position and having means for preserving the position chosen. The patentees embodied this idea in a structure which is composed of two rounded sections, containing groups of incandescent lamps; each section being the segment of a circle, the arc of which measures about 45 degrees. The two sections are connected together at "the upper ends thereof" by means of a hinge. The sections are capable of forming, when together, substantially a half circle, the diameter of which may be increased or diminished by the operation of a hinge. This, of course, causes the shape of the unitary structure to depart somewhat from the circular form; but the general idea of the device may be gathered from the above description.

There is implied in this thought of the plaintiff the right of the patentees to have made claim to the whole of the advancement on the prior art involved in the idea of making, by means of a connecting hinge or hinges, one unitary structure out of what was before two disconnected structures.

The proposition of the defendant is that there is no call to discuss what the patentees might have claimed, and no aid rendered the plaintiff by an examination into the conditions of the file wrapper to learn what in fact was at first claimed. The file wrapper discloses that all the claims of the application were refused because of prior art reference, and that the patent which did issue was a patent charged with the limitations set forth in the claims which were finally allowed, with the first and third of which we are now concerned. These claims, as defendant reads them, each limit the patentees to a structure made up of two sections, having a single hinge at what may be termed the top of the structure, or what the claims themselves define as the upper ends of the sections.

The defendant's structure has two hinges, and while in a sense these hinges are at the upper ends of the sections respectively, they are not at the upper ends of the sections in the sense in which those terms are employed in the claims. The defendant has, as has been stated, two hinges positioned at the extremities of what may be called a yoke. More accurately described, the plaintiff's structure is a unitary structure, composed of two sections joined together by means of a hinge at the upper ends of the sections; while the structure of the defendant is a like unitary structure, composed of three sections hinged together in the two places at which the ends of the top section respectively meet the other sections.

The situation with which the plaintiff is thus confronted is in consequence this: The patentees, as the price of securing the grant of the patent, limited the patented device to a structure having two sections and having one hinge at the top. This limitation they, therefore, must observe, and in the light of this limitation the defendant's structure does not infringe.

Some confirmation is given to this by the fact that the defendant's structure is made under the protection of a patent granted to him. We say this, mindful of the truth that the grant of the second patent by no means necessarily implies the absence of infringement of a prior patent in the use of the second device, as it may be merely the grant of a patent on a novel feature added to an existing patented device. A finding of the validity of such second patent might, of course, be wholly consistent with the like finding of the validity of the former patent, as it would involve no right of the second patentee to anything more than the exclusive right to the specific structure which embodied the improvement which the second patentee had invented. None the less there is significance in the grant of the second patent, because it is at least suggestive of the thought that the first patent was also limited to a specific structure. This suggestion presents the point of the decision to be now made. It is brought out in a series of questions: Did the thought of having the separate structures made one, by uniting them by means of a hinge, originate with the first patentees? Is there invention in such a thought? If so, did the patentees disclose and make claim to this invention? Again, if so, did they, as the cost of securing the patent which was granted, recede from this claim and ac-

cept a patent based upon the narrower claim to a specific structure having one hinge "at the top"?

If the claims which were allowed are read with the thought in mind of holding the patentee to verbal accuracy, the claims must be read as claiming only a right to the last-mentioned specific structure. Should they be so read? The answer must be found in the prior state of the art, the file wrapper experience of this application, and the reception given to the device first patented. The original application made the broad claim now sought to be upheld. Page 10 of the exemplification of the file wrapper discloses this purpose, as well as other parts of the application, and the claims as originally formulated. This application was rejected on all its claims as showing nothing patentable over the Gohlin patent. The application and its claims were then bodily withdrawn, and a second application, with new claims, was substituted. Invention is ascribed to the device as "a compact and simple apparatus" adapted to produce better results than theretofore attained.

There is a suggestion of a broader claim than the "two section, one hinge" type by the statement that "the construction and the precise means of connecting and adjusting the parts or sections of the apparatus may vary more or less in practice"; but this may also be read as referring to variations in the construction of "two section" bakers, which is the mode of construction indicated throughout the application. The claims, however, clearly read broadly enough to include other than "two section" bakers.

All the claims were again rejected on references, again including Gohlin, in the light of the Greville patent. This rejection was met by inserting other claims which may be read as referring to "two section" bakers, and the applicant declares his intention to be "to restrict the case to the construction which is shown" in the five drawings left in the application. The drawings depict a "two section" baker. The natural inference is that the claims were restricted to the "two section" type. This was the impression received at the trial and remained undisturbed by the oral argument. Leave was, however, given to submit briefs, and the very clear and forceful argument outlined in the brief of counsel for plaintiff did very much to remove the impression before received. In fact, during the perusal it changed it. When analyzed, however, the argument seems to prove either nothing at all or too much.

The respective structures of plaintiff and defendant are not only very much alike, but they are in creative idea, function, and substantial design the same. They differ only in the form and make of their mechanical construction, plus whatever inventive idea there may be in connecting the two side sections together by a simple hinge or by a yoke with two hinges. We think counsel from his viewpoint has fairly characterized the Perlman device as a species of the Edward's genus. The former, however, is a variety rather than a species. This is because, if the plaintiff's patent covers the inventive thought of bringing the sections together, it is a variation in mechanical form only to vary the form of the hinge.

[2] We think counsel right, also, in his proposition that a second inventor may invent an improvement upon a patented device and secure a patent upon his improvement; but he has thereby by no means transferred the ownership of the device first patented to himself. He is, of course, an infringer if he, without authority, uses the device first patented, and he is no less an infringer because he mixes his own patented improvement with it.

One proposition advanced by the argument is that the plaintiff was the inventor of a baker which was an embodiment of the broad thought of a unitary structure, the sections of which were united by a hinge, and that the defendant is making this very thing. The inference sought to be drawn is that the plaintiff has the exclusive right to the thing thus invented and that defendant has infringed. In this phase of it the argument, as we have said, proves nothing, because the fact that an inventor had the right to a patent does not of itself prove that he either claimed or was granted it. The argument, therefore, assumes the very thing to be proven. The argument in the phase of the effect of the grant of the second patent, as we have said, proves too much. It is that the patents are each and both valid. The concession of the validity of the second patent would seem to involve either the same assumption of the broad scope of the first patent or a denial of infringement. This is because the second device can escape the charge of infringing the first patent only by each being limited to a particular structure.

Under the facts of this case the second device is not a patentable improvement ingrafted upon a patented previous device. Unless the first patent is limited to a special construction, the second device is an infringement, because it is in the patentable sense the same invention. If, in the inventive sense, the two devices are the same, how can the second be patentable? To concede validity to the second patent is therefore, as has been said, to concede that the two devices are not the same, and this can be true only if each patent is limited to its own particular form, in which event there is no infringement. The assertion that the second patent is valid, because its device is an improved form of that of the first patent, does not advance, but destroys the effect of, the argument, because it concedes the first to be limited to the form of the construction, as otherwise there would be no novelty in the second.

The whole discussion comes back, therefore, to the finding of whether the patented device of the plaintiff is a baker made in any unitary form by means of its sections being hinged together, or whether it is a baker made in the special form of two sections hinged together at the top, plus the finding of whether the defendant's baker is of this same particular construction. The latter undoubtedly is a unitary baker made up of sections hinged together at the top. It differs from that of the plaintiff only in the form of its construction. If there is infringement, the defendant's possesses no patentability. The converse, in this particular case, seems equally true. If the defendant's baker is patentable, it was not anticipated by the plaintiff's baker, and no infringement can be found.

The view taken is, of course, from the standpoint of an acceptance of the findings of the Patent Office, and that both of these patents are in evidence. Counsel have so treated the case in the argument, and we accept this as the admission of the respective parties. It always seems an ungracious thing to refuse to find infringement merely because the claims of a patent are less broad than the deserts of the patentee. Whether such be the case here we have not considered. If such be the case, the legal consequences must be accepted. In the first place, a plaintiff in a patent case has only the rights which his letters patent have conferred upon him. All beyond this he has given to the public. In the second case, no patentee can ask to be permitted to invite others to use that the exclusive right to which he has disclaimed, and then ask to monopolize the market thus created. This has been made so clear by Judge Hand, in Motion Pictures Case, 200 Fed. at pages 412 and 413, 118 C. C. A. 563, that further expression is forestalled.

This takes all value from that part of plaintiff's argument which is built upon the fact of public recognition of merit in these devices. So far as merit is ascribable to the particular construction, which plaintiff has patented, the rewards of this belong to him. So far as merit is ascribable to the particular construction which defendant has patented, the fruits of this cannot be taken from him without giving to the patent of plaintiff a reading which would deny validity to the defendant's patent. This we decline to do.

The bill of complaint is dismissed for want of equity because the proofs fail to show the fact of infringement, and a decree dismissing the bill, with costs to defendant, may be submitted.

BERRY v. FUEL ECONOMY ENGINEERING CO. et al.

(District Court, E. D. Pennsylvania. January 29, 1918.)

No. 1531.

PATENTS ⇐328—**VALIDITY AND INFRINGEMENT—FEED WATER REGULATOR.**

The Berry patent, No. 726,792, for a feed water regulator for steam boilers, discloses patentable novelty and invention, covering a device by which is secured the highest efficiency of the supply regulator by reason of its delicacy of mechanism, and which at the same time is readily removable for cleaning and repair. In this limited field the patentee was a pioneer, and the patent is not limited to a particular structure, but is entitled to a liberal construction. As so construed, *held* infringed.

In Equity. Suit by William H. Berry against the Fuel Economy Engineering Company, John J. Buckley, and J. F. MacIndoe. On final hearing. Decree for complainant.

John E. McDonough, of Chester, Pa., and Augustus B. Stoughton, of Philadelphia, Pa., for plaintiff.

Robert M. Barr, of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. The question involved in this case, in the sense of what is really in controversy, is presented in contrasting statements of the respective positions of the parties.

The patent with which we are concerned is that granted to the plaintiff as No. 726,792, relating to steam boilers, and granted for an improvement to feed water regulators. It is asserted, on behalf of the plaintiff, that he made a real and valuable contribution to the art, through and by an invention combining the features of such delicacy of mechanism as to be quickly responsive to the demands made upon it and, at the same time, to be removable for adjustment and repair without interference with working conditions.

The claims of the patent are given a reading sufficiently broad to visit a charge of infringement upon the defendants. It is asserted, on behalf of the latter, that such reading of the claims is an afterthought, no suggestion of which is to be found in the application, or its claims, and is prompted by a desire to forbid the use of defendants' device, and to appropriate the trade which it would otherwise command.

Defendants' real position is taken, not so much on a denial (although this is also formally made) that the invention of the plaintiff was broad enough to have included all which is now claimed, but on the assertion that no patent was asked for or granted covering that part of the invention which is embodied in defendants' device, and that defendants in consequence had the right to appropriate all of the invention of which they have made use. Stated in other terms, the plaintiff disclaimed or dedicated to the public that part of his invention, the thought of which may be expressed by the word "genus," and limited the claims of his patent to a species, of which genus defendants' device is another distinct species, not otherwise akin to that of the plaintiff. There is, in consequence, no infringement.

The bill, as originally framed, embraced other complaints than that of the infringement of the patent. These other causes of action involved nothing arising out of either the Constitution or laws of the United States, and as the plaintiff and some of the defendants are citizens of the same state, a question of jurisdiction was suggested, which it was finally stipulated should be avoided by the plaintiff reframing his bill into one involving only a dispute arising out of rights claimed by him under his letters patent.

The relation between the plaintiff and some of the defendants was so well known and appreciated by all concerned in the trial that a very full statement of the general facts out of which this controversy has arisen was not put upon the record. It is, however, sufficiently disclosed to one familiar with the general conditions, the atmosphere of which pervades the case.

This general situation is that the plaintiff is himself a trained, practical mechanic of many years' standing. To the knowledge gained by his experience in positions which he had occupied as master mechanic he has added the fruits of a very practical training as a mechanical engineer, in addition to which he has been an inventor in the wide field covered by his activities. He has also been engaged in the pro-

fession of mechanical engineering and the business of a machinist, in the course of which he built and dealt in the device covered by this patent. In the conduct of this business he had the assistance of two of the defendants, who became familiar with all the devices made by the plaintiff and came to know the plaintiff's customers. These defendants severed their business relations with the plaintiff, and left his employ to enter that of the other defendant. The plaintiff's real complaint is that his former employes took with them the plaintiff's device, bestowing it upon their new employer, who afterwards, with them, built the same device in a slightly modified form, varied only by slight mechanical differences, and have been since selling it to the trade, including that part of it which the plaintiff naturally thought to be his own. As all features of the complaint other than the patent have been eliminated, of these other features, the truth of the complaint of which is denied, we know nothing, and now care nothing, except so far as they may bear upon the fact of infringement.

We are therefore required to confine ourselves wholly to that part of the controversy which concerns the plaintiff's claim of proprietary rights under his letters patent. There is no dispute, as there would be expected to be none, over the utility feature of this claimed patented device. This is because, whatever else may be said of these rival devices, they make the same appeal to the approval of customers and other users. Neither, under such circumstances, can deny merit to the device of the other, without to that extent condemning his own. The utility of plaintiff's device is, moreover, not only established by the testimony of the expert witnesses, but by the recognition given it in the ready sale which it commanded, and a clear tribute is paid to the merits of the defendants' device, not only by the asserted similitude between the two devices, but also by the complaint which the plaintiff made that the defendants were unduly sharing in the trade.

The device of the defendants is likewise put out under at least the cloak of the protection of letters patent No. 1,170,044, granted February 1, 1916, to one of the defendants. Each of the parties, therefore, has what in this sense may be termed the *prima facie* exclusive right to his device, although many things in the course of the trial carry the implication that the plaintiff does not admit possession of any such right to be in any of the defendants. With this controversy, again we have nothing to do.

The plaintiff in effect charges the defendants with the bold attempt to appropriate his make of device, copy it almost exactly, and sell it as their own in place of his. As before indicated, we are not now concerned with that part of the charge which indicts them with the offense of imposing their make of device upon his customers as his make of device, but we are only concerned with such part of the charge as asserts a violation of the rights granted to him by his patent.

There is, of course, no claim that the patentee is a pioneer in the broad field of boiler construction; but there is an earnest and aggressive claim that he is a pioneer in the small field which he marked out for himself within the limits of this broad field. In order to under-

stand the problem upon which the plaintiff claims to have successfully brought his inventive faculties to bear, a few general observations may be of aid.

The modern engineering practice has brought out the thought of the value of what may be termed the permanence of water level in boilers, or, as more accurately phrased, the maintenance of this water level. This is maintained through and by the device of a water column, in which is a float which responds to the water level in the boiler, and at given levels automatically operates the water supply through and by means of a mechanism which actuates valves controlling the supply, and which itself responds to the commands of the float. This water column is, of course, in a sense a distinct and separate body of water from that in the boiler; but in the Philadelphia district it is required, and there is among engineers a universal recognition everywhere of the necessity, or at least the wisdom, of keeping the boiler water body integral with the water column body, and because of this the absence of valve connections in the communication between them. It is recognized, further, to be of importance that a small change in the water level in the boiler should be communicated to the water column and should cause the supply regulator to operate.

There are two ways of accomplishing this. One is to have a large float, which will operate the mechanism required to be operated by exerting sufficient power to overcome any friction there may be. Another is by having as nearly as possible a frictionless mechanism, requiring small power to operate it, and thereby permitting of the use of a small float. This delicacy of mechanism is in itself desirable; but, if delicate, the mechanism is easily upset. The conditions made the danger of this disarrangement of the mechanism a real danger. It is sufficient to instance the one of a clogging due to impurities in the water supply. This fact introduces the requirement of some means of access to this mechanism, in order that it may be removed for cleansing or repair. If the point of disconnection is within reach of the steam, it is clear that the removal of the parts is impossible, or at least impracticable, because of the danger involved, unless the steam is shut off. This would interrupt operations.

Out of these facts sprang the necessity of in some way shutting the steam off from the place from which this mechanism was removed. The prior art had sought to meet the conditions of this problem by the use of stuffing boxes. This fulfilled the purpose intended, but it was at the cost of such an increase of friction as to bring about a decrease in efficiency of the regulating construction. That this cost was excessive is indicated by the fact that there might be a very considerable change in the water level in the boiler before the supply regulator would operate. The prior art had sought to eliminate this frictional excess, and successfully so through and by the use of a mechanism, such as is illustrated in the Walter patent; but this, again, was at the cost of rendering this mechanism inaccessible for the purposes of removal or repair, while, at the same time, through its increased delicacy of construction, rendering the mechanism more liable to disturbance, and thereby making the necessity of access to it of more frequent recurrence.

The problem which confronted Berry as an inventor was to preserve this delicacy of mechanism, in order that thereby he might secure the highest efficiency of the supply regulator and at the same time so contrive as that the mechanism might be readily and easily removed. This problem he solved, and in this limited field he was a pioneer.

Without attempting a description of the details of construction in his device, the essential thought was to have the shut-off, which prevented the egress of the steam when the mechanism was removed, held normally out of operation and at the same time to be always striving to get into operation, and being permitted to do so by the very first act toward the removal of the mechanism, so that the first turning movement toward removing the mechanism would simultaneously bring the shut-off into operation. This was accomplished by the expedient of having a valve kept pressed away from its seat by a plug, whose contact with the valve could be controlled from the outside, so that, as the plug was withdrawn, the valve would be caused, by the pressure of the steam back of it, to follow until the valve became seated, when the operation of removal could be completed without danger of the escape of steam.

Just here may be brought to bear the point before made on which the whole defense pivots. The argument made on behalf of the defendants does not deny novelty in the idea which we have attempted to convey, nor does it imply a denial that the patentee might have claimed invention in any device embodying this idea. The stress of the argument is upon the finding which we are asked to make that, however broad the patentee might have made his claims, he limited himself to a claim to the specific construction by which the result sought to be attained was reached.

We are unable to construe the claims as narrowly as we are asked to do. As patents are issued to evidence the exclusive right of the patentee to make, use, or vend things, it is necessary that patent claims should cover the embodiment of ideas, and not the application of abstract ideas to disembodied conceptions. In this sense patent claims refer to constructed things, or to things conceived of as being constructed, and not to the abstract idea in accordance with which they are constructed. The limitations of human language and of the space required for the written expression of ideas are such that it is impossible to cover within the requirement of the patent laws every possible variation in the embodiment of the same inventive idea.

The phrase "substantially as described," which is parroted at the end of every patent claim, was devised to eke out this poverty of language. After all, what is done is to view the infringement construction in the light of the prior state of the art, and of the advance which the patentee of the infringed patent made, and pronounce judgment according to the encroachment or nonencroachment by the alleged infringer upon the field of construction which the patentee has marked for his own.

In this sense, as is the situation in the instant case, when we have determined the limits of this field, we have determined both the scope of the claims and the infringement. Each and every of the tests usually applied to determine the questions of invention and of infringement

result here in a finding in favor of the plaintiff. In the first place, the history of the art brings into view no one before this patentee who had solved the problem of frictionless parts and their removability, in the sense in which the latter term is properly to be interpreted. Those who before him had attempted to solve the problem may be divided into two classes, the members of which had each solved, respectively, one-half of the problem. We had, on the one hand, stuffing boxes, by which one of the ends desired to be reached could be reached; but it was at the expense of destroying the delicacy, and, to this extent, the efficiency, of the regulating mechanism. The other had mechanisms which were practically ideal in the presentation of the features of delicacy and efficiency when in operating condition, but which could not be readily restored to operative efficiency, and this condition of inoperativeness was hastened by their very delicacy. Before Berry we had no device which covered both requirements of the problem. This part of the field of possible discovery his invention covered, and as his reward he should be protected in his exclusive occupancy of it during the time limited by the patent laws. The construction thus given to the claims renders unnecessary any comparison of the two devices, for the reason that the very clear-cut argument of counsel for defendants virtually concedes the fact of infringement, if this broad meaning be given to the claims.

A few additional general observations will help to clarify the thought with which the trial court was impressed. The plaintiff is claiming a monopoly of the right to make devices, of which that of the defendants is one. This monopoly, of course, he cannot protect through the decree of a court, unless it is his right. He can assert such right only as it is evidenced by letters patent. It is not enough that the device was his invention. He must have patented it, and his rights are measured by his grant. If he invented something which he did not patent, his disclosure is a dedication to the public, and confers the right of use upon every one. The truth of this proposition is supported by obvious principles of law, and is confirmed by any number of rulings, of which it is sufficient to refer to Motion Pictures Patents Case, 200 Fed. 412, 118 C. C. A. 563.

The real finding asked to be made is that of a disclaimer by the applicant for the patent. The real question is whether such disclaimer can be found. The answer must be sought in the whole situation presented. If we restrict ourselves to the verbiage of this application, the impression received is that the applicant was asking for a patent limited to a particular structure. This impression is not wholly removed by a further resort to the words of the claims, although they are broader than the expressions in the application, and may be read, as we find they should be read, broadly enough to include defendants' device. None the less, it must be admitted, the claims may be read as including only a particular construction. When there is at least this possible difference of reading, the real question is reduced to that of what should be the inclination of the reader. When the meaning of words is in question, the situation and character of the writer or speaker becomes of value in determining the sense to be given to the

words employed. The words here are the words of one who is primarily a mechanic. He is speaking, it is true, as an inventor; but, as the invention is embodied in a mechanical construction, it is to be expected that one whose mind was dominated by his mechanical training and experience, one whose mind had the mechanical bent, would express himself in mechanical terms. If, however, the thought is present and is found to have been expressed—in other words, if the invention is disclosed by the application and covered by the claims—the terms in which the thought is thus expressed become unimportant.

To illustrate the point attempted to be made, we compare two applications and pronounce the same judgment as to each. One employs the words of an inventor, who is not a mechanic, but a man trained to the expression of abstract ideas. The application as framed by him might take the form of a claim to the conception of an invention (describing it) which is embodied in a mechanical construction (also described). The other employs the words of a man trained as a mechanic, who gets his grasp of the principles of an operation from seeing them embodied in a concrete construction. The application as framed by the latter might take the form of a description of the embodied construction. In this he would see the invention as clearly as if it were placarded. The mental processes are different, but the thought result is the same. The type of man first described would have difficulty in firmly grasping the inventive idea, unless you gave it to him first in its abstract form and then embodied it in its concrete form. If he was confronted with the latter only, the thought of the principle of the construction might find no entrance to his mind. The mechanically minded type of man would see the principles of construction sticking out of every part of the construction. If this application and the claims are read with this thought in mind, the inventive idea, now claimed to be there expressed, clearly appears.

There is this further observation to be made. If there is no thought of the invention, to which claim is now made, to be found in the claims of plaintiff's patent, then there is no invention for which a patent could issue, except possibly one for a particular construction, which would be of such small value as not to be worth the office fees payable on its issue. We say this because, given the inventive thought hereinbefore referred to, its embodiment in a construction called for very little, if anything, more than the application of mechanical judgment and skill. Every means employed in each of these devices to make use of the inventive idea involved is as old as almost anything in mechanics. The plaintiff must therefore be given that which he claims, or denied everything of any real value.

There is only one more thing to be said. The very able presentation of the defense with which we have been favored, if driven from its main position, has in reserve the falling back to a secondary position. This is in substance that defendants' device does not infringe, because it does not embody the invention claimed by the plaintiff. Some confirmation is given to this thought by the fact that defendants' device is also patented. The averment of no infringement is based upon this difference in construction. The plaintiff's device is so con-

structed that the mechanism to be removed cannot be removed without shutting off egress of steam. In this respect it possesses a "fool-proof" feature. The defendants' device is not so constructed. On the contrary, the work of removal involves starting it at one place, and, before an opening had been made for the escape of steam, a manually operated stop valve is brought into use, and the work of removal is then resumed. If this stop valve is not used, the escape of steam is not prevented. In other words, the difference is that in the Berry device the steam is shut off as a consequence of starting the work of removal, and it is in this sense automatic, while in the defendants' device there must be a second manual operation or manipulation before the steam is shut off.

This difference, however, cannot afford escape from the charge of infringement. It does make clear, however, that the validity of each patent may be upheld. Given the right in Berry to the invention claimed, the defendants cannot use it by varying the means of using it, even if the second means has less merit than the first. The fact, however, that the second device differs from the first, might well give the second patentee a valid patent on his improved device, which would, however, be secondary and subordinated to the first patent. The "fool-proof" feature would have little practical value, because the work of removal is always in practice done by experienced men, and they would understand the work of removal was to be done so it could safely be done. When it is so done, what is done is done as the Berry device does it of itself.

Without further prolonging the discussion, we find the claims in issue, 5, 10, 11, and 12, to be valid, and to have been infringed by the defendants.

A decree embodying these findings, and according costs to the plaintiff, may be submitted.

BLACKBURN v. BONITA MFG. CO.

(District Court, E. D. Pennsylvania. February 7, 1918.)

No. 1605.

PATENTS 328—VALIDITY AND INFRINGEMENT—CABLE HANGER.

The Blackburn patent, No. 1,144,318, claim 1, for a cable hanger, by means of which a lead pipe in which electric wires are inclosed and strung on poles may be supported by a steel cable, called a messenger, which is strung above the lead cable, *held* not anticipated, valid, and infringed.

In Equity. Suit by Jasper Blackburn against the Bonita Manufacturing Company. On final hearing. Decree for complainant.

Edward E. Longan, of St. Louis, Mo., and J. Bonsall Taylor and E. Hayward Fairbanks, both of Philadelphia, Pa., for plaintiff.

Howson & Howson, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This dispute involves the validity and infringement of letters patent issued to the plaintiff June 22, 1915,

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

under No. 1,144,318. The formal answer is a denial of both validity and infringement. The real defense is that the proprietary rights of the plaintiff are limited to a structure so unlike that of defendant as that no real question of infringement arises. A short statement of the special facts involved in the case will show on what the real dispute hinges.

The patent is for a cable hanger. It is a device by means of which a lead pipe, in which electric wires are inclosed and strung on poles, may be supported by a steel cable, called a messenger, which is strung above the lead cable. It is of the essence of the device, and of this invention, that this hanger be so constructed as that it may be attached to the messenger readily by the use of one hand, yet, when attached, will have so firm a grasp upon the messenger as to be practically immovable, in the sense of any longitudinal sliding. There is an admitted invention of the plaintiff, his right to which is not in dispute, in the form of a hanger which is so constructed that a part of the wire of which the hanger is made extends as an arm, reaching from one of the hooks of the hanger toward the other hook, but so that this arm is disposed at an angle to a line drawn from one hook to the other. This arm terminates in a tooth having either a smooth or serrated edge. The principle upon which the hanger is thus constructed is that, after one hook has been placed over the messenger, the other hook is adjusted through and by a leverage action. The wire of which the hanger is made has in it more or less spring. The result is that the pressure exerted through this spring action holds the hanger firmly to the messenger, and this firmness of grasp is increased by the further fact that the tooth at the end of the arm above mentioned enters the messenger, and, if the latter be formed of strands, the tooth inserts itself between two of these strands. The effect of all of this is that all longitudinal movement or sliding of the hanger along the messenger is prevented. This is the make of device referred to in the second and third claims of the patent, which are not in issue. It is clearly not infringed by the device of the defendant. It is referred to, and with some particularity described, because by this is brought out another form of plaintiff's device, which is averred to be protected by claim 1 of the patent, which is in issue and averred to be infringed by the defendant.

A reference to one feature of the prior art will also aid in bringing out the point of the controversy between the parties. A part of the prior art is what is known to this record as the Krips & Wright patent. The principle upon which the hanger of this latter patent is constructed is to make avail of what has aptly been called a scissor action. The wire composing this hanger terminates in two hooks so shaped as to go over and inclose the messenger. The device may further be described by following the wire from one of these hooks down in the form of a loop and coming up spirally near its starting place, where it is bent at right angles away from the starting point, and then again at right angles to its last direction, and going downward, forming another loop parallel with the first one, returning upward again, and terminating in the other hook. The wire between the points where it makes these right-angled turns is bent over in the form of a bight to

also hook the messenger. What results is that we have really four hooks, two of them having no ends, or two single and one double hook, but forming together one gripping device. The grip of these hooks upon the wire comes from the elasticity of the wire in the loops; the inside double hook pressing in one direction and the outside single hooks in the opposite direction. This pressure, it will be seen, is transverse. It was found unnecessary to have this duplication of loops and hooks which was characteristic of Krips & Wright. The device might be confined to a single loop and two hooks only, if they were bent in a certain way and were sufficiently separated. The change in the structure does not lend itself readily to verbal description, but for our present purposes is clearly enough indicated and illustrated in Figure 5, accompanying the Brenizer application, for the letters patent granted to him.

For the purpose of clearly presenting the real point of difference between these parties, this latter may be viewed as the device of the defendant. It is, of course, obvious that there is in this device nothing whatever of the tooth action which is present in the device referred to in claims 2 and 3 of the patent in suit. It is averred by the defendant that the gripping action of this hanger is due wholly to the spring which is communicated by the loop and is exerted transversely. If this is wholly true, the defense is made out.

The plaintiff, however, earnestly asserts that claim 1 of his patent covers a modified form of his patented device, from which the tooth feature is wholly eliminated, and which is infringed by the device of the defendant. The grip of this make of plaintiff's device is afforded through and by an elastic element, which is provided so that it extends from one hook toward the other and is disposed at such an angle to the line drawn from one hook to the other as that, when one hook is placed over the messenger, the other is adjusted through and by a leverage pressure which brings the elasticity of the wire, of which the hanger is made, into play, so as to give a practically firm grip upon the messenger. The described means of securing the application of this springing force is averred to be of the essence of the plaintiff's invention, and to have been appropriated by the defendant. This spring is secured in the patented device through and by producing a kinking action in the messenger. To get this you must have a fulcrum between the hooks, and to get a sufficient power from the leverage the hooks must be separated. In his make of device the plaintiff gets it by a lengthening out, in the form of an arm, of what would be the barbed part of the hook (if it were a fish hook), and disposing it at the proper angle. The defendant, it is asserted, gets it in the same way, introducing only the formal difference of having the upper part of the shank of the hook serve the purpose of this extended arm, and by disposing it at the proper angle, and having the hooks separated in order to get the same leverage action of the required strength as does the device of the plaintiff.

A vigorous denial is made of the truth of the assertion of the defendant that the force which makes the defendant's grip a sufficiently firm one is a force transversely exerted. On the contrary, it is confidently and aggressively asserted that the grip of this hanger is the

very grip which the plaintiff invented, and not the transversely operating grip of Krips & Wright. The whole discussion is thus reduced to the results of two inquiries: One, whether the plaintiff's device, with the tooth eliminated, is patentable, and has been patented; and, if so, the other inquiry, of whether the grip of the defendant's hanger is the grip which the plaintiff contributed to the art.

The first inquiry of patentability is itself divided into two: One is whether the invention, which the plaintiff now claims to have made, was made and disclosed through and by his application, and was in fact by him patented; and the other, whether it was anticipated. In considering this question, two preliminary observations may be made: One is that the device which is verbally described in the application was a device which possessed as one of its essential features a tooth which was meant to bite into and engage the messenger wire in the manner hereinbefore described. Another observation is that it was found to be the fact that a practically effective device could be made without the presence of any real tooth action, if certain other elements were present, including an extending arm disposed at such an angle as that the hanger could not be brought in alignment with the wire otherwise than by a leverage action which would result in the kinking, to which reference has frequently been made.

This brings us to the first inquiry suggested of whether the thought of this second device is disclosed through and by the application and is covered by claim 1 of the patent. The comment above made, that this secondary invention is not verbally proclaimed in the application, is justified by the admission made on behalf of the plaintiff by his expert. The admission is "the specification does not specifically point out" this secondary device. It is asserted, however, that such verbal disclosure was not called for, because the described tooth device itself voiced the invention of the secondary device, and this, supplemented by claim 1, which is averred to cover the secondary device, makes a full disclosure of the invention now in controversy. To restate the same thought, in the phrase employed by plaintiff's expert, a device operating in accordance with the principles upon which the secondary device operates is "the inevitable operation of the device," the structure of which is disclosed by the application.

Our finding is with the plaintiff upon this feature of the discussion. The finding is based upon two convictions: One is that no one can have a conception of the preferred tooth device without having disclosed to him that the tooth feature may be dispensed with. The other is that claim 1 does cover the secondary or toothless device. We say this because, if it does not cover such a device, it is meaningless, and as it must be assumed to have had some meaning, and behind it the purpose to cover something, we are justified in concluding that it does express the thought of and does cover the only inventive feature which it could express and cover.

This brings us, so far as this branch of the case is concerned, to the second question, of whether, assuming the presence of the inventive feature referred to, it originated with the plaintiff. The Hagerman patent, No. 795,910, is relied upon as an anticipation. The Pat-

ent Office experience of the Blackburn patent is cited as confirming the thought of anticipation. We are unable to get into accord with the thought either of anticipation or of any such finding by the Patent Office. The claim at first made by Blackburn was rejected, but it was rejected because it was a very broad, if not the broadest possible, claim to a hanger possessing the feature of holding its position on the messenger wire. Blackburn did not broadly invent such a hanger, but there is implied in this no denial of his claim to have invented a hanger by which this sliding movement was prevented by the particular means which he devised for the purposes of the accomplishment of this result.

The Dissel patent, No. 950,148, which is relied upon, may be dismissed with the comment that it also disclosed a hanger, but not the hanger in suit. We are unable to find that the principle of action to which the Dissel device owes its grip is due to the element of a leverage resulting in a kinking of the wire. The real principle of its action is a pinching of the wire, produced by one arm pressing in one direction and the other arm pressing in the opposite direction. In other words, it is essentially what the very capable expert on behalf of the defendant characterized as a scissor action. Inasmuch, however, as this suggests a cutting rather than a pinching result, the thought intended may perhaps be more aptly and accurately described by calling the action a pincer, rather than a scissor, action, although the two things are in this respect of course the same.

The same comment may again be made upon the Brown patent, No. 837,185, which is also cited as an anticipation. Here we have what is really the same transverse pressure as before; the only difference being that the loop in the hanger is wholly upon one side of the messenger wire, and not partly upon each side, as in the Dissel patent. We have the same transverse action, however; the pressure being exerted by the turned down ends of the hanger. It must be admitted, however, that there is in this a resultant kinking action to some extent. There would seem, also, to have been a clear recognition of this by Brown, and a reliance upon this to give to his hanger a firmness of grip. This patent will be further referred to.

The Krips & Wright patent, No. 960,344, would seem to be clearly distinguishable from the patent in suit, because the former owes its grip wholly to the pincer principle. The file wrapper clearly presents this differentiation. The original claim having been rejected on Hagerman and Dissel, and the first amendment of the claim having been rejected because vague and indefinite, the claim as it now stands was made and allowed over Krips & Wright.

This takes us back to the Brown patent. It is significant that there is an omission of this from the file wrapper. Finding, as we do, the presence and the recognized presence of the kinking action, we must begin the comparison of Brown with Blackburn with a recognition of a likeness in this very important, if not vital, principle. When, however, we come to consider the two devices, we find the kinking action to be necessarily present in all of these devices in which there is a transverse pressure exerted, if the pressure is exerted at two separated

points. Considered with this thought in mind, the pressure is due, not to a simple scissor or pincer action, but to this kind of a pressure brought to bear, not on opposite sides of the object gripped, as it is in the case of pincers, and not at nearly opposite sides, as it is in the case of scissors, but the pressure is exerted from opposite sides at points more or less separated.

This suggests the thought of whether Blackburn can be distinguished from Brown in the same way in which Blackburn is distinguished from Krips & Wright and the other patents. We think this is to be learned from a comparison of the two devices. The kinking action in Brown is due to transverse pressure exerted at more or less widely separated points. There is the absence of the thought of the arm and also of the thought of the elasticity in the material of the hanger being brought into operation through the prying action, by which the line drawn through the arms of the hanger is brought into alignment with the messenger wire. If Brown and Blackburn are compared with this thought in mind, the absence of Brown from the file wrapper is explained, and the conclusion is that the Brown device is not an anticipation of that of the plaintiff.

This brings us to the consideration of the second question which was proposed. This is the question of infringement. The position of defendant is a concession (at least *arguendo*) of invention in the primary or preferred device described in the plaintiff's application for letters patent. The inventive element in this, however, is essentially the tooth feature, and as the tooth feature has been wholly eliminated from the defendant's device, there is the consequent denial of infringement. It seems clear, however, that this denial of infringement is nothing more than the reassertion of the denial of any proprietary right in the plaintiff, other than his right to the tooth device, and inasmuch as we have reached, so far as concerns the trial court, the conclusion that the plaintiff's patent rights are not limited to a device embracing the tooth feature, but extend to a device omitting the tooth feature, but embracing the other features, to which we have several times made reference, it follows that this calls for a finding of infringement. We say this because there is in the defendant's device every element which contributes to its efficiency which is in the device of the plaintiff. The differences are differences in form, but not in substance. The arm is less exposed to observation and more difficult to recognize; but it is there, and there is the presence of the elements which exert the kinking action to which both devices owe their success.

We must subscribe to nearly all the principles of construction of patent claims which defendant invokes, but the application of them to the facts of this case cannot be conceded. There is running all through the argument of defendant the iteration of the averment that the plaintiff's patented device is untried, and his patent a paper patent. By this it is obvious in many instances that what is meant is the statement in another form of defendant's view that plaintiff's patented device is a toothed device. In other places it would seem the statement means that plaintiff's device is a closed ring device. The fact is that plaintiff's device has been sold in large quantities. There does not seem to be

anything which limits the plaintiff to a closed ring device, and we have found that he is not limited to a toothed device. The paper patent cases, therefore, not only have no application, but plaintiff is brought within the converse principle of being able to lay claim to every reasonable construction of the scope of his patent which will protect him against encroachments upon the trade which has been built up in the thing which he has patented.

It is not made entirely clear whether defendant asserts that its device owes all of the efficiency of its grip to the scissor action, or whether it claims immunity from the charge of trespass upon the rights of plaintiff because its device has, and plaintiff's device, as embodied in the closed loop form, has not, this action. We have made the finding that defendant's device does owe its grip to the arm feature, and, if there is also a transverse grip, this will not enable them to escape the charge of infringement.

We are not able to follow the principles which defendant deduces from the fact that its device has also been patented. One branch of the argument would seem to go almost, if not quite, to the length of supporting the proposition that the defendant has not infringed, if its device is an improvement upon that of plaintiff, although this is doubtless not meant to be urged. A patent is evidence of the possession of the right to make, use, and sell, and commands the prima facie finding of validity. When, however, a prior patent is put in evidence, this negatives the right to that which is first patented. It does not, however, necessarily negative the validity of the second patent, because there may be patentable novelty in the second device, notwithstanding the fact that it has incorporated with it the device first patented.

We therefore do not follow defendant's argument to its conclusion, that a second combination, which contains a less number of elements than a first (one element in the second being made to perform functions for which the first requires two or more elements), does not infringe the first. If the reduction of the number of elements is at the loss of the functions which the omitted elements perform, there is no invention, and the second invention is not patentable. If the reduction is without loss of function, there is invention. To conclude, however, that because the second is patentable by reason of its being an improvement there is no infringement is a conclusion which cannot always be reached. If each patent is for a combination, and the combinations are different, there is, it is true, no conflict or overlapping, and, in consequence, no infringement; but, if the second device is merely an improvement upon the first, the second patent is subordinated to the rights granted by the first. This must be true, or one man could appropriate the patented device of another by merely inventing an improvement. The true doctrine, as applied to the facts of this case, leads to the conclusion that the defendant's device may be a better device than that of the plaintiff; but, as we have found it embodies the invention made by the plaintiff, this compels the finding of infringement.

The file wrapper of the defendant's patent we do not find to have been put in evidence. The application was filed about the time the plaintiff's patent was allowed (September 22 and November 25, 1914),

and the patent issued a year after the plaintiff's was allowed. What the file wrapper would disclose we do not know. The finding of infringement, however, is no finding in conflict with that of the Patent Office that the defendant's device was itself patentable.

The bearing of the discussion of the utility of the plaintiff's commercial device is not clear. Utility is found, and cannot be seriously denied. The continued extended use of the older Cameron device is no denial of utility in that of the plaintiff.

The bearing of the patent granted to plaintiff, after the grant of the patent in suit, is likewise not clear. We cannot draw the inference, which defendant asks to have drawn, which is in effect that it is a confession that plaintiff's patent in suit was limited to the toothed device of claims 2 and 3. The purpose of the later application would seem to have been to protect the use of a special form of loop or saddle for carrying the lead conduit pipe, and this element was inserted in a large number of combination claims.

The final finding is that claim 1 of the plaintiff's patent is valid and infringed. The plaintiff is in consequence entitled to a decree enforcing these findings, with costs, and leave is granted plaintiff to submit such form of decree.

In re BEST.

(District Court, S. D. Alabama, S. D. March 19, 1918.)

No. 1841.

FRAUDULENT CONVEYANCES \Leftrightarrow 110(2)—**MORTGAGES—VALIDITY.**

Under Code Ala. 1907, § 4287, declaring that all deeds, conveyances, transfers, and assignments in trust for the use of the person making the same are void against creditors, and section 4293, declaring invalid all conveyances or assignments in writing or otherwise of any interest in real or personal property made with intent to hinder, delay, or defraud creditors, purchasers, or other persons, a mortgage of a mill and stock of logs and lumber made in consideration of advances to the mortgagor, which allowed the mortgagor to manufacture the logs on hand, dispose of the product, and after paying his expenses and retaining a weekly salary to purchase other logs for manufacture, which should be subject to the lien, is invalid as in fraud of creditors.

In Bankruptcy. In the matter of the bankruptcy of Hedley S. Best. On petition by the trustee in bankruptcy to review the order of the referee sustaining the priority of the claim of Albert D. Hanaw under a mortgage. Order reversed, and mortgage declared invalid.

Stevens, McCorvey & McLeod, of Mobile, Ala., for petitioner.
Palmer Pillans, of Mobile, Ala., for contestant.

ERVIN, District Judge. This matter comes on to be heard on a petition by the trustee of the bankrupt, Best, to review the finding and conclusion of the referee allowing the claim of Albert D. Hanaw as a prior claim under a mortgage given by the bankrupt to said Hanaw, and having been argued and submitted, it was held for consideration.

The whole question depends upon the proper construction of the

mortgage itself and whether the provisions therein contained are in conflict with the provisions of the Alabama Code. The sections of the Code relied on by the trustee as invalidating this mortgage are sections 4287 and 4293. Section 4287 reads as follows:

"All deeds of gift, all conveyances, transfers, and assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same, are void against creditors existing or subsequent."

Section 4293 reads as follows:

"All conveyances, or assignments in writing, or otherwise, of any estate or interest in real or personal property, and every charge upon the same, made with intent to hinder, delay, or defraud creditors, purchasers, or other persons of their lawful suits, damages, forfeitures, debts, or demands; and every bond, or other evidence of debt given, suit commenced, decree or judgment suffered, with the like intent, against the persons who are or may be so hindered, delayed, or defrauded, their heirs, personal representatives and assigns, are void."

There are certain cases of the Alabama Supreme Court construing these sections, which are, it seems to me, conclusive of the question at issue. The case of *Benedict v. Renfro*, 75 Ala. 121, 51 Am. Rep. 429, holds that where a party makes a mortgage on property, which he then has, and reserves the right of disposing of this property in such a way that the proceeds may be used for his own use and benefit, creditors may be so delayed in the collection of their debts, and this is such a fraud as renders this mortgage void. The case of *Bluthenthal v. Magnus*, 97 Ala. 530, 13 South. 7, holds that where goods are conveyed by one to another, and the purchaser is given the authority to sell the goods so conveyed, on an agreement that the proceeds, less necessary expense of making the sale, are to be deposited in a designated bank to the credit of the seller, this is not a fraudulent transaction where there is no implication that the purchaser is to be paid for his services in disposing of the goods. The case of *Roden v. Norton*, 128 Ala. 136, 29 South. 637, holds that where a mortgage is made by a merchant conveying a stock of goods then owned by him, and a paper is contemporaneously executed enabling the mortgagor to continue business and sell the goods and pay himself a wage for making such sales, at \$50 a month, out of the proceeds, this is such a benefit to the mortgagor as invalidates the mortgage.

The case of *Manchuria S. S. Co. v. Donald*, 77 South. 12, after citing many cases, holds that where a mortgage is made to secure future advances, and the mortgagor has nothing at the time of making the mortgage which is then liable to be subjected by creditors, and that the only property which inures to the mortgagor is profits in a business to which the future advances are made, and such profits inure only through the making of such future advances, the fact that a salary may be paid out of the profits to the person conducting such business does not invalidate such mortgage, provided on a proper statement of the account it is ascertained that there would be nothing to the credit of the mortgagor should mortgagee be charged with the salary so paid to the mortgagor. There are a number of cases cited in the *Donald Case*, where property was conveyed to one by another and the purchaser given the right to sell the property, and it was held

that no creditor of the purchaser had a right to complain because the mortgagor, purchaser, never parted with anything out of which the creditor could have made his money; the goods sold, and for which the mortgage was given, having been those of the mortgagee and not those of the mortgagor. The Donald Case merely extends this principle, and I think the extension is correct in equity, because, as these cases put the proposition, there must be first a creditor to be defrauded, a debtor intending to defraud, and lastly a conveyance of property out of which the creditor could have realized his claim or some portion thereof.

The whole argument in these cases rests on the last proposition, and it was held in each of them that as there was never anything had by the debtor, mortgagor, which might have been subjected by his creditor, such creditor had no right to complain. *Adkins v. Bynum*, 109 Ala. 281, 19 South. 400. The Donald Case meets the proposition laid down in the Roden Case and inferentially decided in the Bluthenthal Case, namely, that the payment of a salary to the mortgagor was a benefit to him, by showing that, even if the salary paid were deducted, there still would be nothing left to the debtor out of which the creditor could make any portion of his money. That case affirms the statement of the general rule that a reservation by the mortgagor of an interest invalidates the mortgage.

The question here involves the correct application of the foregoing principles. The facts are that Best, who owned a small mill and stock of logs and some lumber which had been cut from logs, borrows money from Hanaw and executes to Hanaw a mortgage conveying to Hanaw such logs and lumber manufactured therefrom. The mortgage contains provisions requiring the placarding of the logs in the boom and the lumber on the yard as the property of Hanaw, which apparently was done. Other provisions required Best to keep an accurate account of his business transactions.

Other terms of the mortgage provide that Best may sell the manufactured product of the logs then on hand, and also the product to be manufactured, and reinvest in other logs, which are then to be manufactured, and it is provided that such other logs and the product therefrom, which are so purchased, shall become subject to the lien of this mortgage. It is further provided that Best may borrow money from banks to supply the necessities of his business, and that Hanaw will waive the pledging of the bills of lading for such manufactured product as Best may be then selling to the banks to secure such sums as may be loaned by the banks to Best. It is then provided that Best should be allowed \$20 a week out of the profits of the manufactured product for his living expenses, and that he could also pay the operating expenses of the business out of such profits. It is also provided that, in carrying on the business of manufacturing the logs into lumber:

"It is distinctly understood and agreed that, during the period of time covered by this lien, Best shall manufacture the logs and sell the manufactured product solely as the agent of Hanaw, and have no right for or on behalf of or on account of himself."

There is no contention in the case that there was any express fraud on the part of any one. In fact both parties conceded that there was

not. The whole question is whether there was such a legal fraud in the terms of this mortgage as invalidated it, and this question depends upon which line of authorities apply to it. Applying the test of the three essentials above referred to, we find that Best owned, at the time he made the mortgage, property which his creditors may have subjected in part to the payment of their debts. We further find that the property which came into the custody of the bankrupt trustee was purchased in part at least with the proceeds of this property.

While it is true that Hanaw advanced money at the time he took the mortgage from Best, which money went into Best's business, and to that extent benefited the creditors of Best, still this money did not create the property Best then had, nor that he subsequently acquired, though it did in part supply the funds which paid for it. If the property which came into the hands of the trustee had been wholly the result or proceeds of the money which Hanaw advanced, then I think he would have come under the rule laid down in the Donald Case; but as the mortgage conveyed property which Best then owned, and gave to Best compensation for his services in managing the business and selling such property, I am reluctantly forced to conclude that the mortgage is invalid.

In re GOODZINSKY.

(District Court, N. D. Georgia. January 23, 1918.)

No. 4321.

1. BANKRUPTCY \Leftrightarrow 426(1)—DISCHARGE—EFFECT.

Though Bankruptcy Act July 1, 1898, c. 541, § 14b(3), 30 Stat. 550, as amended by Act June 25, 1910, c. 412, § 6 (Comp. St. 1916, § 9598), provides for denial of a discharge where the bankrupt has obtained money or property on credit upon materially false statement in writing, as section 17 (section 9601) declares that a discharge shall not release the bankrupt from liability based on false pretenses or representations, the claim of one who extended credit on a materially false statement in writing is not barred, though such creditor participated in the bankruptcy proceedings and unsuccessfully opposed discharge.

2. BANKRUPTCY \Leftrightarrow 417(1)—DISCHARGE—VACATION.

Discharge already granted will not be vacated at the instance of a creditor whose claim was not barred by the discharge.

In Bankruptcy. In the matter of the bankruptcy of Jacob Goodzinsky. On motion to set aside and vacate a discharge heretofore entered. Motion denied.

J. S. James and J. R. Bedgood, both of Atlanta, Ga., for objecting creditors.

J. R. Hutcheson, of Douglasville, Ga., for bankrupt.

NEWMAN, District Judge. This is a motion to set aside and vacate a discharge in bankruptcy heretofore entered in the case above stated. At the time the discharge was granted the court had before it the testimony of W. A. Ward of the Ward-Truitt Company, ob-

jectors to Groodzinsky's discharge. This testimony, as reported, was difficult for the court to understand, either because it was not well understood by the stenographer, or because it was not well reported. Therefore opportunity was given the objectors, at the time the case was heard on the application for discharge, to retake the testimony of Mr. Ward, so as to make it clear what he intended to testify. The decision of the court was held up for some time in order to allow this to be done, but, there seeming to be unnecessary delay; the court having the papers before it all the time, the matter was taken up and reconsidered as presented by the testimony then before the court, and an order entered overruling the objections and granting the discharge.

Some time after the discharge was granted the present motion to vacate the order granting the discharge was filed. This coming up for hearing, and satisfactory reason being given why the testimony of Mr. Ward had not been taken as directed by the court, he was heard to testify in open court. In this testimony he stated the facts upon which the objections to the discharge were based very clearly, and he may have made a case of obtaining goods from his firm by false representations in writing, the representations being made for the purpose of obtaining credit, although this testimony was denied by the bankrupt, who was also allowed to take the stand and testify in open court. Thus the case stands now.

[1, 2] I think it is unnecessary to decide the merits of this objection by the Ward-Truitt Company to the bankrupt's discharge. If the Ward-Truitt Company's debt against the bankrupt was created by the false statements and false representations of the bankrupt, the debt and the rights of the Ward-Truitt Company will not be affected by his discharge. Their rights are fully protected by section 17 of the Bankruptcy Act, which, it has been determined by the courts, is not in any way lessened by section 14, paragraph 3, of the act, which provides that a discharge will not be granted if the bankrupt 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." Comp. St. 1916, § 9598.

The important case on this subject is *Talcott v. Friend*, 179 Fed. 676, 103 C. C. A. 80, 43 L. R. A. (N. S.) 649, in which the Circuit Court of Appeals for the Seventh Circuit had the question before it as to whether such debts were discharged, even where the creditor had received his dividend and had come into court and objected to the bankrupt's discharge on the ground named and contained in section 14 of the Bankruptcy Act. The third and fourth headnotes of this case decided by the Circuit Court of Appeals will show what was held. They are as follows:

"An action for deceit is not based on a rescission of the contract, but implies an affirmation and the proving of a claim in bankruptcy for the price of goods sold and delivered on a contract, and the receiving of dividends thereon is not a bar to a subsequent action by the creditor for deceit base on fraudulent representations inducing the sale.

"Neither the action of a creditor in opposing a bankrupt's discharge on the ground that he obtained credit on a materially false statement nor a finding by the court thereon, that the bankrupt had not been guilty of any act which

barred his right to a discharge under Bankr. Act July 1, 1898, c. 541, § 14b(3), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1909, p. 1310), is a bar to a subsequent action by the objecting creditor against the bankrupt for deceit based on the same false statement; the parties appearing in such action in a different capacity and the finding of the court not being necessarily determinative of the fact in issue in the second action."

This case was taken by certiorari to the Supreme Court of the United States and is reported in 228 U. S. 27, 33 Sup. Ct. 505, 57 L. Ed. 718, reported as *Friend v. Talcott*. What the Supreme Court decided, in a full opinion by the Chief Justice, so far as material here, also is shown by one of the headnotes to the case, which is as follows:

"A creditor, after unsuccessfully opposing a composition and a discharge in bankruptcy on the ground of fraud in creating a debt, accepted the dividend and then sued for the balance on the ground that the debt was excepted from the discharge. *Held*, that there was no waiver of the right to sue on the tort by accepting the dividend, nor was the granting of the discharge *res judicata* of the claim for the balance of the debt."

The objections of the Ward-Truitt Company are the only ones I consider material on the question of setting aside this discharge, and its rights not being affected in any way, or its remedy, by the granting of the discharge, it is unnecessary for that reason to vacate the same.

The application of the M. C. Kiser Company to come in as an objector, if the discharge is vacated, even if they could be heard in this matter, is not meritorious for the same reason. Their objection to the discharge is upon the ground that a statement was made to that company, and that it was false and in writing, and made for the purpose of obtaining credit of them, and upon the strength of which the bankrupt did obtain credit. So, if their objections were allowed, they would stand upon the same footing as that of the Ward-Truitt Company, and their rights would not be affected in any way by the granting of the discharge.

If deceit was practiced upon these creditors by the bankrupt by false statements in writing, made for the purpose of obtaining credit in the purchase of goods, which credit was allowed him and the goods purchased and delivered, the deceit thus practiced would be the basis of a right to recover, notwithstanding the discharge in bankruptcy. That being true, the result is what I have stated—that it is immaterial to them whether he obtains a discharge in bankruptcy or not. I am somewhat doubtful about the right under the act to revoke this discharge at all, but certainly the reasons I have given are sufficient as the case now stands.

The motion to set aside and vacate the discharge is overruled.

WRIGHT v. BARNARD et al.

(District Court, D. Delaware. November 7, 1917.)

No. 338.

1. ESTOPPEL ⇨83(1)—CONTRACTS—FALSE REPRESENTATIONS.

Officers of a corporation, who in contracting with complainant falsely represented that they owned and controlled all of the stock and thereby induced action on the part of the complainant, who in good faith relied upon the truth of the same, were estopped to deny such ownership and control, or that, being a majority of the directors, they had power to secure a proposed amendment of the charter, and to cause to be done all other things to be done on the part of the company.

2. CORPORATIONS ⇨428(12)—OFFICERS—FRAUD—NOTICE—IMPUTING TO CORPORATION.

Where the vice president and the secretary and treasurer of a corporation were sons-in-law of the president, who was old, feeble, and of impaired faculties, and the three officers, with the wife of one of them, owned all of the stock, and such two officers conducted its business, it was chargeable with knowledge of the fraud practiced by them on complainant in contracting with him to remain in its employ.

3. CORPORATIONS ⇨426(1)—LIABILITY FOR FRAUD OF OFFICERS—RATIFICATION.

A contract by officers of a corporation respecting the amendment of its charter and salaries of its officers, the enlargement of its operations, and other matters affecting its interests, related to its business and affairs, and not to their private or individual interests, and it became liable with them for its consequences by ratifying and adopting the agreement with knowledge of fraud practiced by the officers on the other party to the contract.

4. CORPORATIONS ⇨306—OFFICERS—RATIFICATION—PERSONAL LIABILITY.

The ratification or adoption by a corporation of an agreement of its officers could not shield them from responsibility for the consequences of their own fraud in connection therewith.

5. CORPORATIONS ⇨426(6)—CONTRACTS OF OFFICERS—RATIFICATION—NECESSITY OF FORMAL ACTION.

If the continued course of action of a corporation, through its officers and agents, with knowledge of which it was chargeable, was consistent only with an adoption of an agreement of its officer on its behalf, it ratified the agreement, though no ratification or adoption was disclosed by its minutes.

6. CORPORATIONS ⇨319(7)—CONTRACT—FRAUD—EVIDENCE—SUFFICIENCY.

Where officers of a corporation, who owned less than a majority of the stock, contracted with the complainant that he should remain in its employ, agreeing to have the amount of stock increased, and to give him the ownership of part of the stock on certain conditions, falsely representing that they owned and controlled all of the stock, evidence held to show that they made no bona fide attempt to have the charter amended.

7. CONTRACTS ⇨169—CONSTRUCTION—SURROUNDING CIRCUMSTANCES.

To ascertain the real intention of the parties to a contract containing expressions reasonably susceptible of more than one interpretation, the situation and surrounding circumstances may be considered.

8. CORPORATIONS ⇨319(7)—CONTRACT WITH MANAGER—BREACH—PRESUMPTIONS.

Where officers of a corporation in December, 1911, contracted with the complainant that he should remain in its employ, agreeing to increase the stock and place a part in escrow for him, but made no bona fide at-

tempt to do so, it will be presumed, as against them and the company as wrongdoers, that but for their nonobservance of the agreement complainant would have been as contemplated in the agreement general manager of the company under an amended charter and entitled to dividends on the agreed part of the stock prior to July, 1912, when the agreement was modified.

9. CORPORATIONS ⇨316(1)—STOCK—CONTRACT WITH MANAGER—"LIQUIDATED."

Under a modified contract, providing that, when the debts of a corporation for 1912, as shown on the last day of that year, were liquidated, the stock would be increased, and one-third thereof placed in escrow for complainant, who was to be general manager, the word "liquidated" meant paid, and not merely ascertained, though generally it might have either meaning.

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

10. CORPORATIONS ⇨316(1)—STOCK—CONTRACT WITH MANAGER—"DEBTS OF THE COMPANY FOR 1912."

The "debts of the company for 1912," within such contract, were the debts incurred in that year in the course of its ordinary business, and not debts for the erection, enlargement, or multiplication of the company's plants.

11. CORPORATIONS, ⇨316(1)—STOCK—CONTRACT WITH MANAGER—PERFORMANCE.

It was the duty of the company to pay the indebtedness for 1912 before expending large amounts for the construction and enlargement of its plants, and, where these debts might have been paid the failure to pay them was fraud on complainant, of which the corporation or its officers could not take advantage.

12. CORPORATIONS ⇨316(1)—STOCK—CONTRACT WITH MANAGER—"DEBTS FOR THE YEAR 1912."

An indebtedness existing in the preceding year did not constitute "debts for the year 1912," within the contract.

13. CORPORATIONS ⇨316(1)—CONTRACT WITH MANAGER—ABANDONMENT OF EMPLOYMENT—FORFEITURE OF RIGHTS.

Where complainant was employed by a corporation under an agreement that the stock was to be increased and part placed in escrow for him on certain conditions, but the corporation and its officers fraudulently omitted to amend the charter or set apart stock for plaintiff, took business properly belonging to one in his position out of his hands, made repeated efforts to induce him to surrender his agreement and declared it valueless and failed to pay his salary, he was justified in leaving the company's service, and forfeited none of his rights by so doing.

14. EVIDENCE ⇨590—TESTIMONY OF PARTY TO FRAUD.

Fraud in fact is an acted lie, and the testimony of a party to the fraud touching the fraudulent transaction, when uncorroborated and given in his own interest, cannot avail against the inherent probabilities of the case.

15. CORPORATIONS ⇨319(2)—CONTRACT WITH MANAGER—EQUITABLE JURISDICTION—FRAUD.

Officers of a corporation contracted with the complainant that he should remain in its employ, agreeing that stock would be increased and a part placed in escrow, to become complainant's property when he had increased the earnings to a specified amount, but falsely represented that they owned all of the then existing stock, and made no bona fide attempt to amend the charter to provide for such stock increase, and subsequently took out of his hands business properly belonging to one in his position, endeavored to induce him to surrender the agreement, declaring it valueless, failed to pay his salary, and later increased the stock under an arrangement with third parties, who were permitted to subscribe for the additional stock,

thereby depriving complainant of the opportunity of acquiring any portion of the stock, or of receiving the dividends on the agreed portion of the stock. *Held*, that equity had jurisdiction of a suit for relief, especially in view of equity rule 23, prescribed by the Supreme Court.

16. DAMAGES ⇨163(1)—EVIDENCE—PRESUMPTIONS.

Presumptions of damage or loss of gain are indulged as against wrongdoers; but they must be reasonable, and have relation to loss or damage which there is a reasonable probability would not have occurred, had not the wrong been committed, and they do not exist with respect to purely speculative or remotely possible loss.

17. TRUSTS ⇨334—ESTABLISHMENT AND ENFORCEMENT—GROUNDS.

Where a contract provided that a corporation's stock should be increased, and one-third placed in escrow for the complainant, who was to be the general manager, and to become owner of such stock when he had increased the earnings to a specified amount, but he was wrongfully deprived of the opportunity to earn the stock, a trust could not be impressed on one-third of the company's stock, and its delivery decreed; it not appearing that the company had any treasury stock, and it being conjectural whether the complainant would have succeeded in increasing the profits.

18. INJUNCTION ⇨118(5)—SUITS FOR INJUNCTION—PLEADING—PRAYER

A prayer that the selling or encumbering of the corporation's property, in violation of complainant's rights be restrained, was too vague and indefinite to be enforced.

19. EQUITY ⇨427(3)—RELIEF—PRAYER FOR GENERAL RELIEF.

Under the prayer for other and further relief, complainant was entitled to such relief as was consistent with the case as made by the pleadings and the evidence.

20. CORPORATIONS ⇨319(½)—STOCK—BREACH OF CONTRACT—DAMAGES.

It being a reasonable presumption, founded upon a reasonable probability, that if the contract had been carried out one-third of the stock would have been placed in escrow the dividends on which were to be received and enjoyed by complainant, he was entitled to recover the dividends which the failure to carry out the agreement prevented him from receiving.

21. CORPORATIONS ⇨38—CHANGE OF IDENTITY—AMENDMENT OF CHARTER.

An amendment of the charter of a corporation to provide for an increase of stock would not have affected the identity of the company.

22. FRAUD ⇨12—PROMISE WITHOUT INTENTION OF PERFORMING.

The signing of an agreement by officers of a corporation, providing for increasing the stock and placing part in escrow for complainant, amounted to a representation of fact that they then intended to do this, and such intention not existing, they were guilty of false representation of fact.

23. CORPORATIONS ⇨316(1)—STOCK—CONTRACTS—CONSIDERATION.

Where a contract, as modified, provided that the stock of a corporation should be increased, and equally divided between the complainant and officers of the corporation, complainant's stock to be placed in escrow until the earnings had been increased to a specified amount, and complainant had been working for the company under the original contract for six months prior to the making of the modification, which recognized the validity of the original agreement, the services rendered or to be rendered by complainant constituted ample consideration to support the agreement as modified.

24. CORPORATIONS ⇨319(½)—STOCK—BREACH OF CONTRACT—DAMAGES.

Where a contract under which the complainant was employed by a corporation provided that the stock should be increased from \$100,000 to \$150,000, and that one-third should be placed in escrow for him, subject to certain conditions, and the corporation failed to make the increase, or to give him an opportunity to earn the stock, and subsequently increased the stock to \$200,000, issuing the additional stock to third persons, one-

third of the original capital stock must be taken as the basis for the computation of the dividends measuring complainant's damages.

25. WITNESSES ⇨130—COMPETENCY—TRANSACTIONS WITH DECEDENT.

Under Rev. St. § 85S, amended by Act June 29, 1906, c. 3608, 34 Stat. 618 (Comp. St. 1916, § 1464), providing that the competency of a witness shall be determined by the laws of the state, and Rev. Code, Del. 1915, § 4212, providing that, in actions by or against executors in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with the testator, complainant could testify to a transaction with a deceased officer of a corporation as the basis for a decree against the corporation, though the officer's estate owned stock, as a decree against it would not be a decree against the executrix.

In Equity. Suit by Heriman L. Wright against Cynthia E. Barnard, executrix of Remsen C. Barnard, deceased, and others. Decree for complainant in accordance with the opinion.

See, also, 233 Fed. 329.

Andrew E. Sanborn and John W. Huxley, Jr., both of Wilmington, Del., for complainant.

Robert H. Richards, of Wilmington, Del., and William M. Hope, of Dover, Del., for respondents.

BRADFORD, District Judge. Herman L. Wright, of New York, brought his bill against Cynthia E. Barnard, Executrix of Remsen C. Barnard, William Pennewill and the Stetson & Ellison Company, hereinafter referred to as the canning company or the company, charging fraud and breach of contract against Barnard, Pennewill and the canning company, and praying sundry relief against them as hereinafter mentioned. It appears from the evidence that the canning company was incorporated December 22, 1904, for the purpose, among other things, of canning and preserving fruits, vegetables, meats, &c., with a capital stock of \$100,000, divided into 1,000 shares of \$100 each. In the certificate of incorporation there was no provision for preferred stock. The original subscribers and incorporators were William Ellison, Barnard and Pennewill, the two latter being sons-in-law of Ellison. These three men composed the board of directors. Ellison became president, Pennewill vice president, and Barnard secretary and treasurer of the company.

In May, 1910, the complainant became connected with it. He wrote April 29, 1910, to the company suggesting that there was a plan by which from 25% to 30% more profit could be made on its output of canned goods, referring to his experience in selling and advertising to the wholesale and retail grocery trade, and indicating his desire to have a personal interview on the subject. Such an interview was promptly had with Barnard, the secretary and treasurer, who went to Philadelphia for that purpose, and in the early part of the following month, without any formal written contract, the complainant was employed by the company for the balance of that year for the salary or compensation of \$300 a month in order that the efficacy of his suggested plan might be tested. This arrangement having been made, the

complainant opened an office in the city of New York at No. 105 Hudson Street. At the time of his employment by the company approximately 40,000 cases of canned tomatoes were in storage, being an unsold surplus of the last year's product. He rendered such active and efficient service as to dispose not only of the product of 1910, but of the above mentioned surplus. His work having proved satisfactory to the company, it was decided late in the fall of 1910 to secure his services for the year beginning December 1, 1910, and ending December 1, 1911, on a basis materially different from that on which he had served the company in 1910. An arrangement was accordingly made between the company and him embodied in a letter written by him to the company November 25, 1910, and endorsed by it in the following words:

"Correct: Stetson & Ellison Co. Per R. C. Barnard, Sec. & Treas."

The portions of the letter material in this connection are as follows:

"This is to confirm the arrangement agreed upon for the maintenance of the New York office from December 1st, 1910, to December 1st, 1911, substance of which is as follows: That \$6,000.00 is to be allowed me during this period for my work on gallon (#10) tomatoes and tomato pulp, this sum to cover the expenses of maintaining the sales offices here in New York, which shall include rent, stenographer, and incidental expenses. * * * Expenses outside of the maintenance of the New York office, such as advertising, salesmen, traveling expenses, etc., etc., are to be paid by Stetson & Ellison Co., but no such expenses are to be incurred without their consent. Remittances are to be made to me on the 1st and 15th of each month, the amounts of same dependent upon what is needed by me at this end. Final settlement of the year's work to be made at a date to be agreed upon."

It appears from the evidence that the "expenses of maintaining the sales offices here in New York" were insignificant in amount as compared with the \$6,000 allowed him for his work, falling short of \$100. The complainant served the company faithfully and efficiently during the year agreed on, from December 1, 1910, to December 1, 1911, and received December 21, 1911, from the company, and receipted for, a check for \$1,869.27, being balance in full of the stipulated salary or compensation of \$6,000 and his commissions on sales of tomatoes.

About or shortly before the time of the expiration of the last mentioned agreement with the complainant, it being necessary that a further arrangement should be had with him to secure his services for the future, the matter was taken up by him with Barnard and Pennewill who went to New York to discuss the situation for 1912. The conference continued for several days. It appears from the evidence, direct and circumstantial, that Barnard and Pennewill recognized that the complainant had secured good results in 1911, and desired that the company should have the benefit of his services thereafter for the enlargement of its business. The complainant, however, was unwilling to continue to serve the company on the same basis which he viewed as "more or less of a salary and commission proposition," and he so informed Barnard and Pennewill, who agreed that if the sales could be largely increased by him he would be entitled to have a part or share in the business of the company. Finally a decision was reached that,

to use the language of the complainant on the stand, "the business should be split into thirds; in other words, that we should all go in on an equal basis; get together and strive to pull the business up and to share the profits equally." With respect to the raising of the requisite amount of money for the proposed enlargement of the business, it was suggested and concluded by those present that the same could be secured through preferred stock, or an issue of bonds, or borrowed from the bank. After the discussion of some further details of the proposed change the complainant secured the services of Arthur Rowe, an attorney at law, who met him and Barnard and Pennewill at the Wool Club in New York. The evidence does not disclose any act, statement or conduct on the part of Barnard, Pennewill or the company, prior to this meeting at the Wool Club, on its face suggestive of a fraudulent or unfair intent toward the complainant or in the least inconsistent with an observance by them of entire good faith. He was not aware of anything calculated to beget in him the slightest suspicion of fraud or bad faith on their part. He, relying, unconsciously it may be, upon the presumption of honesty and fair dealing in business transactions, assumed and had a right to assume that he was negotiating with straightforward and honorable men. But the evidence of what transpired at the Wool Club, and subsequently up to and including December 19, 1911, between Barnard and Pennewill and the complainant, renders it impossible to reconcile the conduct of the two former with the rules of fair and honest dealing. It is established by the documentary and oral evidence and is wholly beyond controversy that during all that time the 1,000 shares of the capital stock of the company were held and owned as follows: Barnard 330 shares; Pennewill 20 shares; Katherine E. Pennewill, his wife, 480 shares; and William Ellison 170 shares. Thus Barnard and Pennewill together held and owned but 350 shares as against 650 held and owned by others,—only slightly over one-third of the total capital stock. Rowe testified to the effect that at the conference at the Wool Club Barnard and Pennewill told him they were the owners of all the capital stock of the company. He further testified as follows:

"They discussed the situation of the Stetson and Ellison Company; they said that it was a corporation with one hundred thousand dollars of common stock, and that Mr. William Pennewill and Mr. R. C. Barnard were the owners of the common stock; that Mr. Wright had for some time been connected with the company as sales agent, and had proved his value to the company by increasing the net returns of company. Mr. Barnard said that Mr. Wright was so valuable to the company that they wished to retain his services, and Mr. Wright explained that the goods put up by the company were very good, and that was, in part, the reason for his success in selling the goods; they told me that they wished the company reorganized in such a way that Mr. Wright would be entitled to one-third of the proceeds of the business."

And further, that as a result of the conversation at the Wool Club the witness prepared two paper writings, (Complainant's Exhibits 71 and 72,) being proposed agreements between Pennewill, Barnard and the complainant, relative to the business and affairs of the company. The first recital in the preamble in Exhibit 71 is as follows:

"Whereas, William Penniwell and R. C. Barnard, are each the owner of \$50,000 of the stock of Stetson & Ellison Co., which corporation is engaged in the canning business."

Exhibit 72 contains nothing inconsistent with the above recital. It appears that these proposed agreements were received from Rowe by the complainant through the mail on the day next after the conference at the Wool Club, and were personally delivered by him to Barnard and Pennewill, who took them to Delaware for the expressed purpose of taking up the matter with Ellison, the president of the company. The complainant received December 18, 1911, a letter, dated the preceding day, from the company bearing its typewritten signature, but in fact prepared and emanating from Barnard, in which it was stated, among other things, that:

"We have had our conference with Mr. Ellison which has ended as we predicted, 'Well, go ahead boys, I leave it to you.'"

The proposed agreements prepared by Rowe were submitted by Barnard and Pennewill to an attorney in Dover, Delaware, who prepared in lieu of them a proposed agreement which was subsequently signed by Wright, Barnard and Pennewill December 19, 1911, as follows:

[The contract was here quoted in full.]

It will be observed that, contrary to the fact, the first recital in the preamble declares that Pennewill and Barnard "own and control the capital stock of Stetson and Ellison Company," and that in the third paragraph the agreement provided that 1,500 shares of the common stock of the "new or re-organized company" be issued to Pennewill and Barnard "full paid, in consideration of the one thousand (1,000) shares of stock now held by them and the business of the company." The complainant testified that at the time the agreement of December 19, 1911, was signed he did not know, and it appears that until after the bringing of this suit, he never did know that there were other holders of stock in the company than Barnard and Pennewill, save that he "thought Mr. Ellison held one share which had probably been issued to him and endorsed, so he could have the office of president," and that nobody had told him so, "but he was the president, and he must have had a share." Although Pennewill testified as to the holdings of the stock of the company at the time of the signing of the agreement of December 19, 1911, he does not say, and there is absolutely no evidence, that until after the filing of the bill the complainant had been informed or was aware that at the time of the Wool Club conference or on December 19, 1911, or thereafter, substantially all of the stock was not owned and controlled by Barnard and Pennewill, as falsely recited and declared by them. In fact in the bill as originally filed the complainant, evidently relying upon such false statements, averred that Pennewill and Barnard "owned and controlled the capital stock" of the company; but in the amendment to the bill filed six months later declared that before and at the time of the execution of that agreement it was "falsely and fraudulently represented" to the complainant by Pennewill and Barnard, and "the contract falsely and fraud-

ulently set forth, that they owned and controlled the capital stock of the said Stetson and Ellison Company."

Secrecy is of the essence of fraud and those meditating the latter do not proclaim their nefarious purpose from the housetops. Consequently, almost without exception, the proof of fraud must depend upon evidence of circumstances which in their totality clearly establish it. I say in their totality, for even though the circumstances in a given case taken individually and separately may not be sufficient to sustain the charge, yet when considered collectively they may leave no escape from its truth. On this subject Mr. Justice Mitchell in delivering the opinion of the court in *Montgomery Web Co. v. Dienelt*, 133 Pa. 585, 19 Atl. 428, 19 Am. St. Rep. 663, forcibly said:

"Fraud, as has so often been said, can rarely be proved by direct and positive testimony, and great liberality is always allowed in the introduction of evidence having a tendency to show it. * * * Defendants had to get their testimony from the other side, and from the circumstances, and were not able to make positive and direct proof of the fraudulent intent, but had to rely upon circumstances pointing thereto. In his charge, the learned judge took these up seriatim, and disposed of them summarily. * * * The substantial defect of the charge is in its treatment of the items of evidence, one by one, without at any time directing the view of the jury to their united force. There probably never was a case of circumstantial evidence that could not be blown to the winds by taking up each item separately, and dismissing it with the conclusion that it does not prove the case. The cumulative force of many separate matters, each perhaps slight, as in the familiar bundle of twigs, constitutes the strength of circumstantial proof."

In order that the company should further enjoy the services of the complainant it was necessary, owing to the stand taken by him, that its charter should be amended in such manner as, among other things, to allow the issue of more capital stock. Under the laws of Delaware this could be effected only through affirmative action by a majority of the board of directors approved by the holders of a majority of the capital stock. As Barnard and Pennewill had only 350 out of 1,000 shares, they had not the power, without the co-operation of other stockholders, to secure the requisite amendment. If Ellison, after the Wool Club conference, and prior to December 19, 1911, had been in sufficient possession of his faculties and, after having had the proposed scheme embodied in the written agreement of that date laid before him, had in good faith said to Barnard and Pennewill "Well, go ahead boys, I leave it to you," there would have been no reason, if they intended to carry that scheme into execution, why they should make a false statement as to the ownership and control of the capital stock. For they were a majority of the board of directors and with Ellison held a majority of the whole capital stock, namely, 520 of the 1,000 shares and would have been able to secure the requisite amendment of the company's charter or its reorganization. The making of these false statements affords cogent evidence that they either could not control Ellison's stock or did not intend to secure the amendment or reorganization they agreed to obtain; or, in other words, that they lacked either the expectation or the intention of securing the change in the charter contemplated in the agreement. Barnard and Pennewill were in a position where they could not secure the services

of the complainant without deceiving him as to the control and ownership of the stock, and the evidence satisfies me that their false statements were made for the purpose of securing those services for the company and without any intention on their part that the complainant should enjoy the benefits of those provisions in the agreement which served as the sole or principal inducement for his becoming a party to it. The fact that they practiced this fraud upon the complainant in order to have the benefit of his services is the highest tribute they could pay to his fidelity and efficiency.

[1-5] It is urged on behalf of the defendants that the company was not a party to the agreement of December 19, 1911, and that if it possessed any validity it bound only the individuals who signed it. The agreement from beginning to end related to the business and affairs of the company—the amendment of its charter, the salaries of its officers, the enlargement of its operations, and other matters affecting its interests, and not to any private or individual interests of those signing it, dissociated from the interests of the company. It is true that the performance of the various things provided for in the agreement would affect individual interests of Pennewill, Barnard and the complainant, but only as connected with and growing out of the business and affairs of the company. It was signed by Pennewill and Barnard clearly on behalf of the company and for its intended benefit. Pennewill, Barnard and the complainant were all of full age and sound mind and were competent to contract, and the two former by reason of their fraudulent statements touching stock ownership and control are estopped from denying in this suit, brought by one innocent of the fraud, that they did own and control all of the capital stock of the company, and, being a majority of the board of directors, had it within their power to secure the proposed amendment of the charter and to cause to be done all other things necessary under the provisions of the agreement to be done on the part of the company. Their relationship to the company was such that it was chargeable with knowledge of the fraud practiced by them, and would become equally liable with them for its consequences by ratifying and adopting the agreement, though not originally authorizing it. It appears from the evidence that Ellison, the president of the company, was at the time of the hearing about eighty years old, very feeble and of impaired faculties; that, as admitted by counsel on both sides, he was not in a condition to testify intelligently; and that he had not been actively engaged in the business of the company since 1907 or 1908, nor since that time taken part in directing its policy or affairs. It is to be inferred that he was continued in the presidency of the company on account of his long association with it and by reason of the family ties existing between himself and Barnard and Pennewill. The two latter, directors and respectively vice president and secretary and treasurer of the company, served as its eyes, ears and mind. Whatever they saw, heard or learned touching its business or affairs was seen, heard or learned by it. The ratification or adoption by the company of the agreement of December 19, 1911, could not serve to shield Pennewill and Barnard from responsibility for the consequences of their own fraud. It is urged that the minutes of the company do not

disclose either authorization or ratification and adoption of the agreement. This is unimportant. The occurrence of acts does not depend upon the record which may be made of them; and it is settled law that corporate minutes are not the only medium of proof of corporate action. The question in this immediate connection is one of substance rather than form. It is whether the continued course of action of the company through its officers and agents, with knowledge of which it was chargeable, was not clearly inconsistent with the idea that it had not adopted the agreement of December 19, 1911. It appears that the company even before its execution contemplated the ratification and adoption of that agreement. [The court here referred to sundry documentary evidence leading to this conclusion.] It may be added, as will hereinafter appear, that the existence and value to the complainant of the agreement of December 19, 1911, and of the modification thereof made July 25, 1912, received on a number of occasions the implied recognition of the company through demands made by it through Barnard for the surrender or relinquishment of that agreement and its modification for the benefit of the company. It is unnecessary to refer to the many other circumstances showing ratification and adoption by the company of that agreement.

That agreement provided in substance, among other things, that on or before January 1, 1912, the charter of the company should be so altered that the capital stock should be \$250,000, consisting of 1,500 shares of common stock, and 1,000 shares of preferred stock, of the par value of \$100 each; that in consideration of the complainant's becoming the general manager of the "new or reorganized company" and of his selling all of the preferred stock at par and without commissions, 500 shares or one-third of the common stock should be transferred to the complainant, a certificate for the same to be deposited in escrow with and held by the Baltimore Trust Company, and by that company delivered to the complainant when he should have disposed of all the preferred stock "or so much thereof as shall be agreed upon by any two of the parties hereto" and should have "brought the business of the said new or reorganized company to a showing of at least a net yearly profit above fixed charges and expenses," as therein defined, of \$45,000; that if the complainant should fail to sell the preferred stock, or so much thereof as should be agreed upon as above mentioned, and to bring the net annual profit up to \$45,000 on or before January 1, 1922, the certificate of stock so deposited with the trust company should be returned to Pennewill and Barnard; that the complainant during the period the stock certificate should be held in escrow by the trust company, should receive "any and all dividends that may be declared on the common stock of the said new or reorganized company for the shares so held in escrow"; that commencing with January 1, 1912, annual salaries to the officers of the "new or reorganized company" should be paid as follows: to Ellison, as president, \$2,500; and to Pennewill as vice president, Barnard as secretary and treasurer, and to the complainant as general manager, \$5,000 each; provided that only \$300 per month should be paid to the last three named until the end of the fiscal year 1912; that the total

proceeds from the sale of the preferred stock should be paid into the treasury of the company and used for operating expenses incident to its business, for enlargement of its plant, the purchase of new plants, or otherwise, as the board of directors should direct; and that none of the parties to the agreement without the consent of the others should sell, hypothecate, or in any wise dispose of any of the common stock of the company.

[6] It was a matter of vital importance to the complainant that the charter of the company should be amended pursuant to the agreement. Until that should be effected it would be impossible that 500 shares of common stock should be set apart for him on the terms and conditions specified in the agreement, on compliance with the terms of which he would have the right to share equally with Barnard and Pennewill in the profits of the business. It was mainly, if not solely, the securing of such stock that constituted the inducement to his becoming a party to the agreement. The stipulated salary was not the moving cause; for during the expiring year of 1911 he had received compensation for his services larger by nearly \$1,000, and yet was dissatisfied. It was the setting aside for him on his becoming general manager of the company and devoting himself to its service of one-third of the common stock to be held in escrow with the right to receive all dividends thereon until January 1, 1922, even if he failed earlier to comply with the terms and conditions on which would depend his right to receive the stock itself. Barnard and Pennewill knew this as well as the complainant. To secure his services at a salary inadequate when considered apart from the other provisions of the agreement in his favor, and at the same time withhold from him all opportunity for acquiring equal ownership in the stock would involve such further fraud on their part as might naturally be expected to follow the misstatement of their stock ownership and control. After agreeing without qualification that the charter of the company should be amended on or before January 1, 1912, it was incumbent on them to secure or at least attempt to secure such amendment. They did not secure it, and the evidence sufficiently shows that they made no bona fide attempt to that end. Pennewill's wife was the owner, as before stated, of 480 of the 1,000 shares constituting the total capital stock of the company, and if Pennewill and Barnard, notwithstanding their misstatements as to stock ownership and control, intended to live up to the provisions of the agreement of December 19, 1911, it is hardly conceivable that she should not have been consulted about the proposed amendment of the charter. Yet she testified that she never obtained knowledge or heard of that agreement prior to the institution of this suit; and that she had never been consulted by her husband or Barnard or any other person with respect to the making of such an agreement. Pennewill testified that he never either before or after the execution of that agreement discussed it with Ellison and never talked with him about it. It appears from his testimony that Ellison has not been actively engaged in the business of the company nor taken any part in directing its policies since 1907 or 1908. In view of the above it is somewhat remarkable that he should have given the following testimony:

"X. Then you were going on the presumption that Mr. Ellison would reorganize this company, according to the agreement which you entered into with Mr. Wright, without knowing whether he would do it, or not? A. On presumption, yes. X. Entirely on presumption? A. Yes."

The statement in the letter of December 17, 1911, from the company through Barnard to the complainant, "We have had our conference with Mr. Ellison which has ended as we predicted, 'Well, go ahead boys, I leave it to you,'" was either true or false. If it was true and Barnard believed Ellison to be mentally competent and in earnest, there was no legitimate reason for an omission on Barnard's part to co-operate with Pennewill and Ellison in securing the proposed charter amendment. The complainant testified to the effect that on December 19, 1911, after the signing of the agreement of that date he and Barnard and Pennewill arranged that the complainant should go to Delaware a few days later, and "we were to hold a meeting and arrange for changing the charter and various other things"; that he went to Dover where he met Pennewill and Barnard; that he "asked them if they were going to have a meeting, that if they were all ready, we would have the meeting"; that "they said that the matter was being carried through by their lawyers, that the papers were being drawn up and that the stock and everything would be fixed in a few days, so that the matter was simply in the hands of the lawyers, and everything would be fixed"; that the complainant had received a telegram from Chicago asking him to go there on some business of the company; and that they suggested that he should go to that city and "while I was out there they would attend to the details and put the reorganization through"; and that he accordingly went to Chicago about the end of 1911. No amendment of the charter, however, was secured as promised and agreed by Pennewill and Barnard. The defendants have not produced nor accounted for the absence of any lawyer or lawyers employed to "put the reorganization through," nor has any evidence been adduced that Pennewill and Barnard or either of them at any time attempted to secure an amendment of the charter in accordance with the agreement of December 19, 1911.

But, notwithstanding such default on the part of Pennewill and Barnard, the complainant, who was wholly unaware of the falsity of their statements as to stock ownership and control, continued actively and loyally to co-operate with them for the advancement of the company's business and welfare. I have discovered nothing in the testimony or in the documentary proofs indicating on the part of the complainant fraud, bad faith or indifference to the interests of the company; but, on the contrary, zealous efforts on his part in its behalf.

The complainant testified to the effect that he had an interview with Barnard and Pennewill in Camden, in the latter part of July, 1912; that the witness inquired as to the need for insurance on his life, he having been requested to have his life insured in the sum of \$30,000 for the benefit of the company, because he had not discovered why they wanted such insurance; that they told him the trust company demanded about \$90,000 insurance on the lives of Barnard, Pennewill and himself in equal portions, as additional collateral for the

loans that that company had made to the canning company; that the proposition of raising more money was not discussed at that time; that Barnard and Pennewill said "they had all the money they needed" and that "for operating expenses they would demand an advance from Libby, McNeil & Libby, (a corporation of Maine, doing business in Chicago, with which the canning company had a contract for furnishing tomato pulp, &c.) as soon as the season started"; that after they stated that the company had all the money it needed the complainant said he felt it was "unfair to me to hold me down on my contract with the sale of that preferred stock, or any part of it"; that they seemed willing to make a change in the agreement of December 19, 1911, to meet his ideas, and the change was made; that it was written out by the complainant and signed July 25, 1912, as follows:

"July 25th, 1912.

"When debts of company for 1912 (as shown Dec. 31st, 1912) are liquidated, company will be reorganized from \$100,000.00 to \$150,000.00 and \$50,000.00 given to each. In case earnings do not equal \$45,000.00 year, stock of H. L. W. to be placed in escro according to original agreement until earnings do reach same.

O. K.

"H. L. Wright

"R. C. Barnard

"Wm. Pennewill."

The word "liquidated" as used in the above agreement has been treated by counsel on both sides as intended for and as having the same significance as "liquidated," the omission of the letters "id" evidently being a mere clerical error. It is not without significance that the above modification was written and signed on letter paper of the company having on its heading "Wm. Ellison, President, Wm. Pennewill, Vice President, R. C. Barnard, Secretary & Treasurer, H. L. Wright, General Manager," thus implying the recognition and ratification of the agreement of December 19, 1911, subject to the modification. The modification was written in the railway station at Wyoming and on its face suggests haste in its preparation and a lack of the precision which should have characterized an agreement of its importance.

[7] Two questions have been raised as to the meaning of the modification: First, what do the debts of the company as shown December 31, 1912, include; and, secondly, what is the significance of the word "liquidated," as used in the modification. In order to ascertain the real intention of the parties to a contract containing expressions reasonably susceptible of more than one interpretation the situation of the parties and the surrounding circumstances may be taken into consideration. This is not to make a new contract for or defeat the intent of the parties, but to reach and enforce that intent. In *Lowrey v. Hawaii*, 206 U. S. 206, 222, 27 Sup. Ct. 622, 627 (51 L. Ed. 1026) the court said:

"In *Brooklyn Life Insurance Co. v. Dutcher*, 95 U. S. 269 [24 L. Ed. 410] it was said: 'There is no surer way to find out what parties meant than to see what they have done.' So obvious and potent a principle hardly needs the repetition it has received. And equally obvious and potent is a resort to the circumstances and conditions which preceded a contract. Necessarily in such circumstances and conditions will be found the inducement

to the contract and a test of its purpose. The conventions of parties may change such circumstances and conditions, or continue them, but it cannot be separated from them."

[8-12] It is to be presumed, as against Pennewill, Barnard and the company as wrongdoers, that had it not been for their non-observance of the agreement of December 19, 1911, the complainant would have been before and during July, 1912, general manager of the company under an amended charter, and consequently entitled to receive dividends on one-third of the common stock while held in escrow, and have had the right until January 1, 1922, to sell the \$100,000 of preferred stock or so much as should be deemed necessary, and thereby entitle himself to receive and enjoy for his own use the common stock so held in escrow. The modification of the agreement signed July 25, 1912, required as a condition precedent to the increase in the capital stock from \$100,000 to \$150,000, that the "debts of the company for 1912 (as shown Dec. 31st, 1912)" should be "liquidated," and further provided in effect that if the net earnings or profits of the company should not equal \$45,000 a year at the time such increase in the capital stock should be effected the \$50,000 of stock intended for the complainant should be placed and held in escrow according to the original agreement until the net earnings or profits should reach that sum. The modification did not contemplate the creation of preferred stock, but only of common stock, and therefore eliminated the provision in the original agreement requiring the complainant to sell preferred stock as a condition precedent to his receipt of common stock for his own benefit. But, on the other hand, while under the original agreement the complainant after becoming general manager and devoting his attention to the business of the company, would be entitled to receive dividends on the stock held in escrow, under the modification he could not receive stock or any dividends until after the debts of the company for 1912, as shown on the last day of that year, should be liquidated, for the reason that it was only after such liquidation that the increase in the capital stock was to be effected. It is urged on the part of the complainant that the word "liquidated" as used in the modification does not mean paid, but only ascertained. Generally speaking, the term may signify either paid or ascertained; but when applied to debts of the company as shown at a certain time it evidently has reference to debts as shown by the company's books or statements, and unless it means paid, the term would possess no independent force of its own. I am satisfied that the "debts of the company for 1912" mean its debts incurred in that year in the course of its ordinary business, and not debts for large loans made to it for the purpose of the erection, enlargement or multiplication of canning plants. Debts of the latter character for permanent structures could not with propriety be designated "debts for 1912." There is another consideration possessing much force in this connection. If under the modification it had been a condition precedent to the acquisition by the complainant of any right to stock that the debts incurred by the company in 1912 for the enlargement of its plants should be paid, his situation would have been infinitely worse than it could have been under the original agreement. The mere substitution for such debts of indebted-

ness to other persons clearly would not be performance of the condition precedent as contemplated and intended in the modification; and the actual payment of such debts would have involved either inordinate delay or the paralysis of its business, and have postponed indefinitely compliance with the condition precedent. Payment of the ordinary indebtedness for 1912 being under the terms of the modification necessary to the reorganization of the company and the increase of its stock and the enjoyment by the complainant of stock or dividends thereon, it was the duty, not of the complainant, but of the company to pay such indebtedness. The agreement of December 19, 1911, recognized that all of the parties to it were "desirous of increasing the plant and output of the said company"; but in view of the fraud and deception practiced upon the complainant, and of his loyal and unremitting attention to its interests, the company was in equity bound, before expending the large amounts necessary for the construction and enlargement of its plants to apply a sufficient sum to pay the indebtedness for 1912 remaining unpaid at the expiration of that year, amounting to a comparatively small sum. Further, the evidence shows and it was admitted by Pennewill in his testimony that the net profits of the company for 1912 after payment of salaries were at least in excess of \$11,000. He stated, however, in substance, that there was an indebtedness of from \$15,000 to \$20,000 from the preceding year. But whatever indebtedness existed in the preceding year could not constitute "debts for the year 1912." The omission by the company to make such payment was a deliberate disregard of its duty to secure performance of the condition precedent and a fraud upon the complainant, of which neither it nor Pennewill or Barnard can take advantage. Consequently the case is to be treated in all respects as if the "debts of the company for 1912," as shown on the last day of that year, had been duly "liquidated." At the request of the company through Barnard the complainant took out or permitted to be taken out August 29, 1912,—a month after the execution of the modification of the original agreement of December 19, 1911,—insurance on his life in favor of the company in the sum of \$30,000, and the policies representing that amount were assigned September 20, 1912, to the trust company as collateral security for loans made to the canning company for the purpose of defraying the cost of enlarging and extending its plants. Common gratitude, if no other higher motive, should have secured from the company for the complainant fair treatment for the protection of his interests. But he did not receive it.

The evidence discloses a set purpose on the part of the company and its two active directors to reap the benefit of the complainant's services and at the same time to withhold from him the principal benefit and advantage they had ostensibly intended to secure for him. The testimony of the complainant on this branch of the case is natural, inherently credible, and accords with the fact that the agreement of December 19, 1911, and its modification were finally nullified by the company, Barnard and Pennewill, so far as they had power to do so, in the spring of 1913, as hereinafter set forth. [The complainant's testimony and other evidence were here reviewed.]

[13] It appears from the evidence that, as above stated, the com-

plainant did not work for the company after February, 1913. In ceasing so to work, however, he was not guilty of a voluntary abandonment of the contract under which he had rendered faithful service. He is to be regarded as having been discharged or prevented by fraud and wrongdoing from the further performance of his duties. To justify a servant in leaving the service of his master without forfeiting or injuriously affecting his rights it is not necessary that he should be ejected by force from the place allotted to him for the carrying on of his work. He is justified in leaving when the acts or conduct of the master toward him have prevented the performance of further service, or are of such a character as to render his further continuance in the service intolerable to any self-respecting man. The company, Barnard and Pennewill left the complainant no other course than to retire at the end of February, 1913. They had fraudulently omitted to secure an amendment of the charter or to set apart stock to be held in escrow for him; they had wrongfully taken out of his hands the conduct of negotiations entrusted to him and properly belonging to one in his position; repeated efforts had been made to induce him to surrender his agreement and it had been declared by the company through Barnard to be of no value; no salary had been paid him in 1913 nor had he received the \$1,400 reserved from his salary for 1912. Under these circumstances the complainant in leaving the service of the company was guilty of no wrong and forfeited none of his rights.

It appears from the evidence that the certificate of incorporation of the canning company was amended March 27, 1913, by striking out the provision limiting its capital stock to \$100,000, and specifying \$35,000 of capital stock for the commencement of business, and inserting in lieu thereof the following:

"The amount of the total authorized capital stock of this corporation is two hundred thousand dollars (\$200,000.00), divided into two thousand (2,000) shares of one hundred dollars (\$100.00) each. The amount of capital stock with which it will commence business is one hundred thousand dollars (\$100,000) being one thousand (1,000) shares of one hundred dollars (\$100) each."

[The evidence relating to this amendment and the issuance of the additional stock was here referred to.]

There is evidence to show that the complainant had no knowledge or suspicion of the contract of March 13, 1913, and of the amendment of the certificate of incorporation March 27, 1913, until long afterwards. Further, it appears from the evidence that the execution of that contract and the amendment of the charter followed and were in consequence of a contract between the company and Libby, McNeil & Libby for an increase in the supply of tomato pulp by the company to that concern, the negotiations for which contract were taken out of the hands of the complainant in January, 1913, as before stated, by the company through Barnard. The amendment of the company's charter March 27, 1913, and the subsequent issue of stock to the exclusion of the complainant as above mentioned were the consummation of the fraud and wrong perpetrated by the company, Barnard and

Pennewill upon him. After this wanton violation of his rights they evidently felt uneasy as to the possibility or probability of being held to account for their fraud, and nothing could be more natural than that an attempt should be made to approach the complainant in such manner as to do away with the danger of litigation. It appears from the testimony of the complainant that during or about the month of May, 1913, Barnard visited New York and "invited me to lunch. He was looking, mostly, for information; wanted to know what I was doing, and so forth. No proposals were made at that time. He seemed afraid to make any proposals." It further appears that Barnard called in August, 1913, upon the complainant at Great Neck, Long Island, where he lived and made certain proposals at that time; asking the complainant to surrender the contract of December 19, 1911, as modified, and offering to employ him at a salary of \$3,000 a year if he would come back as a selling agent. The complainant inquired "What becomes of my interest in the business?" and Barnard replied, "There is no interest on the business. We are hooked up with other people, now, and the old deal doesn't count for anything."

It is difficult to conceive of a case more permeated with fraud than that now before this court. The evidence, direct and circumstantial, oral and documentary, has established to a moral certainty fraud and wrongdoing on the part of the company, Barnard and Pennewill, by which the complainant's rights were violated and his interests disregarded.

It is contended on the part of the defendants, and there is some evidence to the effect, that the contract negotiated by the complainant between the company and Libby, McNeil & Libby in January, 1912, for the furnishing of tomato pulp by the former to the latter was disadvantageous to the company, but advantageous to Libby, McNeil & Libby on account of the low price to be received by the company for the pulp. Pennewill testified to the effect that it was partly or wholly owing to the execution of the above mentioned contract that the amendment of the charter of March 27, 1913, was secured under which Libby, McNeil & Libby acquired an interest through their representatives. I fail to perceive any force in this contention or its relevancy to the issues involved in this case. If the contract just mentioned was disadvantageous to the company the responsibility for its improvident character rests upon the company and not the complainant, for the former through Barnard and not the latter determined the prices on which the contract was bottomed. Further, the contract received the attention and approval of both Pennewill and Barnard who as men of practical experience in the canning business, unlike the complainant, were more familiar with the cost of production. But aside from these considerations, no disadvantageous feature in the contract could justify the practicing by the company, Barnard and Pennewill of fraud upon the complainant.

[14] It is also contended on the part of the defendants that the complainant promised to raise the requisite amount of money for the enlargement of and additions to the company's plants and failed to do so. Pennewill testified to the effect that at the conference in the office

of the company in New York between the complainant, Barnard and himself, shortly before the execution of the agreement of December 19, 1911, Wright "stated to us, 'Why, it is no trouble for me to go out and get all the money that you fellows want.' And he said, 'You can go right ahead with the plant, enlarge your business, and I will see that you get the money.' * * * Mr. Wright assured us he could raise all the money we wanted in sixty to ninety days," and that the witness believed he could do it. He further testified:

"X. Then, Mr. Pennewill, the Stetson and Ellison Company went ahead and put up these factories, or negotiated for these factories, simply on the faith that they had in Mr. Wright's words that he could raise this money in ninety days? A. Right. I won't say raise it all in ninety days, but he said he could the better portion of it in ninety days—a big portion of it."

Pennewill's testimony in this connection must be rejected. If the company had faith in the ability of the complainant to raise money for enlargements and additions, as stated by him, according to Pennewill's testimony, it is difficult to account for the fact that in the agreement executed shortly afterward he was allowed ten years within which to dispose of \$100,000 of preferred stock for the same purpose. Further, Pennewill's testimony on the above point is inconsistent with that of the complainant. Fraud in fact is an acted lie, and the testimony of a party to the fraud touching the fraudulent transaction, if not against interest, is entitled to little, if any, weight. He has discredited himself; and such testimony, uncorroborated and coming from a party to the cause testifying in his own behalf, should not be permitted to avail against the inherent probabilities of the case, to say nothing of apparently truthful evidence given by others innocent of wrongdoing.

[15] The complainant received no part of the sum of \$1,400, the amount reserved out of his salary for the year 1912, nor anything on account of salary for the year 1913. He has been deprived, so far as the defendants had power to do so, of the opportunity of acquiring any portion of the capital stock of the company, and he has also been deprived, so far as they had power to do so, of the opportunity to receive any dividends on any portion of the stock during the stipulated period expiring January 1, 1922. That he is entitled to relief of some kind in this case I have no doubt. The jurisdiction in equity on the pleadings and proofs cannot successfully be challenged. *Boyce's Executors v. Grundy*, 3 Pet. 210, 215, 7 L. Ed. 655; *Watson v. Sutherland*, 5 Wall. 74, 78, 18 L. Ed. 580; *Insurance Co. v. Bailey*, 13 Wall. 616, 621, 20 L. Ed. 501; *Lewis v. Cocks*, 23 Wall. 466, 470, 23 L. Ed. 70; *Drexel v. Berney*, 122 U. S. 241, 252, 7 Sup. Ct. 1200, 30 L. Ed. 1219; *Rich v. Braxton*, 158 U. S. 375, 406, 15 Sup. Ct. 1006, 39 L. Ed. 1022; *Kilbourn v. Sunderland*, 130 U. S. 505, 514, 9 Sup. Ct. 594, 32 L. Ed. 1005; *Jones v. Mutual Fidelity Co.* (C. C.) 123 Fed. 506, 520. And rule 23 of the equity rules prescribed by the Supreme Court (198 Fed. xxiv, 115 C. C. A. xxiv) provides that "if in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court." It is a serious question, however, to what extent relief can be accorded the complainant. Aside from the prayers for answer, subpoena and for

inspection of books, papers, &c., the bill prays that an account may be taken of what is due to the complainant from the defendants under the agreement of December 19, 1911, as amended July 25, 1912, and that they may be decreed to pay to him the amount found due together with the costs of this suit; that the defendants may be restrained from directly or indirectly selling or disposing of any of the capital stock of the company, or from selling, disposing of or encumbering any of their or its real estate or personal property, in violation of the rights of the complainant; that the court may impress the stock of the company with a trust in favor of the complainant to the extent of one-third of the capital stock of the company, and decree the delivery of that portion of the stock to him; and that the complainant may have such other or further relief as the nature of the case may require.

[16-21] Presumptions of damage or loss of gain are indulged by courts as against wrongdoers in order that just compensation may be made to those who have suffered from the wrong. Such presumptions to be just must be reasonable. Otherwise they would be calculated to work possible or probable injustice. The presumption must have relation to loss or damage which there is a reasonable probability would not have occurred had the wrong not been committed. It does not exist with respect to purely speculative loss or damage, or that of which there is only a possibility more or less remote. Some of the relief prayed clearly cannot be given. I perceive no ground on which the court could impress one-third of the stock of the company with a trust in favor of the complainant, and decree its delivery to him. The evidence excludes the idea that the company is in possession of any treasury stock. All of its stock is owned by individuals and beyond its control, and under no circumstances could a trust be impressed upon the stock of individuals who are not parties to the cause. Whatever equity the complainant might conceivably have as against the stock of Pennewill or Barnard's estate, would necessarily grow out of the agreement of December 19, 1911, as subsequently modified, and the fraud of Barnard, Pennewill and the company in relation to it. It was necessary under the agreement as modified, even had the charter of the company been amended, that the complainant should bring the net profits of the company up to \$45,000 a year before becoming entitled to any portion of the capital stock. The evidence does not show that he succeeded in doing this, although he largely increased its profits. It is true that had no fraud been practiced against him he might have raised the net profits to the required sum prior to January 1, 1922, but whether he would have done so is largely, if not wholly, conjectural. His success would have depended upon conditions and circumstances which could not be foretold with any degree of accuracy, and the presumption against a wrongdoer cannot safely be carried so far as to cover such a doubtful and speculative gain. Practically the same considerations require the denial of the prayer that the defendants be restrained from disposing of their capital stock in the company. The portion of the prayer relating to the selling or encumbering of real estate or personal property "in violation of the rights of the complainant" is too vague and indefinite to be enforced. But the complainant was grossly wronged and defrauded by the company,

Barnard and Pennewill, and may under the prayer for other and further relief be entitled to such as is consistent with the case as made by the pleadings and evidence. It is to be presumed that, if the company, Barnard and Pennewill had lived up to the agreement of December 19, 1911, and had secured the amendment of the charter contemplated in that agreement, in view of the fact that the complainant was recognized as general manager and devoted his attention to the business of the company, one-third of \$150,000 of common stock would have been placed in escrow, the dividends on which, pursuant to the agreement, were to be received and enjoyed by the complainant. Such a presumption is not strained but reasonable and founded upon a reasonable probability. The securing of the contemplated amendment would not have destroyed the identity of the company. Its management would have remained unaffected. It is true that the agreement of December 19, 1911, in referring to the company after the amendment to its charter should have been secured, used the phrase "the new or re-organized company." This on the face of the agreement was a misnomer. The amendment of the certificate of incorporation of the company March 27, 1913, did not change its identity. And equally a change in the charter of the company in accordance with the agreement above referred to would have been without effect so far as affecting the identity of the company is concerned. So, if the company, Barnard and Pennewill had lived up to the agreement of December 19, 1911, as modified July 25, 1912, the complainant would equally have been entitled to receive and would have received a dividend or dividends on one-third of \$150,000 of common stock held in escrow for the debts of the company for the year 1912, as shown on the last day of that year, were either paid or should have been paid, as the company that year had net profits amounting to at least a sum in excess of \$11,000, after payment of all salaries. If the company did not pay the debts for that year as so shown a fraud or wrong was thereby committed against the complainant of which the company cannot take advantage.

[22] It is urged on the part of the defendants that the agreement of December 19, 1911, lacked mutuality of consideration, and, therefore, no relief can be obtained in this suit by the complainant. This objection is, I think, without force, for more than one reason. Fraud by which one is damaged is a substantive ground of action both in equity and at law, on general principles, aside from the technical rules applying to contractual relations where the element of fraud is absent. The signing of the agreement of December 19, 1911, by Barnard and Pennewill, in conjunction with the complainant, amounted in law to a representation of fact by them, namely, that they had at the time an intention to do what they said they would do, and such intention on their part not existing, as has been shown, they were guilty of a false representation of fact. *Rogers v. Virginia-Carolina Chemical Co.*, 149 Fed. 1, 78 C. C. A. 615; *Edginton v. Fitzmaurice*, 29 L. R. Ch. Div. 459; *Johnson v. Monell*, *41 N. Y. 655; *Stewart v. Emerson*, 52 N. H. 301; *Ayres v. French*, 41 Conn. 142; *Laing v. McKee*, 13 Mich. 124, 87 Am. Dec. 738. In the first named case the circuit court of appeals for the third circuit said:

"There is a prima facie presumption of fairness and honesty in the dealings of mankind, and, where one man makes a promise to another as an inducement for a change of position or other action on the part of the latter, he, if not expressly, impliedly avers that he has an existing intent to fulfil his promise, and such implied averment of existing intent is of matter of fact and, if false and fraudulent, is a fraudulent representation, which may or may not, according to circumstances, furnish the basis for an action ex delicto."

[23] I am satisfied that this suit is maintainable on the broad ground of the fraud and wrongdoing of the company, Barnard and Pennewill, relative to the agreement of December 19, 1911, and to that agreement as modified July 25, 1912. Further, whatever view might be taken, in the absence of fraud, as to the presence of mutuality of consideration as disclosed on the face of the original agreement, that agreement as modified is not justly liable to criticism on that ground. The complainant had been working for the company for six months prior to the making of the modification. The modification recognized the validity of the original agreement under which the company had been acting in the payment of salary and other respects. It dispensed with the provision for preferred stock, and provided that on payment of the debts of the company for 1912 its common stock should be increased from \$100,000 to \$150,000, to be equally shared by Barnard, Pennewill and the complainant; "the stock of H. L. W.," if the net profits did not equal \$45,000 a year, to be placed in escrow according to the original agreement "until earnings do reach same." The modification recognized that the status of the complainant was such as to entitle him to dividends on stock in escrow after the debts of the company for 1912 should be paid, and, further, to the stock which should have been placed in escrow as soon as he should bring the net earnings of the company up to \$45,000 a year prior to January 1, 1922. The services rendered or to be rendered by the complainant to the company constituted ample consideration to support in his favor the agreement as modified.

[24] Although the agreement of December 19, 1911, as modified, contemplated the placing of \$50,000 of the common stock in escrow, that sum cannot equitably furnish the basis for the ascertainment of the amount which should be paid to the complainant if he be entitled to damages measured by the amount of dividends. The capital stock of the company until its charter was amended March 27, 1913, was \$100,000. By that amendment it was increased to \$200,000, consisting exclusively of common stock. Libby, McNeil & Libby through its representatives subscribed for \$100,000 of this stock. The residue of the stock, namely, \$100,000, represented the amount of the original stock of the company, and one-third of that amount, or \$33,333.33, must be taken as the basis for the computation of dividends measuring the amount of damages to which the complainant may be entitled, that sum being one-third of the par value of the stock owned by Ellison, Pennewill, Mrs. Pennewill and Barnard prior to the acquisition by Libby, McNeil & Libby of an interest in the company.

Shortly after the opening of the trial, the complainant being on the stand, objection was made to "his assuming to testify to any conver-

sation between him and Mr. Barnard" on the ground that "Mr. Barnard's estate is a defendant in this suit, and under the statute in this state the witness being the complainant cannot testify to any transactions with the deceased." Barnard died September 1, 1914. The court sustained the objection in so far as Barnard's estate was concerned, but overruled it in so far as it applied to the company. No objection was made that under no circumstances could a statement by Barnard be admissible against the company, but that, not being admissible against Barnard's estate, the evidential value of the proposed testimony could not be separated,—that it could not "be applicable to one phase of the case without being applicable to another phase of the case." By the act of Congress of June 29, 1906, c. 3608, 34 Stat. 618 (Comp. St. 1916, § 1464), section 858 of the revised statutes was amended to read as follows:

"Sec. 858. 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."

The law of Delaware on this subject is found in section 4212 of the code of 1915, as follows:

"No person shall be incompetent to testify in any civil action or proceeding whether at law or in equity, because he is a party to the record or interested in the event of the suit, or matter to be determined: Provided, that in actions or proceedings by or against executors, administrators or guardians in which judgment or decree may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate or ward, unless called to testify thereto by the opposite party."

In order to render a party incompetent under this provision to testify it is necessary not only that the suit be an action or proceeding by or against an executor, administrator or guardian, in which judgment or decree may be rendered for or against him, but also that the proposed testimony relate to a "transaction with or statement by the testator, intestate or ward." This provision has received judicial construction in the state tribunals. In *Krause v. Emmons*, reported in 97 Atl. 238, the supreme court of Delaware said:

"It clearly appears from our statute that in actions by or against executors, etc., the parties are *not disqualified from testifying in their own behalf, but are disqualified only from giving testimony concerning any transaction with or statement by the testator, etc., unless they are called to testify by the opposite party.* The purpose of the legislatures in passing statutes of this kind is equality. In this state the intention was to prevent both parties, unless called as a witness by the opposite party, giving testimony of transactions with or statements by the deceased, concerning which the deceased, if living, could of his own knowledge contradict, corroborate or explain. So much depends upon the particular facts in each case, that it would practically be impossible to define the word 'transaction,' as used in the proviso, in terms sufficiently comprehensive so as to include all facts which would be considered a transaction, and at the same time exclude all facts which would not be a transaction within the meaning of the act. In general terms a transaction, within the terms of the statute, may be said to be an occurrence or action to which both decedent and the other party had knowledge, and to which the decedent if living would be equally qualified to testify with the other party."

[25] This court did not permit the complainant to testify as to any transaction with or statement by Barnard for the purpose of securing in this suit a decree against his estate, but expressly declined to do so. Any such testimony given by the complainant is valueless and has been disregarded for that purpose, and no decree can properly be rendered against that estate unless the complainant has established a demand against it by evidence wholly aside from his own testimony as to such transactions with or statements by Barnard. But testimony given by him as to transactions with or statements by Barnard in his official capacity as representing the company, for the purpose of securing a decree against it, is on a different footing. The only point remaining open for consideration in this immediate connection is whether, on the assumption that Barnard's estate at the time of the trial included capital stock in the company, a decree against the company for the payment of money to the complainant would, within the meaning of the Delaware statute, constitute a decree rendered against the executrix. If so, no decree could be rendered against the company unless the complainant should have established a demand against it by evidence wholly aside from his own testimony as to transactions with or statements by Barnard. But even on the above assumption as to stock ownership, a decree against the company would not be a decree against the executrix within the meaning of the statute. *Potter v. National Bank*, 102 U. S. 163, 26 L. Ed. 111; *Snyder v. Fiedler*, 139 U. S. 478, 11 Sup. Ct. 583, 35 L. Ed. 218. In both these cases the court had under consideration section 858, as then existing, of the U. S. revised statutes, which in all points material to the present case was similar to the Delaware statute. In the former case the court said:

"The existing statute (Rev. Stat. Sect. 858) seems too plain to require construction. The first clause of that section shows that there was in the mind of Congress two classes of witnesses,—those who were parties to the issue, that is, parties to the record; and those interested in the issue to be tried, that is, those who, although not parties to the record, held such relations to the issue that they would lose or gain by the direct legal operation and effect of the judgment. A witness may be interested in the issue without being a party thereto,—a distinction which seems to have been recognized in all the statutes to which reference has been made. But whether a party to or only interested in the issue, the witness is not to be excluded in the courts of the United States, upon either ground, except that in actions in which judgment may be rendered for or against an executor, administrator, or guardian, no party to the action can testify against the other as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. The proviso of Sect. 858 excludes only one of the classes described in its first clause,—those who are, technically, parties to the issue to be tried,—and we are not at liberty to suppose that Congress intended the word 'party,' as used in that proviso, to include both those who, according to the established rules of pleading and evidence, are parties to the issue, and those who, not being parties, have an interest in the result of that issue."

Under section 858, as then existing, a witness could not be excluded "because he is a party to or interested in the issue tried." Under the Delaware statute he is not to be excluded "because he is a party

to the record or interested in the event of the suit or matter to be determined." In substance these quoted provisions are the same, and the reasoning of the Supreme Court applies in full force to the Delaware statute. The evidence however, oral and documentary, especially the latter, satisfactorily establishes, wholly aside from any testimony given by the complainant as to Barnard's statements, fraud and wrongdoing on the part of the latter.

It appears that only one dividend was paid or declared after January 1, 1912, and before the bringing of this suit. That dividend, amounting to 20% on the \$200,000 capital stock of the company was payable November 28, 1914. For the reasons hereinbefore given the complainant must be held entitled to receive primarily from the company by way of damages 20% on \$33,333.33, being one-third of the \$100,000 of capital stock other than that acquired pursuant to the negotiations with Libby, McNeil & Libby, such percentage amounting to \$6,666.66, on which interest at the rate of 6% per annum is to be computed from November 28, 1914; also one-sixth of the amount of any further dividend or dividends heretofore declared or hereafter to be declared and which has or have become payable or shall become payable prior to the making of the final decree in this cause, together with interest thereon at the said rate to be computed from the time or times respectively when such dividend or dividends, if any, became or shall become payable; also his instalments of salary for January and February, 1913, each amounting to \$416.66, aggregating \$833.32, together with interest at the rate aforesaid, computed on one-half of said amount from February 1, 1913, and on the residue thereof from March 1, 1913; also the sum of \$1,400 reserved from his salary for 1912, as hereinbefore mentioned, with interest thereon at the rate aforesaid from January 1, 1913, and also damages representing the net pecuniary loss sustained by the complainant from being wrongfully deprived through the fraud of the defendants of the opportunity of receiving the specified salary of \$5,000 a year from the time to which it was paid as aforesaid until January 1, 1922; such net pecuniary loss to be ascertained in the light of the circumstances of the case, including probabilities of life, the complainant's earning capacity, and the extent to which he has offset or had the opportunity of offsetting or may reasonably be expected to offset his loss with respect to the non-receipt of the specified salary, to the end that just and equitable compensation, and no more, may be made him for the wrong he has suffered. *Semet-Solway Co. v. Wilcox*, 143 Fed. 839, 74 C. C. A. 635. I fear the measure of relief accorded to the complainant is not commensurate with the damage he has suffered from the wrong done to him, but I have been unable to discover any ground on which consistently with the principles controlling the presumption of damage or loss of gain as against wrongdoers more extensive relief can be given.

The case must be referred to a master for an accounting and ascertainment of damages the complainant may be entitled to receive aside from the items specifically mentioned in this opinion.

A decree in accordance with this opinion may be prepared and submitted.

THE CITY OF NORFOLK.

THE HAWKHEAD.

(District Court, E. D. Virginia. December 21, 1917.)

1. COLLISION ⇄69—ANCHORING IN CHANNEL.

A large and heavily laden ocean-going steamship, which had left her pier and started down the Elizabeth river for the sea in the evening, *held* not in fault for anchoring in the eastern side of the channel when she encountered a thick fog, which in the opinion of both her local pilot and her master rendered it dangerous to proceed; there being at least 200 feet between her and the west side of the 30-foot channel, which was ample depth for such vessels as were navigating the river at the time; the pilot being given reasonable discretion in such matter by Code Va. 1904, § 1965, as amended by Acts Va. 1908, c. 120.

2. COLLISION ⇄82(1)—MOVING AND ANCHORED VESSELS—EXCESSIVE SPEED IN Fog.

A steamer passing down the Elizabeth river in the evening in a dense fog, because of excessive speed and the negligence of her lookout, *held* solely in fault for collision with a steamship, which had anchored at one side of the channel because of the fog and was regularly sounding her fog bell, which was heard on the moving steamer at a distance of half a mile, and showing proper lights, which were seen when 200 feet away.

In Admiralty. Suit and cross-suit for collision between the steamships City of Norfolk and Hawkhead. Decree in favor of the Hawkhead.

Hughes & Vandeventer, of Norfolk, Va., for the City of Norfolk.
Hughes, Little & Seawell, of Norfolk, Va., for the Hawkhead.

WADDILL, District Judge. This proceeding involves a collision between the steamship City of Norfolk and the British steamship Hawkhead, which occurred in the Elizabeth river, between Boush Bluff and the Virginian Railway piers at Sewell's Point, on the evening of October 6, 1916, at 6 minutes after 7 o'clock. The City of Norfolk was a passenger and freight steamer of the Chesapeake Line, 297 feet 5 inches long, 46 feet beam, and 16 feet 2 inches deep; and the Hawkhead, a large British steamship, of 4,622 tons gross, 385 feet long, 56 feet 6 inches beam, and 26 feet 5 inches deep.

The case of the City of Norfolk is that on the evening in question she left Norfolk en route for Baltimore, and while proceeding down the Elizabeth river, between Craney Island Light and Boush Bluff Lightship, she encountered fog, and thereupon rang down to half speed, and sounded her fog signals at regular and lawful intervals. The fog becoming denser, she slowed down, and proceeded thence with only sufficient speed to keep her steerage way. Her navigators at the time could see the gas buoys on the port hand of the channel. The fog becoming thicker, her engines were stopped, and she drifted with the ebb tide under a little headway, and, whilst so navigating, a steamship, which afterwards proved to be the Hawkhead, was observed and reported close aboard, directly ahead, at anchor, and with which the City

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

of Norfolk collided, striking her on the starboard side aft of amidships. The collision occurred in the Boush Bluff Channel, a little below Gas Buoy 12a, and to the westward of mid-channel.

The Hawkhead's case, briefly, is that she left Lambert's Point pier about 5:30 that evening, in charge of a Virginia pilot, bound for sea, and about 6 o'clock ran into a thick fog and came to anchor at high water, on a 15-fathom chain, in the vicinity of Gas Buoy 12a, on the eastern side of the channel, partly within and partly without the same, and, with the turn of the tide, tailed slightly down the river, and across the channel; that, when she came to anchor at the place named, the fog had become so dense that in the estimation of her pilot, in which the ship's master concurred, it was impracticable either to return to Lambert's Point or to proceed to the anchorage grounds by and below Sewell's Point, and, indeed, to navigate at all. She at once set up her regulation anchor lights, fore and aft, which were burning brightly both before and after the collision, properly stationed her anchor watch, and fog signals were duly sounded. After coming to anchor, the chief officer and lookout remained on the forecastle head, and the master, third officer, and the Virginia pilot were on the bridge. While thus at rest, shortly after 7 o'clock, she heard several fog signals from a steamer under way, coming down the river, and almost immediately the City of Norfolk, approaching at a high rate of speed, loomed up about four points on the Hawkhead's starboard bow, showing her starboard and masthead lights, and swung into the starboard side of the Hawkhead abaft the beam.

Both vessels make charges of negligence one against the other; the City of Norfolk that the Hawkhead was unlawfully anchored in a narrow channel in thick weather, that she let herself so drift as to almost entirely obstruct the channel, and, being in this condition, failed to have properly set and burning her lawful lights, or to sound lawful and proper fog signals, and also failed to give signals indicating her presence in the channel, and failed to maintain an efficient watch.

The Hawkhead charges negligence on the part of the City of Norfolk in attempting to navigate in a thick fog; for proceeding at an unsafe speed; for failing to keep a sufficient and proper lookout, and to keep out of the way of the Hawkhead, a vessel at anchor; and likewise for not having a competent officer in charge of her navigation; also for reversing her engines when close aboard the Hawkhead, causing the City of Norfolk's bow to sheer to starboard, and collide with the Hawkhead.

From this statement of the case, and the averments of negligence by the parties one against the other, it will be necessary for the court to determine, first, whether the Hawkhead was lawfully anchored within the channel; and, secondly, if so, whose negligence brought about the collision.

The first question is largely one of law. The second depends upon a full consideration of the testimony, as to which there is a sharp conflict, especially as regards the navigation of the City of Norfolk at and about the time of the collision, and whether the Hawkhead had and maintained proper anchor lights, and was giving the proper fog signals.

[1] First. Considering the question of the anchorage of the Hawkhead, the court's conclusion is that she had the right to anchor where she did. She would undoubtedly have had such right, day or night, in the absence of fog; it having been determined in this district, since the passage of the act of March 3, 1899, that it was not the purpose of said act to forbid anchoring in navigable waters, except only at such places as would necessarily prevent the passage of other vessels, or so obstruct their passing as to make the effort so to do a dangerous maneuver, and that vessels anchoring in the channel, where, notwithstanding such anchorage, other vessels, navigating with the care the situation required, could safely pass, neither violated the statute, nor rendered themselves liable, under the general rules applicable to navigation, although to some extent such channel might be obstructed. *The Caldys*, 153 Fed. 837, 83 C. C. A. 19; *The Strathleven*, 213 Fed. 975, 977, 130 C. C. A. 381. It will hardly be seriously contended, if it became necessary for a vessel to come to anchor in a fog, that she would have less rights respecting a place of anchorage than at other times, provided proper lights were set and burning, and appropriate fog signals given. At the place in question the 35-foot deep water channel was 400 feet wide, and the 30-foot channel 600 feet wide; and the consensus of the testimony was that certainly as much as from 75 to 100 feet of the deep water or 35-foot channel, on its westward side, was open, and the 30-foot channel extended considerably more than 100 feet to the westward of the line of the deep water channel at the scene of the collision. Other shipping passed to and fro along the western edge of the deep water channel, two vessels abreast in one instance, and large ships passed in the 30-foot portion of the channel to the westward of the deep water channel, none of them being in any manner affected by the presence of the Hawkhead; in fact, there was ample depth of water for all of the vessels passing up and down the harbor, at about the time of the collision, for the space of at least 200 feet, and perhaps 250 feet, away from the stern of the Hawkhead.

The Hawkhead was a large and heavily laden ocean-going ship, and, encountering dense fog, attempted to return to the anchorage grounds at Lambert's Point, and, in the judgment of her pilot, found it dangerous to do so, or to continue her navigation down the river by the Virginian Railway piers, and across the channel to the anchorage grounds some mile and a half below. Thereupon her navigators, as a matter of safety, concluded to anchor to the eastern side of the channel, a distance of some mile or more above, and south of the Sewell's Point pier. The ship was of deep draft, in a busy harbor, at an hour for the passage of much shipping, and she could have proceeded with safety, if at all, only by the exercise of the utmost prudence, and it was undoubtedly the wiser course to anchor while she could do so, without danger to herself or other vessels navigating with care. In the opinion of the court, under the existing conditions, she was warranted in coming to anchor when and where she did, and there was no danger reasonably to be anticipated from her so doing, to other vessels themselves conforming to the rules of navigation in a fog. Undoubtedly, if the Hawkhead alone came to anchor in a fog, and other shipping proceeded

regardless of its existence, then necessarily a dangerous condition would arise, but one for which she would not be responsible. Moreover, the Hawkhead was in charge of a licensed pilot, in whom was vested discretion as to the ship's movements, and on the occasion in question, both his judgment and that of the experienced master of the ship concurred in what was the safe course to adopt, in the position in which they found themselves; and the court sees no reason why the ship should be held liable for the exercise of this discretionary act on their part. Code Va., § 1965, as amended by Acts 1908, p. 147, is as follows:

"Sec. 1965. *What Vessels to Take Pilots and Where.*—The master of every vessel, other than vessels exclusively engaged in the coastwise trade and those made exempt by United States statutes, inward bound from sea, shall take the first Virginia pilot that offers his services, Cape Henry bearing west of south, to Smith's Point, Yorktown, Newport News, or Norfolk, or any intermediate point; and any such vessel, outward bound, shall take the first Virginia pilot that offers his services at Smith's Point, Yorktown, Newport News, or Norfolk, or any intermediate point to sea; and any master refusing to do so shall immediately pay to the said pilot full pilotage from the sea to Newport News, Smith's Point, Yorktown, or Norfolk, or from said ports to the sea, as the case may be; * * * provided further, that after a licensed Virginia pilot shall have offered his services to any vessel subject to the provisions of this chapter (or whose services shall have been voluntarily required), such pilot shall have full discretion as to when such vessel shall be piloted to or from sea or to or from any port or place within the state, and shall not be interfered with by the master or any other person, but such pilot's discretion shall be exercised in a reasonable way, with a view to the vessel's safety."

See Revised Statutes, § 4235 (Comp. St. 1916, § 7981); *Steamship v. Joliffe*, 2 Wall. 459, 460, 17 L. Ed. 805; *Atlee v. Steam Packet Co.*, 21 Wall. 389, 22 L. Ed. 619; *The A. P. Skidmore*, 115 Fed. 791, 53 C. C. A. 287; *The Newburgh*, 130 Fed. 331, 64 C. C. A. 567.

[2] Second. This brings us to the consideration of the City of Norfolk's navigation at the time of the collision, and whether the Hawkhead, after coming to anchor, properly observed the rules of navigation prescribed for vessels at anchor. As to each of these questions, there is a sharp conflict in the testimony. There was an unusual number of witnesses examined, particularly from passing vessels, some three or more steamers having passed up, and a like number down, the harbor, during the existence of the fog, and shortly before and about the time of the collision; and there is a unanimity of opinion as to the presence of a heavy fog extending from below Thimble Light to a point between Boush Bluff and Craney Island Light, and of unusual density about the scene, and at the time of the collision; and the court could but be impressed with the fact that, with the exception of the Hawkhead, but little time was lost by moving shipping as a result of the fog. It is true, none of the steamers admitted violating any rule of navigation regarding their speed and movements; still the loss of time during the presence of the fog, and certainly the inconvenience to shipping, and delay consequent upon the prevalence of thick weather, was not very apparent. The inward bound vessels, in several instances, took occasion to hail those going out, and admonished them of the

presence of the anchored ship, but for which, most probably, some steamer thus fortunately warned would have shared the fate of the City of Norfolk,

The City of Norfolk insists that she was in all respects complying with the law and rules of navigation, and that she had reversed her engines, and was merely drifting with the tide, when the two ships came together, having no more headway than was sufficient to control her movement. This statement is directly contradicted by the Hawkhead, and the conflict with respect thereto is sharply drawn. The court is convinced that the testimony does not support the City of Norfolk's contention as to her speed. The collision would not have occurred, had she been navigating as insisted upon by her; and certainly, with a stationary vessel, no such result would have followed as took place. It could have been easily avoided by proper navigation, after the presence of the Hawkhead was or should have been discovered. The weather was calm, and there was nothing in existing conditions to have prevented the two vessels from observing each other, and the moving vessel from clearing the anchored vessel.

A careful consideration of all the testimony, specially that of the navigating officers of the City of Norfolk, and the passenger thereon, himself an experienced pilot, indisputably shows that the fog bell of the Hawkhead was heard on the City of Norfolk at a distance of certainly half a mile, and that the lights of the Hawkhead were observed at least 200 feet away. It is true the navigators of the City of Norfolk insist that the bell they heard was not from the Hawkhead, but that will not do. It was undoubtedly from that vessel, as testified to by the disinterested witness on the City of Norfolk, and no other bells have been shown to have been ringing in the immediate location of the collision. Besides, hearing a bell ahead was sufficient to warn those navigating the City of Norfolk to avoid colliding with the vessel from which the sound proceeded. It gave warning of the presence of a vessel at anchor, as a moving vessel should have been sounding a prolonged blast of its whistle in fog. In the latter case, so high a degree of care was not required, since to some extent the vessel could escape danger, as it might be moving away, unless the whistle indicated its approach; whereas, the bell gave notice of a stationary object in the water, one entirely helpless, save as protected from danger by navigators themselves respecting and observing the warnings afforded by her rules of navigation.

The mere presence of fog of the density then existing should have admonished and warned the City of Norfolk that in going down a narrow and much frequented channel, especially at that time of the evening, when incoming and outgoing local steamers were due to be passing, they should have proceeded, if at all, with the utmost care, and they had no right to anticipate that prudent navigators would not lay to, if necessary, or, if proceeding at all, would comply with the rules of navigation, and proceed at such a rate of speed, that they would be quickly overtaken by one not conforming to the requirements of the laws and regulations governing their speed. Rule XVI of the Navigation Laws is as follows:

"Every [steam] vessel shall, in a fog, mist, falling snow, or heavy rain-storms, go at a moderate speed, having careful regard to the existing circumstances and conditions. A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over." Comp. St. 1916, § 7854.

The light from the Hawkhead was seen certainly 200 feet away, and the loom of the ship about the same time; and had the City of Norfolk been proceeding only at the moderate speed required, having careful regard to the existing circumstances and conditions, she would have been afforded ample time to have avoided coming into collision with the stationary object.

From all the testimony, the court is convinced that the lookout on the City of Norfolk, was grossly negligent in not hearing and reporting the fog bell sounded from the Hawkhead earlier than he did, and that the City of Norfolk was proceeding at undue speed, in utter disregard of the law and regulations prescribed for the control of her movements in fog. Those on the Hawkhead so testified; one of the passengers on the City of Norfolk so affirmed; and the time taken to cover the distance from the vessel's entering the fog to the scene of the collision gives strong support to the claim. Had she not been so running, the reversing of her propeller would have thrown her head to starboard; and it is entirely clear that, with the Hawkhead at rest and the City of Norfolk proceeding as claimed by her, she would not have come into and cut through the steel plates and into the structural part of the Hawkhead, at the angle she did, for a distance of 5½ feet. Authorities to sustain the views herein expressed might be given almost without number, and only a few need be cited: *The Pennsylvania*, 19 Wall. 125, 22 L. Ed. 148; *The Colorado*, 91 U. S. 692, 23 L. Ed. 379; *The Nacoochee*, 137 U. S. 330, 11 Sup. Ct. 122, 34 L. Ed. 687; *The Umbria*, 166 U. S. 404, 417, 17 Sup. Ct. 610, 41 L. Ed. 1053; *The Bayonne*, 213 Fed. 216, 129 C. C. A. 560; *The Julia Lackenbach*—*The Indraguala* (D. C.) 219 Fed. 600, affirmed 239 Fed. 94, 152 C. C. A. 144; *The Otter*, Law Rep. 4 Ad. & Ec. 203, 206; *The Lancashire*, 4 Ad. & Ec. 198, 201.

Considering the conduct of the Hawkhead, after coming to anchor; that is, whether she had up and burning her proper anchor lights, and was sounding her proper regulation fog signal, the evidence in this respect seems conclusively to establish her contention, and to exonerate her from fault in the respects mentioned. Those testifying for the ship, including the pilot, sustain this view, and their testimony is entitled to much weight, as they were in the best position to know, see, and hear what took place; and besides, it is highly improbable that, under the circumstances in which the ship came to anchor, they would have omitted any of these usual and necessary precautions, required alike for the vessel's safety and their own protection. Moreover, the testimony from a number of witnesses, including some examined from the City of Norfolk, is to the effect that fog bells were heard, which the City of Norfolk attributes to other shipping anchored in the vicinity; but just why this should be done is not ap-

parent, as it is evident that the Hawkhead, whatever the others were doing, was sounding the regulation fog signals, which were heard, and that the collision ought not to have occurred, had those navigating the City of Norfolk been engaged in the proper navigation of their ship at and about the time of the collision.

It follows, from what has been said, that the collision resulted solely as a result of the negligence of the City of Norfolk, and a decree will be entered, on presentation, so ascertaining.

THE POWHATAN.

THE TELENA.

(District Court, E. D. Virginia. December 21, 1917.)

COLLISION \Leftrightarrow 39—STEAM VESSELS MEETING—FAULT.

A collision at night between the meeting steamships Powhatan and Telena in a 500-foot channel in lower Chesapeake Bay *held*, on the evidence, due solely to the fault of the Powhatan, outbound, in crossing the Telena's proper signal to pass port to port, and crossing from the south to the north side of the channel, where the collision occurred; also *held* that, conceding the claim of the Powhatan that, when half a mile ahead, the Telena was crossing the channel from the south side, she was still in fault under the rules for not stopping or keeping to the right, and that in no event was she justified in starboarding, as she admittedly did.

In Admiralty. Libel and cross-libel for collision between the steamships Powhatan and Telena, and petition for limitation of liability by the owners of the Powhatan. Decree in favor of the Telena.

Daniel H. Hayne, of Baltimore, Md., and Hughes, Little & Seawell, of Norfolk, Va., for the Powhatan.

Hughes & Vandeventer, of Norfolk, Va.; and R. S. Erskine and Kirlin, Woolsey & Hickok, all of New York City, for the Telena.

Lewis, Adler & Laws, of Philadelphia, Pa., and John W. Oast, Jr., of Norfolk, Va., for cargo owners and underwriters.

W. P. McBain, of Norfolk, Va., for petitioners Hall & Reiss.

Edward R. Baird, Jr., of Norfolk, Va., for A. Minto.

WADDILL, District Judge. This proceeding involves a collision that occurred about 8:24 p. m. on December 15, 1916, in the lower waters of Chesapeake Bay, a short distance southeast of Thimble Light.

The ships were large, ocean-going vessels—the Powhatan 310 feet long, 38 feet beam, one of the fleet of the Merchants' & Miners' Transportation Company, sailing between Norfolk, Va., and Boston, Mass., outward bound; and the Telena, a British tramp steamship, 375 feet 6 inches long, 48 feet beam, inward bound. The collision occurred in the deep water channel that extends from a point two miles south southeast of Thimble Light, for a distance of some 3½ miles, in a southeasterly direction of Cape Henry. The channel is 35 feet deep, 500 feet wide, and marked on its southern edge by can buoys lighted at night and its northern line by nun buoys. The collision took place in the vicinity

of buoy No. 8, on the north line of, or slightly to the northward of the north line of, the deep water cut. The ships were considerably damaged, the Powhatan beached, and she and her cargo proved largely a total loss.

The Telena's case is that she was proceeding, inward bound, along the northern edge of the cut channel, on her proper course, and, observing the Powhatan ahead on the opposite side of the channel about a mile away, she gave the usual passing signal of one whistle, indicating her intention to pass port to port, and that, when the vessels were within some three-quarters to a mile of each other, the Powhatan responded with two whistles, and abruptly crossed to the northern side of the channel, and over the Telena's course; that on seeing the maneuver the Telena, then running about eight knots an hour, hard-ported her wheel, and reversed her engines, and did everything possible to avert the disaster, but the two vessels came together, the Powhatan's starboard side, about amidship, striking the port bow of the Telena a glancing blow.

The Powhatan claims that, while navigating as aforesaid along the southern side of the channel, she observed the masthead light of the Telena, one-quarter to one-half a point, on her starboard, some $3\frac{1}{2}$ miles away, navigating apparently up and outside of the cut channel, and to the southward of the range lights that marked the southern side of the cut, on the inside of which the Powhatan was navigating; that she subsequently observed her range and green lights some mile and a half away, still a quarter to a half a point on her starboard bow, when she put her helm half a point to starboard, thereby allowing greater room to pass, and steadied; that the Telena was apparently coming still nearer to the lighted buoys, and the Powhatan's course, when suddenly she showed her red and green lights, being then a half to three-quarters of a mile away, and thereupon the Powhatan sounded two blasts of her whistle, indicating starboard to starboard, and put her helm hard astarboard; that the Telena responded with one whistle, indicating her purpose to pass port to port—that is, responded by giving crossing signals, when it was too late for the Powhatan to alter her course, and in these circumstances, the Telena being well under way to starboard, the Powhatan continued under a hard a port wheel, without slackening her speed of 14 knots an hour, until the collision, that maneuver being, in the judgment of the Powhatan's navigator, the surest way of escaping from the impending danger caused by the Telena's cutting across her course.

It will be readily observed that the contentions of the respective ships, as to how the collision was brought about and how they were navigating at and about the time of the collision, are directly at variance; and it is upon the correct solution of this apparently hopeless conflict that the merits of the case must be reached. The Telena's contention, briefly, is that upon meeting the Powhatan, while inward bound through the cut channel, in a situation that called for the vessels to pass port to port, she gave the accustomed signal of one blast, and the Powhatan responded with two blasts of her whistle, indicating her purpose to pass starboard to starboard, and without slackening her

speed, cut directly across the *Telena's* course, and ran into her. While the *Powhatan* says that she properly navigated through the cut channel, outward bound, and observing the *Telena* coming in, not in the channel at all, but on the outside of and to the south of it, bearing on the starboard bow of the *Powhatan*, that she sounded two whistles, indicating her purpose to pass starboard to starboard, and that the *Telena* responded by sounding one blast of the whistle, and immediately cut across her bow, at a time when it was too late to avert disaster.

That the collision should have occurred as claimed by either ship is most unusual. Navigators having regard alike for their own lives and those of their passengers, and the safety of the valuable property committed to their care and safe-keeping, rarely make such blunders, or are guilty of such gross negligence. *Haney v. Baltimore Steam Packet Co.*, 64 U. S. (23 How.) 287, 291; *The Lauretta Speddin*, 184 Fed. 283, 285; *The Surf*, 230 Fed. 485, 489. Improbable, however, as is the charge, it is evident in this case, where the vessels are making, in effect, the same accusations one against the other, that as to one of the two vessels the claim is substantially true. One or two undisputed facts in the case will largely solve the problem, and at least serve to throw much light on the controverted issue. The *Powhatan's* version of the *Telena's* course is predicated upon the fact that the latter ship navigated not in the cut channel, but on the outside of and to the southern or left side of it, which, aside from being improbable, is positively negated by the overwhelming preponderance of the testimony. The navigating officers of the *Telena*, namely, her master, third officer, quartermaster, lookout, and the Virginia pilot in charge of the ship's navigation, all either on her bridge or in positions to observe the ship's movements, testify directly to the contrary, and insist that she came in through the cut channel and along the northern or right-hand line thereof, and they further, one and all, testified to the fact of the *Powhatan's* course along the southern line of the channel, until she made a sudden departure across the *Telena's* course, after giving two whistles, indicating her purpose so to do. The *Powhatan* agrees with them as to where she was navigating, and that she cut across the channel, and over the course of the *Telena* to the northward, or to the north line of the channel, where the collision occurred.

The question in dispute is as to the cause of her crossing the channel—the *Powhatan's* claim being that she first sounded the two passing signals as the *Telena* showed her red and green lights, to which the *Telena* gave one blast in reply; whereas the latter ship insists that she first inaugurated the passing maneuver by giving one signal, to which the *Powhatan* improperly replied with two. Thus, as to those two most important matters, the *Powhatan's* course of navigation, and the fact of her starboarding sharply across the channel, and coming into collision with the *Telena*, the evidence is in harmony and full accord, leaving in dispute only the giving and hearing of signals, and the course of the *Telena*, whether along the northern side of the cut channel, or to the south of the southern line thereof. The five witnesses mentioned, from the *Telena*, swear positively to her course coming in,

and to the fact of her having inaugurated the passing signal, by sounding one blast of the whistle, and then receiving two blasts in reply; whereas only two witnesses from the Powhatan, her navigating officer and quartermaster, claim to have heard the one whistle from the Telena after the sounding of two by her, and as to her course to the southward of the channel. The Powhatan's master, who was on the inside of the ship and heard the two whistles sounded by her, testifies that he did not hear the single whistle; nor did Lieut. Carter, a naval officer on board the Powhatan as a passenger, examined as a witness by the Telena, and who heard the two whistles from the Powhatan hear the same, and neither of them testify as to the course of the Telena being on the south of the channel.

It is most significant that these experienced seamen, one the Powhatan's master and the other a naval officer traveling as a passenger upon her, did not hear the one blast signal from the Telena in reply to the two blasts from the Powhatan, if such single whistle was, in fact, given at that time. They were both on the inside of the Powhatan, and each, upon hearing the two blasts from her, an unusual signal, came out on deck quickly to ascertain its meaning, and each saw the Telena approaching, showing her red light, but neither heard the one signal, which they undoubtedly would have done, had the same been given, as claimed by the Powhatan; whereas, failure to hear the same, if given at the time the Telena's witnesses testify it was given, would not be surprising, as the two ships were then some distance apart, and they were on the inside of the vessel.

The court is not unmindful that the mere number of witnesses is not always a safe test to adopt in arriving at the true or real facts of a case. Here there are circumstances that strongly support those from the Telena. Her officers are manifestly more intelligent and experienced than those from the Powhatan. The master and third officer of the Telena were both officials of intelligence and long experience, each holding master's license, and the Virginia pilot, an experienced public officer. The quartermaster and lookout, while both Chinamen, were apparently well qualified, from long service at sea, to give an unbiased and correct account of what they saw and did; whereas, the only two witnesses called for the Powhatan, the third officer in charge of its navigation and the quartermaster, while doubtless of good meaning, were not persons who by their demeanor and manner on the stand, would impress themselves greatly upon others. The third officer had been at sea only seven years, held a second officer's license less than three years, and at the time of testifying was not engaged in navigation, but working for the Bethlehem Steel Company. The quartermaster was even less experienced—had been to sea only four years, acting as a sailor, waiter boy, and had been quartermaster three months, and at the time of testifying, was out of employment entirely. Evidence of witnesses of the caliber and limited experience of these two cannot carry with admiralty courts the weight that ought to be given to the testimony of persons that should be placed in such positions of responsibility. If shipowners are prejudiced as a result of these con-

ditions, they have only themselves to blame. *The Eagle Wing* (D. C.) 135 Fed. 826, 832, and cases cited.

Moreover, the Powhatan's failure to call witnesses cannot be lost sight of, especially her failure to produce the lookout, a most important witness of this occasion. Of the large number employed on ship-board, only the two above named were examined, and the chief engineer tendered for cross-examination. The master, while examined, was not in a position to give material testimony, save as to occurrences when the ships were within from two to three lengths of each other. It may be that the failure to produce the lookout was from no fault on the part of the Powhatan, but that will not relieve the owners from the misfortune of not having his testimony. The importance of his evidence was manifest, and his deposition should have been taken, if necessary, and at least, he should not have been allowed to go away, without making arrangements to be kept advised of his whereabouts. *The New York*, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126; *The Gladys* (D. C.) 135 Fed. 601; *The Georgetown* (D. C.) 135 Fed. 854.

The court is convinced, from the entire testimony, that the *Telena's* version of the happening of the collision, and not that of the Powhatan, is the correct one; that the *Telena* did not navigate to the southward of the buoys on the southern line of the cut channel, but on the northern line of the same, and that the case was one of passing port to port; that, the Powhatan being admittedly on the southern line of the channel, the one whistle given by the *Telena* was the proper signal to have been sounded in the circumstances, and that the same was properly given.

Assuming, however, the version of the Powhatan to be true, that the *Telena* navigated to the southward of the line of the buoys, it would not serve to relieve her from responsibility under the facts and circumstances of this case. She admits having observed the masthead light of the *Telena*, bearing a quarter to half a point on her starboard bow some three miles away. Subsequently, when a mile and a half away, she again observed her, showing her masthead and green lights, still bearing a quarter to half a point on her starboard bow, and when about a half a mile away the *Telena* showed her red as well as her green and white lights. The latter position, at a distance of half a mile, clearly made the case one of meeting head on, or nearly so, under article 18, rule 1, and not one of crossing, as contemplated by that rule and article 19. Had the Powhatan, from any cause, failed to understand the course and intention of the *Telena*, she should, under rule 111 of article 18, have immediately signified the same by giving several short blasts, not less than four, of her steam whistle. The only excuse that can be given for the Powhatan's navigation is that she considered it a crossing, and not a head-on, situation; and, having the *Telena* on her starboard, it was her duty to keep out of the way of the latter. Even in this view, however, it would not (article 22) have warranted the Powhatan in attempting to cross ahead of the *Telena*, and she should, on approaching the latter ship (article 18), if necessary, have slackened her speed, or stopped, or reversed, instead of attempting to cut ahead. Had these rules of navigation been observed, whether

treating the case as one of head-on or crossing, the collision would almost certainly have been avoided. Instead, however, of observing the same, the Powhatan, upon seeing the red light of the Telena half a mile away, put her wheel hard astarboard, throwing herself directly across the course of that ship, and continued at full speed ahead of 14 knots an hour. This maneuver, adopted by the Powhatan, was the one which, in the judgment of the court, would almost certainly insure the bringing about of the very consequence that followed.

Considering the action of the Powhatan in the most favorable view, it would not warrant her in ignoring all other rules of navigation, especially rule 111, art. 18, above, and the general prudential rule, article 27. There was no excuse, upon her own showing, for her to have navigated, save with regard to article 18, rule 1; that is, the situation of end on, or nearly so, and upon the Telena's showing up her red light, for her to have starboarded and gone to port, instead of under a hard aport wheel to starboard, immediately across the course of the incoming Telena, was inexcusable.

It follows, from what has been said, that the Powhatan is solely responsible for the collision, and a decree so ascertaining will be entered on presentation.

CHESTNUT RIDGE RY. CO. v. UNITED STATES (INTERSTATE COMMERCE COMMISSION, Intervener).

(District Court, D. New Jersey. December 24, 1917.)

No. 1640.

1. COMMERCE ⇐88—INTERSTATE COMMERCE COMMISSION—SUFFICIENCY OF ORDER AND FINDINGS.

The Chestnut Ridge Railway Company owns a short line of road in Pennsylvania, with a shorter branch at one terminus. While a common carrier, the entire stock of the company is owned by a zinc company, which operates a plant at either end of the branch line, and the principal part of the traffic over such line consists of shipments to and from these plants. This road also connects at each of these points with a different through line. With one of these lines and its connections the company joined in establishing joint class rates to and from points west of Buffalo, of which it received a divisional share. On complaint of the connecting road at the other end of its branch line, the Interstate Commerce Commission found that its share of the joint rate on car load lots was unreasonable, in that it involved an unlawful concession to the zinc company, amounting to rebates on shipments to and from its plant at the other end of the branch line, and the Commission made an order that "no division should be paid on such traffic" in excess of a prescribed amount per car, making its report and findings a part of the order. *Held* that, taken together, this constituted a validly constructed order, affecting the Chestnut Ridge Company and properly supported by findings.

2. COMMERCE ⇐85—INTERSTATE COMMERCE COMMISSION—POWERS.

Under Interstate Commerce Act Feb 4, 1887, c. 104, §§ 3, 15, 24 Stat. 380, 384 (Comp. St. 1916, §§ 8565, 8583), the Interstate Commerce Commission has power to institute and pursue an investigation concerning practices represented to be unduly preferential or prejudicial, even

though arising on a division of joint rates, and to stop such practices when found by an order that will prevent their continuance.

3. COMMERCE ⇨88—INTERSTATE COMMERCE COMMISSION—VALIDITY OF ORDER—MISTAKE OF LAW.

An order of the Interstate Commerce Commission, requiring a reduction in the divisional share of a railroad company in joint through class rates upon a finding that its share of such rates as established gave an undue preference to a shipper, amounting to rebates, *held* not invalid, as based on a mistake of law.

4. COMMERCE ⇨88—INTERSTATE COMMERCE COMMISSION—VALIDITY OF ORDER.

An order of the Interstate Commerce Commission, requiring a reduction in the divisional share of a railroad company in joint through class rates on carload lots, *held* not invalid, as arbitrarily made, because, while the established tariff fixed its share at a stated sum per 100 pounds, the order fixed a maximum sum per car, where its service rendered was almost entirely over a branch line only 1½ miles long.

5. COMMERCE ⇨88—INTERSTATE COMMERCE COMMISSION—VALIDITY OF ORDER—MISTAKE.

An order of the Interstate Commerce Commission, fixing the divisional share of joint through rates to which a railroad company was reasonably and lawfully entitled, by determining the cost of its service and adding thereto a percentage as profit, *held* invalid, as unsupported by the evidence, because of a mistake in the theory upon which it calculated an item of the cost of service.

6. COMMERCE ⇨96—INTERSTATE COMMERCE COMMISSION—REVIEW OF ORDER BY COURTS.

The courts have power and are required by the statute to set aside and enjoin the enforcement of an order of the Interstate Commerce Commission, based upon a finding which is unsupported by the evidence.

In Equity. Suit by the Chestnut Ridge Railway Company against the United States, in which the Interstate Commerce Commission intervened. Conditional decree for complainant.

William A. Glasgow, Jr., of Philadelphia, Pa., for complainant.

Joseph W. Folk, of St. Louis, Mo., and Albert L. Hopkins, of Washington, D. C., for Interstate Commerce Commission.

Charles F. Lynch, U. S. Atty., of Newark, N. J., for the United States.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges, and HAIGHT, District Judge.

WOOLLEY, Circuit Judge. The plaintiff brings this action by bill in equity, praying that an order of the Interstate Commerce Commission be annulled and its enforcement be enjoined. The matter in controversy before the Commission concerned the validity of a division of joint class rates agreed upon between the plaintiff and certain connecting carriers. The matter before us concerns the validity of the Commission's order, which, as it is alleged, was based upon a mistake of law and was arbitrarily made.

The plaintiff railway company (hereinafter called the Chestnut Ridge) operates a short industrial railroad. As its location, connections, and the general character of its business are fully set forth in reports made by the Commission in this and in a previous investigation (Chestnut Ridge Railway Class Rates Case, 41 Interst. Com.

Com'n R. 62; Chestnut Ridge Railway Case, 37 Interst. Com. Com'n R. 558), we shall limit our statement to those facts which bear directly on the matter in hand.

The railroad of the Chestnut Ridge consists of two lines, a main line and a branch line. The main line extends from Kunkletown, Pa., to Palmerton East, Pa., a distance of about 10 miles, and does a miscellaneous business. The branch line, known as Palmerton Branch, extends from its connection with the main line at Palmerton East to Palmerton (conveniently called Palmerton West), a distance of 1.49 miles.

The stock of the Chestnut Ridge is owned by the New Jersey Zinc Company, a corporation of New Jersey, which also owns the stock of the New Jersey Zinc Company, a corporation of Pennsylvania (hereinafter called the Zinc Company). The latter company has two plants located on the Palmerton Branch; one, the East Plant, at Palmerton East; the other, the West Plant, at Palmerton West. While carrying some general traffic, the principal traffic of the Palmerton Branch consists of the Zinc Company's freight shipped to and from other roads, and moved to and from its two plants. This traffic comprises about 93 per cent. of the traffic of both lines.

The Chestnut Ridge has two trunk line connections, one at Palmerton East with the Lehigh and New England Railroad Company (hereinafter called the New England), which in turn connects at Portland with the Delaware, Lackawanna & Western Railroad Company (hereinafter called the Lackawanna); the other at Palmerton West with the Central Railroad Company of New Jersey (hereinafter called the Central). Both connecting systems carry traffic, by connections, to points west of Buffalo. This is the traffic which has given rise to this controversy.

The Chestnut Ridge, though privately owned and operated chiefly in the service of the Zinc Company, is a common carrier. Chestnut Ridge Railway Case, 37 Interst. Com. Com'n R. 558; The Tap Line Cases, 234 U. S. 1, 34 Sup. Ct. 741, 58 L. Ed. 1185. Being a common carrier it is required to establish through routes and make joint rates with its connecting carriers, and is entitled to share in a division of such rates. Chestnut Ridge Railway Class Rates Case, 41 Interst. Com. Com'n R. 62; Act to Regulate Commerce, §§ 1, 15 (Comp. St. 1916, §§ 8563, 8583). To that end the Chestnut Ridge began negotiations with the New England and Lackawanna looking toward the establishment of through routes and joint rates for the transportation of property of *all classes*, from and to points on its line to and from points beyond Buffalo, reached by the New England, Lackawanna and their connections. As traffic is of two kinds, the negotiations embraced joint class rates applicable to miscellaneous high grade traffic, and joint commodity rates applicable to special low grade commodities moving in heavy volume. These negotiations culminated in agreements respecting one class of traffic, namely, *class rates traffic*. By these agreements "joint class rates" were established on west bound traffic from points on the Chestnut Ridge to points west of Buffalo (Supplement 34 of Freight Tariff I. C. C. 9400), and between points on the Lackawanna and points on the Chestnut Ridge (Freight Tariff

I. C. C. 13099). Pursuant thereto and in obedience to the act in that regard, the Lackawanna, with the concurrence of the Chestnut Ridge, filed with the Interstate Commerce Commission and published these two tariffs.

Corresponding with the Lackawanna and Chestnut Ridge tariffs for joint class rates on traffic bound west of Buffalo, carriers west of Buffalo issued tariffs for the same joint class rates on traffic originating west of Buffalo and destined to points on the Chestnut Ridge (Record 16, 17, 58, 59).

These tariffs were subsequently considered as "applying on class traffic moving to and from points west of Buffalo to and from points on the Chestnut Ridge." They embraced traffic in carload lots and in less than carload lots and showed the share of each connecting carrier in the division. As division of joint class rates for less than carload lots was not excepted to or condemned by the Commission, it is not involved in this controversy. The share of the Chestnut Ridge in the division of joint class rates for carload lots varied with the rates as applied to class traffic of different kinds, and was about 20¢ per ton.

Upon the publication of these tariffs, the Central, conceiving the proposed joint class rates to be inimical to its interest, filed a protest with the Commission; whereupon the Commission suspended the tariffs and instituted an investigation concerning the lawfulness of the rates and of their division. The inauguration of these proceedings halted negotiations between the Chestnut Ridge, the New England and Lackawanna as to joint rates *on all other traffic*. It does not appear that the Chestnut Ridge and its connecting carriers have ever agreed upon or published joint *commodity* rates for traffic either originating on or destined to the Chestnut Ridge. Therefore, as we read the record, the investigation and the order of the Commission, as well as the bill for injunction filed in this action, extend to and concern only *joint class rates*. This is a matter vital to one phase of the case presently to be considered.

The protest of the Central grew out of the location of the two plants of the Zinc Company at opposite ends of the short Palmerton Branch (the Zinc Company and the railway company having a common owner) and out of the fact that each plant was served directly by one trunk line and indirectly by another. The Central contended that normally each line would receive the traffic of the plant with which it directly connects, but that the large share in the division of joint class rates allowed the Chestnut Ridge by carriers connecting with the East Plant, would induce the Chestnut Ridge to draw from the West Plant traffic, which, but for the division, would be delivered to the Central, and would cause the Chestnut Ridge to move this traffic over its mile and half branch road to its easterly end for delivery to the New England and Lackawanna, in order to obtain its share in the division of rates which those carriers offered. Stated briefly the Central contended that the share of the division allowed the Chestnut Ridge was so large that it involved rebates to the Zinc Company, its principal shipper, and amounted practically to a purchase by the New England and Lackawanna of its entire class rates traffic.

The Commission found that the joint class rates were not in themselves unreasonable, but that the share awarded the Chestnut Ridge in the division was unreasonable and unlawful in that it involved an unlawful concession to the Zinc Company amounting to rebates. It thereupon heard testimony concerning the general character and volume of all business of the Chestnut Ridge, ascertained the cost of the service to which the joint class rates in controversy were applicable, and added thereto a profit of 6 per cent. per annum. The cost and profit being reduced to figures, the Commission ordered that no division should be given the Chestnut Ridge on the traffic to which joint class rates were applicable in excess of a given figure per car, which was \$3.25 per car on the Palmerton Branch, and \$4.50 per car on the main line. Applying the principle of the Central's protest to its own situation at the westerly end of the Palmerton Branch, the Commission directed that it also should not allow the Chestnut Ridge any division on joint class traffic exceeding the prescribed amount per car. As the joint class rates were found not unreasonable, the Commission vacated its previous order suspending them.

The effect of the order reducing the share of the Chestnut Ridge in the divisions was to reduce materially its income from traffic to which the joint class rates were applicable. It accordingly brought this action by bill for injunction, attacking the validity of the order upon several grounds. The action is resisted by the United States and the Interstate Commerce Commission (hereinafter referred to as the Government) likewise upon several grounds.

We shall briefly dispose of two preliminary questions raised, leaving the substantial matters for discussion.

[1] The Government moves to dismiss the bill on the ground that the Commission made no order by which to enforce its finding, and the Chestnut Ridge moves for injunction on the ground, *inter alia*, that the Commission made no finding upon which to base its order. Taken together, these opposing motions present the anomalous contention that the record of the Commission's investigation shows a finding without an order and an order without a finding. Of course one or the other of these contentions must be wrong. We think both are wrong.

The Government maintains very earnestly that the Commission made a finding that the share of the Chestnut Ridge in the division of rates involved rebates to the Zinc Company, but contends that the Commission made no order based thereon directed to the Chestnut Ridge, and consequently there is no order for this court to annul or enjoin. *American Sugar Refining Co. v. D., L. & W. R. R. Co.*, 207 Fed. 733, 740, 741, 125 C. C. A. 251. What the Commission did was to make a full report of its finding, and to conclude with the direction:

That "no division should be paid (the Chestnut Ridge) on such (joint class rates) traffic, regardless of its origin or destination, in excess of" given amounts per car according as movements are on the branch or main line, and that "these rates must not be divided, however, otherwise than in accordance with the conclusions herein expressed."

The Commission then, by express language, made its report a part of its order. Taken together, they constitute, to all intents and pur-

poses a validly constructed order to cease and desist from the unlawful practices found. We therefore deny the motion to dismiss.

As an injunctive remedy cannot be invoked against an order never made, the Chestnut Ridge insists just as earnestly that the Commission made an order, but maintains that it made no finding upon which to base it, and therefore, the order is invalid. As the Commission incorporated in its order its "report containing its findings of fact and conclusions thereon," and as this report shows very clearly and very certainly a finding that the share of the Chestnut Ridge in the division of rates was unlawful because large enough to make a discrimination in the form of rebates to the shipper, which was virtually the owner of the line, and to operate with unfair advantage to one carrier and undue prejudice to another, we think there is no merit in this position.

[2] Preliminarily to a discussion of the substantial questions raised in this case, we may say very briefly that there can be no question of the power of the Interstate Commerce Commission, as conferred by the Act to Regulate Commerce, sections 3 and 15 (Comp. St. 1916, §§ 8565, 8583), to institute and pursue an investigation concerning practices represented to be unduly preferential or prejudicial, even though arising on a division of joint rates. Nor can there be a question, since *The Tap Line Cases*, 234 U. S. 1, 34 Sup. Ct. 741, 58 L. Ed. 1185, *O'Keefe v. United States*, 240 U. S. 294, 36 Sup. Ct. 313, 60 L. Ed. 651, and *United States v. Butler County Railroad Co.*, 234 U. S. 29, 34 Sup. Ct. 748, 58 L. Ed. 1196, of the power of the Commission to stop such practices, when found, by an order that will prevent their continuance. In this regard the Supreme Court said in *The Tap Line Cases*, and again in the *O'Keefe Case*, that:

"It is doubtless true, as the Commission amply shows in its full report and supplemental report in these cases, that abuses exist in the conduct and practice of these lines and in their dealings with other carriers which have resulted in unfair advantages to the owners of some tap lines and to discriminations against the owners of others. Because we reach the conclusion that the tap lines involved in these appeals are common carriers, as well of proprietary as nonproprietary traffic, and as such entitled to participate in joint rates with other common carriers that determination falls far short of deciding, indeed does not at all decide, that the division of such joint rates may be made at the will of the carriers involved and without any power of the Commission to control. That body has the authority and it is its duty to reach all unlawful discriminatory practices resulting in favoritism and unfair advantages to particular shippers or carriers. It is not only within its power, but the law makes it the duty of the Commission to make orders which shall nullify such practices resulting in rebating or preferences, whatever form they take and in whatsoever guise they may appear. If the divisions of joint rates are such as to amount to rebates or discriminations in favor of the owners of the tap lines because of their disproportionate amount in view of the service rendered, it is within the province of the Commission to reduce the amount so that a tap line shall receive just compensation only for what it actually does."

The question in this case is: Whether in pursuing its investigation and in making an order intended to end the preferential and prejudicial practices found (under authority of the statute as construed in *The Tap Line Cases*) the Commission exceeded its power in two of the ways declared by the Supreme Court in *Interstate Commerce Com-*

mission v. Union Pacific R. R., 222 U. S. 541-547, 32 Sup. Ct. 108, 56 L. Ed. 308, to be beyond its power, in that (1) the Commission based its order upon a mistake of law, and (2) it acted arbitrarily in that it fixed divisions of joint rates contrary to evidence or without evidence to support it.

Mistake of Law.

[3] The plaintiff's contention that the Commission's order was based upon a mistake of law is presented in two aspects. The plaintiff first contends that the Commission computed an *average revenue* which it deemed to be fair for the railroad's *entire* traffic, and then, instead of fixing rates which would yield that average, forbade *all* divisions in excess of that average, without regard to the commodity carried.

We read the record differently. The Commission's investigation was directed to rebates alleged to be concealed in the division of rates to the Chestnut Ridge for one kind of service, namely, joint class rates service. If rebates were there, they were to be found in the profits to the Chestnut Ridge for that service. Profits in that service could be ascertained only after the cost of that service had been determined. Therefore, the Commission addressed itself to the *cost* of *one* kind of service, namely, joint *class* rates service, and not to the cost of service in moving traffic of *all* kinds. Nor did the Commission address its inquiry to revenue, average or otherwise, derived from the carrier's traffic, except to ascertain the element of cost for the service under investigation, which of course was embraced in that revenue. In ascertaining the cost of this particular service, the Commission had to hear evidence as to the general cost of operation and transportation, involving cost factors common to service of all kinds. These costs being commingled in the carrier's bookkeeping of revenues received and expended, the Commission inquired into them in order to divide and separate the cost of service of different kinds and then to select the cost items of joint class rates service and add them to the cost of that service. Assuming for the moment that the Commission's calculations were correctly made, both in theory and computation, the result was not a *revenue figure*, "which (the Commission) deemed to be fair for the railroad's *entire* traffic, and beyond which it could not go in *any* traffic," but was a figure covering simply the *cost* of one kind of service and a profit on that service, which together would be high enough to be remunerative and low enough to prevent further unlawful practices, leaving the carrier to make from other rates not investigated or considered, such as interstate joint commodity rates, intrastate class and commodity rates, and passenger rates, whatever they would earn. In doing this we do not find that the Commission acted under a mistaken conception of the law.

A further mistake of law upon which the Chestnut Ridge contends the Commission based its order, is found in the factor of profit which the Commission added to the ascertained cost of joint class rates service, in prescribing a lawful division. It maintains that the Commission fixed the profit on the theory, "That the mere earning of an industrial

railroad of more than six per cent. on its investment is, in itself, and without more, unlawful."

If in determining a lawful division involving a profit, the Commission acted upon such theory, there is substance in the plaintiff's contention. Certainly the Commission did not assert such a proposition in words. Let us see whether, by its acts, it enforced such a proposition in effect.

In the first place, the investigation of the Commission did not extend to the *general* earnings of the carrier on its varied traffic. With respect to such, no protest was filed, investigation instituted or order made. The Commission was not concerned even with the Chestnut Ridge's earnings on the particular class rates involved in the investigation, except to inquire and find whether they contained and concealed preferences and prejudices denounced by the law. It therefore began its investigation, not with the object of determining whether the profits of the carrier were unlawful because more than six per cent., but with the one object of determining whether the division of the joint class rates in question was unlawful because large enough to include rebates. In order to determine this, the Commission had to do several things. It had to do what the Supreme Court in *Pennsylvania R. R. Co. v. International Coal Co.*, 230 U. S. 180, 196, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315, said it should do, namely, make "a comparison of rate with service." In comparing the rates with the service it had to determine the value of the service in order to determine whether the rates charged for the service were beyond its value and involved rebates. It had to ascertain, therefore, the cost of the service, which it did in a way to be considered later. Having ascertained the cost of the service, the Commission sought to determine a profit on the service, which because of its several bearings comprises several elements. It was necessary that this profit should be fixed at a figure which would prevent further rebate practices and yet be not confiscatory, and, taken together with the cost, should be a figure, which, while remunerative, should not be so high as to establish a preference in its own favor, directly or indirectly, or a preference to one and a discrimination against the other of the trunk lines competing for its traffic. The Commission decided upon a profit of six per cent. over and above the total cost of the service. This percentage of profit was not fixed upon the theory that a profit beyond six per cent. is, "in itself, and without more," unlawful, but was fixed because "more" was considered in connection with a proper profit, namely, the character of the service on which the profit was to be earned, the cost of that service, the geographical and commercial location of the road, the volume and character of its business, its size, the common ownership of the road and traffic, and especially the line of profit above which rebates occur and below which they stop. Having ascertained all these factors, and having applied them to the practices under investigation, we cannot say that the Commission was guided by a mistaken notion of the law and acted arbitrarily in allowing six per cent. profit on divisions which it established to prevent a continuance of the preferences and prejudices which it found existed in previous divisions.

Arbitrary Fixation of Divisions.

[4] The joint class rates under investigation were so much per hundred pounds in carload lots, and the division agreed upon was for given proportions of the hundred pound rates. The Commission in its "order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto," under authority of the act, prescribed a flat sum *per car* as the proportion of the Chestnut Ridge in the division and left the other carriers to proportions *per hundred pounds*. This the Chestnut Ridge claims to be an arbitrary, and, therefore, an unlawful exercise of power. We are not impressed with this contention. The division of a joint rate per car, instead of per pounds, is none the less a division of the rate. The character of the service, being a matter bearing directly upon the rate, bears equally upon a division of the rate. The service involved was almost altogether over a branch 1.49 miles in length. It is conceivable that the Commission viewed this railroad as little more than a switch, and the service performed on it as little more than a switching service, for which charges are ordinarily allowed and paid per car and not per pound. While under this arrangement it is true, as complained by the Chestnut Ridge, that it gets no more for handling a car of 30,000 lbs. than for handling a car of 10,000 lbs., it is equally true that it gets as much for handling a car of the lighter load as it gets for handling a car of the heavier, as in ordinary switching service.

We do not think that the division of the joint rates in question, made on a per car basis, was arbitrarily made and was for that reason unlawful.

[5] The remaining ground of the contention that the order of the Commission is invalid because arbitrarily made, is an alleged mistake of method in calculating an item of cost of class rates service, known as per diem charges.

In approaching this phase of the case, we shall state again what we have found necessary to say several times in order that the true issue in this controversy may constantly be kept in mind. The Commission's investigation had to do with joint *class* rates; it had nothing to do with joint *commodity* rates. Primarily, therefore, its inquiry was directed to the *cost* of joint class rates service; it was at no time directed to the cost of joint commodity rates service. True, it touched the cost of commodity rates service when some cost item of that service was combined or commingled with a like cost item of class rates service in the accounts of the railroad, as cost of operation, maintenance of highway, depreciation, etc. But it dealt with such double accounts only to divide and separate the items of cost of the two services, and then laying aside costs chargeable to commodity service, it charged the ascertained items of cost on class rate service to that service.

Thus the Commission proceeded, until it ascertained what it thought was the total cost of joint class rates service. To that it added a profit. The sum was an amount which the Commission awarded the Chestnut Ridge as its share in the division of joint class rates, and was such a figure as the Commission conceived would prevent the continuance of its unlawful practices.

In reaching the total cost of joint class rate service, the Commission was required to deal with a factor of cost known as "per diem charges." This is a cost common to both commodity service and class rate service in the sense that it is present in both, but it is present in markedly different proportions, due to a difference in the character of the traffic creating such charges.

The Chestnut Ridge, though a common carrier, has no cars of its own. It carries on its business, therefore, in cars of other carriers. For these it makes payments in the nature of rentals; but these payments are fixed primarily by a flexible rule, and ultimately by a circumstance to be determined after foreign cars have arrived upon its road. This rule and determining circumstance are controlled by the character of the traffic transported.

The freight traffic of the Chestnut Ridge is of two kinds; traffic of low grade, moving in heavy volume, easily discharged, and involving no delay in returning cars, for which relatively low "commodity rates" are charged; and traffic of higher grade, consisting of miscellaneous articles requiring time to discharge and consequently involving delay to cars, for which higher "class rates" are charged. As the Chestnut Ridge moves its traffic of both kinds in cars of other roads, there is entered against each car so used, without regard to the character of the traffic or the rates, an initial charge of 45¢ per day. This is the rule, and items so charged are called "per diem charges."

The rule, however, is relaxed, if a car can be unloaded and returned on the first day of its use. On such a car no per diem is charged. Now a great number of cars moving in and out of the Chestnut Ridge are hopper cars carrying commodity traffic, and being capable of speedy discharge and return in one day, escape per diem charges altogether. Some cars carrying class rates traffic likewise move in and out in one day and escape the initial per diem charge. But class rates traffic is of a character that usually involves slow discharge and consequent delay, running sometimes into several days. It thus appears that while per diem charges are cost factors in both class rates service and commodity rates service, the former is burdened with a cost from which the latter is largely exempt because of the difference in the character of traffic moved in the two services. As the per diem item of cost is considerable or inconsiderable according to the service to which it is chargeable, the method by which the Commission should compute it, being important, became the subject of much discussion and confusion at the hearing.

What the Commission did was to divide the total per diem charges paid on both commodity and class rate traffic for a given period by the total number of cars engaged in *both* traffics, including those which did not pay as well as those which did pay per diem charges, resulting in a quotient of 70¢ per diem charges per car, and charged that sum as a cost of joint *class* rate service. The Commission's method of calculation was at variance with the method recommended by its Examiner, who, when taking testimony, conceived that the proper way to ascertain per diem charges as a cost per car of joint class rates service would be to divide the total per diem charges paid upon cars engaged in *both* traffics in a given period by the total number of cars in both

traffics *paying* per diem in that period (i. e. excluding from the divisor all cars which paid *no* per diem). By this calculation the quotient would be \$1.21 per diem charge per car. The Chestnut Ridge finds itself in accord with the Examiner and contends that his method is the correct one. We believe both methods to be wrong.

We shall first discuss the method for which the railroad contends. Some cars in *class rates* service *do not pay* per diem charges because they are discharged within the first day; *others do pay* per diem charges because not discharged until after the first day. *Class rates* apply to *all class cars*. They apply alike to those not paying as well as to those paying per diem charges. The inquiry of the Commission, however, was directed to the per diem cost chargeable to *all cars moving traffic* for which joint class rates are collected. This requires, as we see it, the ascertainment of an *average* per diem cost chargeable to *each car engaged* in the traffic to which joint class rates per car are applicable. And just here is the fault of the plaintiff's contention.

If the Commission had attempted, as the plaintiff insists it should have done, to ascertain the per diem cost of *class rates service per car* by dividing "the total per diem charges paid for the chosen year (which include charges paid upon both commodity and class rates traffic) by the number of cars *paying* per diem in that year (which includes cars moving both commodity and class rates traffic) i. e., excluding from the divisor cars (engaged in both commodity and class rates traffic) which paid *no* per diem," the Commission would have had in its problem a dividend, which included *commodity* per diem costs, into which it was not inquiring, a divisor, which included a variant *commodity* per diem cost factor, because different from and admittedly less than the per diem cost factor of class rates traffic, and a quotient, which could not conceivably have shown per diem cost per car on *class rates service alone*. If, however, we segregate the total per diem charges paid on commodity traffic and the total number of commodity traffic cars paying per diem charges, and eliminate them from the calculation, and apply the plaintiff's method to class rates traffic alone by dividing the total per diem charges paid on class rates traffic by the number of class rate cars *paying per diem*, i. e. excluding from the divisor, as before, class cars which paid *no* per diem, we have a quotient which is as clearly wrong as it is profitable to the railroad. Such a quotient would give only the per diem cost on class rate cars *paying* per diem charges and would not give a per diem factor of cost on class rate cars *not paying* per diem charges. Yet, *class rates* are the same on *all class cars* and apply equally to those which *do not pay* as to those which do pay per diem charges. When the per diem cost for class rate cars is based upon a calculation that includes only the cars which pay it, then, when class rates are applied to and collected from cars which do not pay it, what was an item of cost on the cars paying it becomes and is transformed into an item of profit on the cars not paying it. With *class rates* at a fixed and uniform level, any variation of *cost* of class rates service of two kinds (that paying and that not paying per diem charges) results in a variation of profit. When the level of *cost* of the *whole* class rates service is fixed by including a cost item *paid by only a fraction* of it, the remaining fraction, which is charged

with but escapes payment of that cost item, yields a profit in the exact amount of the cost item so charged and not paid. This, manifestly, should not be.

It is clear that the calculation which the Commission made, and upon which it based its order, is also wrong, for it places the per diem charge per car for class rates service as certainly below the proper cost per car for such service as the railroad, by its calculation, would place it above the proper cost. By its method the Commission "computed the per diem cost (per car) of the *class* traffic by dividing the total per diem charges (of both commodity and class rates service) by the total number of cars handled" in *both* commodity and class rates traffic, including cars which paid and cars which did not pay per diem charges. Keeping in mind that the purpose of the calculation was to find out the per diem cost per car on *class* rate traffic, it is quite evident that a calculation that has for its dividend per diem charges paid by *two* kinds of traffic in *different* proportions, and has for its divisor the whole number of cars used in *two* kinds of traffic, cannot produce a quotient which will give a correct cost factor of one kind of traffic only. We are therefore of opinion that the Commission based its order upon a mistake in calculation. Has this court power to declare invalid the order based upon that mistake?

[6] We fully recognize that findings by the Interstate Commerce Commission of what are reasonable rates and of what are lawful divisions of joint rates are administrative matters peculiarly within the jurisdiction of the Commission and are not reviewable by courts of law. The validity and finality of such findings, however, depend upon the presence of facts upon which they are based. The Supreme Court has declared that:

"A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law and must, in the language of the statute, 'be set aside by a court of competent jurisdiction.' 36 Stat. 551." *Pennsylvania R. R. Co. v. International Coal Co.*, 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315; *Interstate Commerce Commission v. Louisville R. R. Co.*, 227 U. S. 88, 91, 33 Sup. Ct. 185, 57 L. Ed. 431; *Interstate Commerce Commission v. Delaware, etc., Ry. Co.*, 220 U. S. 235, 251, 31 Sup. Ct. 392, 55 L. Ed. 448; *Florida East Coast Ry. Co. v. United States*, 234 U. S. 167, 185, 34 Sup. Ct. 867, 58 L. Ed. 1267.

In applying this law to the case, we shall not for a moment assume the administrative function of the Commission and determine what is a proper division of the rates in controversy. We shall confine ourselves to our judicial function of determining whether the Commission's cost finding is contrary to evidence or is without evidence to support it, and whether, accordingly, the Commission's order based upon its finding is invalid. We find that the Commission made a mistake in the theory of its calculation for the reasons we have shown. We also find, that while there is enough evidence in the record to indicate the correct theory by which the result desired can be calculated, there is not in the record the requisite evidence with which to make a proper calculation.

There was no evidence produced showing the total per diem charges paid exclusively in class rates service for a given period and showing

also the total number of cars engaged in that service for the same period, upon which to base a calculation of per diem charges per car in joint class rates service. When both these numerals are ascertained by the production of proper evidence, then a division of the total per diem charges paid on joint class rates traffic by the number of cars engaged *in that traffic* (including those which do *not* pay as well as those which do pay per diem charges) will produce a quotient which will show the average and therefore the proper per diem per car chargeable as a factor of cost to *all* cars moving joint class rates traffic for which joint class rates are equally charged and collected. We are of opinion that the order of the Commission is invalid and should be annulled.

This Court does not assume that it is vested with power to supervise the actions of the Interstate Commerce Commission, but it proposes, as a practical consideration, postponing the entry of a decree in this case for a period of ninety days from the filing of this opinion, to afford the Commission an opportunity, should it desire it, to rectify its mistake by such action as may be appropriate. If the Commission shall have taken no action within the period indicated, a decree will be entered upon the expiration of the period, annulling the order and enjoining its enforcement, leaving the opposing parties to their rights as of that date.

THE OGEECHEE.

(District Court, E. D. Pennsylvania. January 17, 1918.)

No. 40.

1. SHIPPING Ⓒ141(1)—DAMAGE TO CARGO—LIABILITY OF VESSEL.

Under a bill of lading providing that lighterage in discharging the cargo shall be at the "risk and expense of the cargo," any loss or damage suffered by the cargo during the lighterage without fault on the part of the ship must be borne by the cargo; but it does not relieve the ship from liability for such loss or damage through the culpable negligence of the ship or her owner.

2. SHIPPING Ⓒ126—DAMAGE TO CARGO—LIABILITY OF VESSEL.

Respondent steamship received a shipment of phosphate rock, to be delivered at libelant's wharf in Philadelphia. As the vessel could not reach the wharf, owing to insufficient depth of water, it was agreed that the cargo should be lightered, lighterage to be "at the risk and expense of the cargo." Libelant was to unload the lighters and be paid for the service. On arrival, the vessel employed two open or deck lighters, on which it discharged the cargo. The second lighter reached the wharf too late on Saturday to be unloaded that day, and during the delay the cargo, which was insufficiently protected, was damaged by rain. *Held*, that the carrier's responsibility did not end until proper delivery of the cargo on the wharf, and that in failing to provide lighters or coverings that would protect it from injury until that time it was culpably negligent, and was liable for the damage.

3. ADMIRALTY Ⓒ59—PLEADING.

To prevent surprise and promote the due administration of justice, parties are held in admiralty, as in other branches of jurisprudence, to the positions respectively taken by them in their pleadings.

In Admiralty. Suit by the General Manufacturing Company against the steamship Ogeechee. Decree for libelant.

J. Frank Staley and Lewis, Adler & Laws, all of Philadelphia, Pa., for libelant.

M. Hampton Todd, of Philadelphia, Pa., for respondent.

BRADFORD, District Judge. The General Manufacturing Company has libeled the steamship Ogeechee for the recovery of damages for injuries to a cargo of phosphate rock shipped on her at Tampa, Florida, for delivery in Philadelphia. It is admitted in the pleadings, among other things, that the libelant is engaged in the business of manufacturing phosphoric acid, fertilizers, and other products; that the Ogeechee is an American vessel hailing from the port of New York, and at the time thereafter mentioned was owned, chartered, operated or controlled by the Southern Steamship Company, engaged in the business of a common carrier for hire between Philadelphia and Tampa, and other southern ports; that the libelant on or about November 24, 1914, caused to be delivered to her at Tampa 996 gross tons of crude dry phosphate rock in good order and condition, to be conveyed by her as a common carrier to Philadelphia; that the Ogeechee accepted the shipment of phosphate rock as such common carrier, and by reason of the premises became liable and was bound to properly load, stow and care for the same, and make proper delivery thereof at Philadelphia to the libelant as the true and lawful owner thereof in the same good order and condition as received. The libel alleges that the Ogeechee, not regarding her duty as a common carrier, did not safely carry and deliver to the libelant at Philadelphia her cargo of phosphate rock in the same good order and condition as when received; but that when the cargo was delivered to the libelant a large portion of it was wet and greatly damaged, for which damage no compensation has been made. The respondent denies liability on the part of the Ogeechee and avers in substance, among other things, that it was agreed between the libelant and the respondent that upon the arrival of the Ogeechee at Philadelphia her cargo was to be unloaded from her and placed on lighters which were thereupon to be towed to the wharf of the libelant at Greenwich Point, Philadelphia, where the libelant was to unload the phosphate rock from the lighters to its wharf, and to be allowed for such unloading 18 cents per ton.

It appears that on or shortly after the arrival of the Ogeechee at Philadelphia at the beginning of December, 1914, she unloaded her cargo of 996 tons of phosphate rock to and upon the two lighters Howard and Belgrade, placing upon the Howard on Thursday, December 3, upwards of 500 tons, and the balance of her cargo upon the Belgrade on the next following day. The Howard with its load was on Friday, December 4, towed and tied to the libelant's wharf at Greenwich, where the phosphate rock was placed upon the wharf, the unloading of the Howard being completed about 4 p. m. on Saturday. The libelant makes no claim for damages with respect to the phosphate rock carried by the Howard. The Belgrade with its load reached the vicinity of the wharf about 11 a. m. Saturday, when the representative of the

libelant directed that the Belgrade be tied up alongside of the Howard which was being unloaded at the time. The unloading of the latter vessel having, as before stated, been completed about 4 p. m., it appears from the testimony of Ericsson, who at that time was in charge of the Belgrade, that he asked Haines, the libelant's superintendent, "Can't I pull my boat in after the Howard?" that Haines replied, "No, never mind. Maybe you might put it in there tomorrow, and be ready for Monday morning," and that he, Ericsson, then said, "That is all right." In fact the libelant did not proceed with the unloading of the Belgrade until Tuesday, December 8, and did not complete the same until the next following day, the load of phosphate rock having in the meantime been greatly damaged by rain.

[1] It is admitted that the Ogeechee was to make "proper delivery" of her cargo to the libelant at Philadelphia, but what would constitute such delivery was not expressly stated. The depth of water at the libelant's pier in Philadelphia not being sufficient to allow a vessel of the draft of the Ogeechee to unload her cargo directly on the pier, employment of lighters was necessary. By the agreement between the parties as disclosed by the bill of lading and the charter-party, it was provided that lighterage should be "at the risk and expense of the cargo." This provision contemplated that any loss or damage suffered by the cargo during the lighterage without fault on the part of the respondent should be borne by the cargo; but not that the steamship should be exempt from liability for such loss or damage to the cargo through culpable negligence of her owner. *The Seguranca* (D. C.) 68 Fed. 1014.

[2] For the purpose of having the cargo transferred from the Ogeechee to the libelant's wharf the respondent furnished the Howard and Belgrade. These vessels were not "house" or "hold" lighters, but "deck" lighters, unsuitable for the carriage of a "dry cargo," such as phosphate rock, in stormy or rainy weather, unless provided with sufficient tarpaulins or other waterproof covering properly arranged and adjusted about the cargo for its thorough protection against water. The libelant had no part in selecting or providing the lighters or furnishing or adjusting the tarpaulins over the phosphate rock placed upon them. All this was attended to by the respondent. And it appears from the evidence beyond all reasonable question that with respect to the Belgrade, to say nothing of the Howard, the tarpaulins intended for the protection of the deck load, amounting to about 450 tons, were insufficient and carelessly and improperly placed over and insecurely attached to the lighter. For any injury to the phosphate rock resulting prior to the completion of the contract of carriage, from these faults or from the negligent use of a deck lighter instead of a house or hold lighter, the Ogeechee should be held liable in damages. The cargo of phosphate rock was in good order and condition when shipped on the Ogeechee at Tampa, and it is not disputed that it was in good order and condition on and after its arrival at Philadelphia, and until after it was placed on the lighters. Whatever damage it suffered from rain occurred after that time. It appears from the weather report for Philadelphia that from midnight to midnight no rain fell on Friday, December 4, and that from midnight to

midnight there was a rain-fall on succeeding days as follows: Saturday, December 5, .33 of an inch, Sunday, December 6, .36 of an inch, Monday, December 7, 3.71 inches, Tuesday, December 8, .51 of an inch, and Wednesday, December 9, .08 of an inch.

Subject to the qualification that lighterage should be at the risk and expense of the cargo, the Ogeechee was bound, unless prevented by the specified dangers of the sea, not only for the carriage of the cargo from Tampa to Philadelphia, but for its delivery in good order and condition on libelant's wharf, in the absence of stipulation or settled usage to the contrary. The *Tangier*, 23 How. 28, 39, 16 L. Ed. 412. And what was thus required by the general law of shipping was in contemplation of the parties; for while the freight for the voyage was fixed at \$2.15 per ton of 2240 pounds, an allowance of 18 cents per ton was to be made to the libelant or owner of the cargo for unloading it, recognizing that the stipulated freight for the carriage of the cargo to Philadelphia included its delivery on the libelant's pier. This accords with the direct evidence on the point, the acting general manager of the libelant testifying to the effect that the freight to be paid the carrier, subject to an allowance or deduction for stevedoring, required delivery of the Ogeechee's cargo on the libelant's wharf. There is nothing in the provision that lighterage should be at the risk and expense of the cargo to relieve the respondent from liability for failure to deliver it in good order and condition on the wharf unless prevented from so doing by loss or damage during the lighterage not occurring through its fault. The respondent not only claims that it had completed its contract of carriage so far as the phosphate rock on the Belgrade is concerned when that vessel was made fast to the libelant's wharf, but contends that it was the duty of the libelant under the arrangement by which it was to be allowed 18 cents a ton for unloading the lighters, to unload the Belgrade promptly and take such other and further steps as should be necessary for the protection of its load of phosphate rock from loss or damage, and that having failed to discharge this duty the libelant is responsible for the damage subsequently resulting from rain. This contention, while plausible, I deem unsound. It appears that on Saturday afternoon at the time the above mentioned conversation between Ericsson and Haines occurred, rain was either falling or immediately impending. It was highly important to the libelant that the phosphate rock on the Belgrade should not be damaged by exposure to rain during the unloading. Nightfall was nearly at hand. It had taken from eight to nine hours to load the Belgrade and it was impossible to complete the unloading before the following day, and that day was Sunday. Ericsson took a reasonable view of the situation; for when Haines suggested that the Belgrade be placed in a position to be ready for the work of unloading on Monday morning there was no protest by the former—no indication by him to Haines that the libelant would at its own peril omit to proceed forthwith with the work of stevedoring. On the contrary Ericsson in charge of the Belgrade and in that capacity representing the respondent assented to the suggestion in the words, "That is all right." On Monday, December 7, the time appointed for the unload-

ing of the Belgrade, there was the very unusual rainfall of 3.71 inches, and there can be no question on the evidence that an overwhelming proportion of the damage to the phosphate rock on that vessel occurred on that day. Had the respondent provided lighters of proper construction for the carriage of a dry cargo or sufficient tarpaulins, properly adjusted and fastened over and about the phosphate rock, it is to be assumed as against the respondent as a wrongdoer that the cargo of neither of the lighters would have been damaged. The evidence discloses nothing to relieve the Ogeechee from liability for the damage done through the wetting of the cargo prior to its delivery on the libellant's wharf.

[3] It is contended that, notwithstanding the admission to the contrary in the answer, the Ogeechee did not receive or carry her cargo of phosphate rock as a common carrier, but only as an ordinary bailee for hire. In the absence of an amendment to the answer, for which no application was made, the respondent is precluded by its admission from taking a position so inconsistent with its pleading. The libellant was notified by the answer of what it was called upon to meet, and it had a right in the absence of an amendment to rely in preparing for trial upon the admission of the common carrier liability of the steamship. To prevent surprise and promote the due administration of justice parties are held in admiralty as in other branches of jurisprudence to the positions respectively taken by them in their pleadings. The contention of the respondent in this connection cannot be sustained. Indeed, in view of the facts established by the evidence I deem it unimportant to the decision of this case whether the Ogeechee undertook the carriage of its cargo as a common carrier or only as an ordinary bailee for hire; for in either case there was such culpable negligence on the part of the respondent as to make her liable for the resulting damage. *Vitelli v. Cunard S. S. Co.*, 203 Fed. 697, 122 C. C. A. 81.

The libellant is entitled to a decree adjudging the Ogeechee in fault and referring the case to a Commissioner for the assessment of the damage, on the evidence heretofore adduced and such further evidence as shall be taken before him on that subject.

A decree in accordance with this opinion may be prepared and submitted.

THE OLAF.

MIKKELSEN v. A CARGO OF SUGAR.

(District Court, E. D. Pennsylvania. January 26, 1918.)

No. 3 of 1917.

1. SHIPPING ⚡173—CHARTERS—SUIT FOR DEMURRAGE—ISSUES.

A charterer, which assumed the work of discharging the cargo without question, cannot defend against a suit for demurrage on the ground that the duty of discharge was not imposed on it by the charter party.

2. SHIPPING ⚡177—DEMURRAGE—CONSTRUCTION OF CHARTER PARTY—"WORKING DAYS."

Under a charter for the carriage of a cargo of sugar, which required discharge at the rate of 5,000 bags per "working day," the charterer as-

sumed the risk of delay due to strikes, bad weather, or any other cause not expressly excepted in the charter party, in the absence of any local usage at the port of discharge giving to the term "working days" a meaning at variance with its accepted legal meaning of calendar days, exclusive of Sundays and holidays.

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

3. SHIPPING ⇨177—DEMURRAGE—CONSTRUCTION OF CHARTER PARTY.

Under a charter party requiring discharge of 5,000 bags of sugar in each working day, no account is to be taken of half days; but the charterer is entitled to a full working day for each 5,000 bags before liability for demurrage commences.

4. SHIPPING ⇨179—CONSTRUCTION OF CHARTER PARTY—"DEFAULT."

The word "default," as used in charter party contracts, does not convey the idea of "fault," but of mere failure to perform; and the lack of performance, if there is such lack, exists without regard to how it came about, subject to the vis major doctrine.

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

5. SHIPPING ⇨181—DEMURRAGE—CONSTRUCTION OF CHARTER PARTY—"24 HOURS AFTER ARRIVAL OF VESSEL."

A provision of a charter party that lay days for discharging shall begin "24 hours after the arrival of the vessel" does not mean that the charterer is entitled to a full working day before beginning to discharge, but is to be read literally; but where the time limit expires on a day which is not a working day the lay days commence with the next working day.

6. SHIPPING ⇨179—DEMURRAGE—DEFENSES.

A consignee of a sugar cargo is not relieved from liability for demurrage by the vis major principle, because of a custom house regulation under which the discharge of sugar in wet weather may be prohibited, where such authority was not exercised, and the regulation did not in any way affect the discharge of the vessel.

7. SHIPPING ⇨177—DEMURRAGE—APPORTIONMENT TO FRACTIONS OF DAY.

Per diem demurrage, fixed by a charter party, is not apportionable to fractions of a day.

8. SHIPPING ⇨179—DEMURRAGE—DEFENSES.

A consignee is not relieved from liability for demurrage, under the doctrine of vis major, on the ground that the delay was caused by the refusal of the stevedores to work; the reason for such refusal not being shown.

9. SHIPPING ⇨171—CHARTERS—DEMURRAGE—SUIT AGAINST CONSIGNEE.

Where a charter of a ship to carry a cargo stipulated for a per diem demurrage, gave the owner a lien on the cargo therefor, and provided that bills of lading should be signed without prejudice to the charter, and a subcharter, made before the cargo was loaded, contained the same provisions, including that for the per diem demurrage, as did also the bills of lading signed thereunder, with respect to lien and their being subject to the charter, the shipowner may maintain a suit for demurrage against the cargo, on delivery to an indorsee of the bills of lading, based on the contract made by the original charter party.

In Admiralty. Suit for demurrage by George Mikkelsen, master of the steamship Olaf, against a cargo of sugar; the Franklin Sugar Refining Company, claimant. Decree for libellant.

Lewis, Adler & Laws, of Philadelphia, Pa., for libellant.

Benjamin O. Frick, and Prichard, Saul, Bayard & Evans, all of Philadelphia, Pa., for respondent.

DICKINSON, District Judge. A discussion of the questions which are presented by this record to be answered may well precede a statement of the facts to be found, as the number of the latter, which are of importance, is determined by the former. The respondent raises substantially four objections to the allowance of the claim made by the libellant.

[1] (1) The first goes to the very root of the case, because it is a denial of any obligation on the part of the respondent to discharge the cargo. If this position be found well taken, it follows that no responsibility, for the consequences of delays in discharging the cargo, can be visited upon the respondent.

We feel, however, relieved of any call to decide or to consider this branch of the defense, because the respondents themselves interpreted the charter party as one imposing the duty of discharge upon them, by assuming it and undertaking the work of discharge. After thus waiving their right (if they had one) to require the libellant to deliver the cargo upon the wharf, it is too late now to make their stand upon it. The issue thus presented is one not raised by the pleadings and one no notice of which was given before trial, nor was it sought to be brought in by amendment. The position is clearly an afterthought, no suggestion of which is disclosed by the answer, but the thought of which was first revealed at the trial of the case.

The answer states that the respondent assumed the task of unloading the vessel, in the course of which difficulties were encountered which caused interruption of the work and consequent delays which the respondent claimed excused performance; but there was no hint of the thought of a denial of the duty to discharge with such dispatch as that the vessel would not be unduly delayed.

A point was made of this by the libellant at the trial in the assertion of the position that the respondent cannot avail itself of a defense not set up in the answer, and objection was promptly interposed to its consideration. Everything which the respondent asked to have the record show in support of this position was permitted to go upon the record, subject to the objection, for such appellate use as the respondent has the right to make of it. We adhere, however, to the ruling indicated. *Brooks v. Hilton* (D. C.) 221 Fed. 265; *Barber v. Lockwood* (D. C.) 134 Fed. 985.

[2] (2) The second branch of the defense is that the discharge of the cargo was prevented, and the consequent detention of the vessel was caused by the inability and refusal of the employes of the respondent, who were engaged as stevedores, to continue the work of discharging the vessel. This was in part the consequence of a strike which had been declared. The delay in discharging the vessel was further due to bad weather conditions, under which the men did not work.

Respecting the first subdivision of these claimed excusing facts, it is to be stated that the strike was not declared until after the vessel should have been discharged, and therefore has no bearing upon the detention of the vessel, beyond increasing the duration of the detention.

Respecting the facts which make up the second subdivision of the excusing conditions, it may be stated that the existence in fact of what may be called the weather excuse is most seriously denied. Here again, with respect to these delays, to whichever of these causes due, the construction we give to the contract is such as to make the considerations, above suggested, of no moment, because we are of opinion that the undertaking was an absolute one to discharge within a time which was measured by the bulk of the cargo, and that the risk of every delay, except those mentioned in the charter party, was assumed by the consignee. *Hagerman v. Norton*, 105 Fed. 996, 46 C. C. A. 1; *Fish v. Brown Stone* (D. C.) 20 Fed. 201.

The cargo consisted of 19,400 bags of sugar. The time of discharge in days was measured by an output of 5,000 bags per "working day." This, although a minimum measure of discharging dispatch, is under the conditions of this case a definition of "customary quick steamer dispatch at the port of discharge." It follows that the time allowance for discharge was four working days, and as soon as we translate working days into calendar days we are enabled to fix the time when the demurrage allowance begins to run.

Disregarding the earlier movements of the vessel, which do not enter this discussion, she was at the wharf ready to discharge her cargo, and the discharge was in fact commenced, on the morning of February 3, 1917. This was Saturday, which, in this port, was a holiday, or at least a half holiday, in the sense that it is a holiday from the noon hour on. The next day being Sunday, if we exclude holidays and Sundays as not work days, and as not "working days," within the meaning of this contract, the consignees were entitled to the four days from the 5th to the 8th, both inclusive, before the demurrage began to run. The vessel was discharged at the close of the working day on the 16th, and on this basis demurrage would be chargeable from the 9th to the 16th, both inclusive, or a total of eight days.

It is not unusual, particularly of recent years, to find incorporated in many contracts a provision to the effect that performance is excused by or during the duration of strikes. There is, however, no such provision in this charter party. There is also in somewhat common use a phrase, frequently employed in charter parties, such as "weather working days," or an equivalent expression. It is to be observed that the phrase employed in this charter party is simply "working days." These words have an established meaning in construing charter party contracts.

This found meaning is that "working days" are calendar days, exclusive of Sundays and holidays, without reference to weather or other excusing conditions. It is not necessary to be held, and in consequence it is not now held, that the words of a contract, which is to be construed as of the place of performance, will not yield their otherwise accepted meaning to the local usage meaning of that locality, because of the finding, hereinafter made, that there is no meaning of the phrase local to the port of Philadelphia at variance with its accepted legal meaning.

[3] (3) The third phase of the defense, which is that 24 hours'

grace was allowed to the consignees before the count of time against them began, becomes wholly immaterial, as the doctrine, if accepted, would work no change in the result. There is in further consequence nothing to be gained by discussing the principle which respondent asks to have applied. In the counting above made, there is involved what may be called the doctrine of half days. There is among those concerned with shipping contracts a widespread notion, of which notice must be taken by the courts, that days may be apportioned, at least into days and half days. It is to be observed, however, that this charter party provides its own measure of time or count of days before the demurrage days begin to run. In a contract providing a per diem demurrage charge, it might be that half days should be taken into consideration; but in a charter party in which, as in this one, a day is defined in terms, not of hours, or of lightness and darkness, but in terms of bag numbers, there is no day other than the day so defined. The undertaking is to discharge 5,000 bags in each working day, but there is no undertaking to discharge 2,500 bags in half a working day.

Demurrage charges partake of the nature of penalties, and although they are more strictly speaking liquidated damages agreed to by the parties, the claim of demurrage none the less is based upon a default which cannot be declared unless in strictness it has taken place. The first working day which the consignees had, which could be called a 5,000-bag day, was Monday, February 5th, and hence the count of such working days against them begins with that day.

[4] (4) The final stand of the defense is that this charter party by its terms visits the liability to pay the demurrage upon the respondent only in case of its "default"; and it is averred that the respondent did not "default" in its obligation to unload, but was prevented from unloading by circumstances over which it had no control. Again, there is no need to discuss the question thus sought to be raised, because it has been flatly ruled against the respondent. The word "default," when used in charter party contracts, does not convey the idea of "fault," but the idea of mere failure to perform; and the lack of performance, if there is such lack, exists without regard to how it came about, subject, of course, to the vis major doctrine. *Southern v. Unkel* (D. C.) 236 Fed. 779; *Burrill v. Crossman* (D. C.) 65 Fed. 104; *Id.*, 69 Fed. 747, 16 C. C. A. 381; and *Crossman v. Burrill*, 179 U. S. 106, 21 Sup. Ct. 38, 45 L. Ed. 106.

It adds nothing of value to the discussion, but an observation or two may be made respecting the position of the libellant. It is that the consignees were bound to discharge with the quick dispatch called for by the charter party, without regard to any time other than that called for by this degree of promptness and energy in the act of discharging. This we think is the correct view, but the parties have defined not only "days," but also "quick dispatch," in terms of bags, so that the discharge of 5,000 bags becomes the most definite, and because of this the accepted, measure of what is a "day," and also what is "quick dispatch."

We have thus, so far as concerns this court, indicated the disposition which should be made of all questions which were raised at the trial of the cause. We are now, however, handed a brief on behalf of the respondents, in which a number of new defensive positions are taken beyond those upon which the answer rests, and no suggestions of which were made during the trial or the oral argument at its close. At the expense of what would otherwise be an overlong opinion, these new points will be discussed, in order that the parties and their counsel may know that all features of the case, which they have thought worthy of being presented, have received consideration.

[5] One is an expansion of the position taken with respect to the leeway of "24 hours" after the arrival of the vessel before the work of discharging the cargo was required to begin. The amended view is that 24 hours means "a clear working day," which is further interpreted as meaning "11 working hours." In this way the respondents (disregarding their fractions) figure the work of discharging need not have begun before 2 p. m. Monday, February 5th, and (allowing 4 lay days and disregarding all other questions) the ship need not have been discharged before Friday, February 9th, at 1 p. m. This is because the vessel did not report until the evening (6:45 p. m.) of Friday, February 2d, and there were only 5 working hours on the succeeding Saturday and none on Sunday. If such a liberty in translating the "24 hours" phrase is allowed the respondents, we see nothing to restrain them from translating "24 hours" into the meaning of 24 "working hours," and thus postponing the running of lay days against them to 3 p. m. Wednesday, February 7th, as Monday was a holiday. This would expand the "24 hours" into practically 120 hours, and literally to 110 hours.

The contract says "24 hours," not "a day." We see, as before intimated, no more warrant for reading it "clear working day" than for reading it "clear working hours"—indeed, a less warrant. We think the charter party means what it says. Of course, it would necessarily mean that "lay days" would not begin until there was a lay day to begin after the expiration of the time limit, and if the time expired on a day which was not a lay day, the running of the lay days would begin with the then next lay day. There would be some plausibility in the argument which is implied in this that it allowed 24 hours of working time in which to prepare for the work of discharging. This would give for preparation the time up to practically Wednesday morning, February 7th, and relieve the respondents of the demurrage charge until noon Tuesday, February 13th (Monday being a holiday), or possibly to the 14th, thus reducing the claim to \$5,250, or to \$4,500. *The Assyria*, 98 Fed. 316, 39 C. C. A. 97.

The expression construed in the cited case was "one clear day," and the construction put upon it was moreover in accord with the proven custom of the port. We find no mandate in that case, nor in any proven port custom here, to construe "24 hours" to have any other meaning than that which the words, as ordinarily understood, carry.

[6] Another point which is made in the brief for the first time is that the respondents are relieved from the demurrage charge by the *vis major* principle. The principle itself must be accepted. *Crossman v. Burrill*, 179 U. S. 100, 21 Sup. Ct. 38, 45 L. Ed. 106. The question is over the propriety of its application. It is asked to be applied here because of a custom house regulation under which the discharge of sugar may be prohibited under wet weather conditions. The fact is found that this authority was not exercised, nor was there occasion in the weather conditions, which affect this case, to enforce the regulations, nor did the regulation in any way cause the detention of the vessel, or affect the dispatch with which she was or might have been unloaded. The *vis major* doctrine has no application.

[7] The *Assyria Case*, *supra*, and *Weir v. Northwestern* (D. C.) 134 Fed. 991, are cited as authority to sustain the proposition that *per diem* demurrage is apportionable, and is properly allowed for fractions of a day. If this is the law, the effect of it is to increase the allowance which we have indicated as proper from \$12,000 to \$12,750. There is, however, absolutely nothing in the first-cited case to support the proposition for which it is quoted. On the contrary, the Court of Appeals' ruling supports that indicated as the proper ruling here. There there were 817,222 feet of lumber to be loaded, and 50,000 required to be loaded each day. The court allowed 17 lay days and 3 days' demurrage. There was, it is clear, no fractional lay day in this, and (although the exact hours are not indicated) the probabilities are the same observation is true of the demurrage allowance. In the *Weir v. Northwestern Case*, the ruling was based upon the custom of that port (Nome, Alaska), born of the peculiar conditions there prevailing. Even in that case the actual allowance was for six round days, and, if fractional days entered into the count, it does not appear otherwise than by the statement that days might be so counted.

There is this further observation to be made. Claims of demurrage may be made by way of damages for detention. In such cases (as we are figuring the actual damage), fractions of days may well be taken into account. Claims of demurrage may not be made on the basis of actual damages, but of a stipulated sum. The latter suggests, not a penalty, but something which partakes of the nature of a penalty. The sum to be paid for a day may be \$1,500, but there is neither an agreement to pay \$750, nor any such penalty incurred, for a half day.

[8] The further newly added thought of making out of the strike conditions the defense of *vis major*, on the authority of the *West Hartlepool Case* (D. C.) 151 Fed. 886, must fail of its purpose for lack of evidence to establish such a defense. There was no suggestion of such a thought when the case was tried. The defense then was the mere fact that the stevedores did not work, because they refused to work. The strike was merely their reason for not working. The respondents, it is true, offered to prove acts of actual violence. They accepted, however, and acted upon, the suggestion of the trial judge that such proofs would probably break down under the vigorous denials which were sure to be interposed. The point is that there was no proof of violence, and nothing therefore upon which to found an

application of the doctrine invoked. For aught that is known, the situation may have been this: The employer thought the work should have been done at a cost in wages of say \$100. The men asked to do the work thought they should have \$110. The doctrine then comes down to this: That the respondents ask to be relieved from the consequences of holding the vessel because they could not unload her for \$100, although they might have unloaded her had they been willing to pay \$110. There is no vis major to be found in the facts of this case as proven.

[9] The stress of the whole case seems now further to be placed upon the fact that the libel is based upon the charter party, which evidences the contract between the ship and the charterer, and the further fact that the respondents are indorsees of the bill of lading, having bought the cargo in transitu. If any point was made of this at the trial, it wholly escaped the attention of the trial judge. The evidential facts underlying the proposition now advanced are these:

There was first the charter party (known as the Anderson-Atkins) dated October 26, 1916. This chartered the whole ship for the voyage afterwards made to carry the cargo which afterwards was carried. It provides for demurrage as now claimed. It provided for the signing of bills of lading "without prejudice to this charter." There was a cesser clause, relieving charterers of liability after vessel was loaded and bills of lading signed, reserving, however, "absolute lien on cargo for freight, dead freight, and demurrage." The cargo was loaded and bills of lading signed.

One was dated January 21, 1917, for 4,400 of the bags of sugar which formed the cargo, and names Czarnikow, Rionda Company, or assigns, as consignees. It provides that:

"This bill of lading is subject to all provisions of the charter party or freight contract dated [blank] under which this shipment is made, and is without prejudice thereto."

Clause 8 provides that the carrier shall have a lien on the goods for "all freights, primages, demurrage, and other charges * * * and also for all other sums for which shipper, owner, or consignee may be liable to carrier under this bill of lading and/or under any charter party or freight contract under which this shipment is made." The final provision is that the shipper, owner, consignee, or holder shall be bound by every provision in the bill of lading which was signed by the master. The other bill of lading covers 15,000 bags of the same cargo (the two thus covering the full cargo). It is also dated January 21, 1917, and is the same as the other, and also signed by the master. The respondents are the indorsees of both of these bills of lading. There was also another charter party, entered into between Atkins & Co. and the Munson Steamship Line, dated January 4, 1917, for the whole ship. It provides for the same \$1,500 per diem demurrage. Clause 5 calls for bills of lading "to be signed without prejudice to this charter and subject to this contract as to * * * demurrage." Clause 12 gives to ship "an absolute lien on cargo for * * * demurrage."

It is not a little difficult to grasp the thought which is intended to be presented by respondents' argument in view of these facts. The starting point of the argument would seem to be the fact that there were two charter parties; one between the ship and Atkins, the original charterer, and the other between the charterer and the Munson Line, who were the actual shippers. So far as the demurrage feature and a right of lien therefor are affected, the contracts are the same. The distinction between the two contracts must therefore apparently be the very narrow one that the libelant has brought its action upon the wrong contract. This is the equivalent of saying to the libelant there are two contracts, each giving you the same right of action, but you have sued upon the wrong one. Even if, in the strict sense, this were true, we think the respondents are too late in raising the question.

We are unable, however, to subscribe to the soundness of the proposition. This action is by the owners of the ship upon the contract made with them. If it were founded upon the Munson contract, the right of action would be in the charterer. We see no difference in respect to contractual liability between a contract affecting a ship and one affecting other property. The owner of a house may lease it without restrictions. The tenant may sublet it (as if he were the owner) to another tenant. If the owner asserts his right of action, it must be based upon the agreement made with him. If he asserts it against his lessee, the contract measures the liability of the defendant. If he asserts it against the subtenant, who is not a party to this contract, the liability of the defendant may or may not be so measured. This fact may introduce other questions.

Respecting the point before us, however, the rights of the plaintiff would be properly based on his contract, although it might be true that his rights as against his lessee had been modified as against the subtenant. This objection to the right of the libelants to maintain their libel is not sustained.

The other point sought to be made is more readily grasped. The right to recharter a chartered vessel must be conceded, because the charterer is pro hac vice the owner. It must be clear, however, that nothing the charterer does can affect ipso facto the rights of the owners. Whatever change is wrought must be because of something done by them, or arise out of the relations between them and the consignees. After a cargo has been taken aboard and a bill of lading is signed, the consignee may assign it, and the indorsee acquires certain rights which, of course, he can assert. Along with these rights he assumes certain obligations, or at least his rights are qualified by those of the carrier. As between the carrier and an indorsee of the bill of lading, the measure of their respective rights may differ from that which is applied in controversies between the carrier and charterer. A carrier, who signed a bill of lading by which he agreed to deliver to any indorsee of the bill without, for instance, the payment of freight or demurrage, could not assert a right to either against such indorsee or the cargo, although his claim against the charterer would remain good. Moreover, the agreement in such bill that the cargo should remain liable to the carrier for demurrage would not be construed as an admission of

liability to a demurrage claim which arose, not out of any fault of the consignee, but wholly out of an agreement between the carrier and another, unless the consignee had so agreed, expressly or impliedly. All this is based upon familiar principles. The true basis of liability is frequently controlled by the circumstance of whether the proceeding in which it is sought to be enforced is in rem or in personam, a distinction which the respondents seem to have ignored. The present proceeding is one in rem, and the libelants, of course, cannot assert against the cargo any rights other than those which they have against the rem, or against it as answerable for the undertakings of its owners. A lien may, however, be asserted against the rem for a claim for which its owners would not be liable in personam.

We see no occasion to pursue this subject further, or to determine questions which might have been raised. Here again the respondents are too late in raising some of the questions which are discussed in the brief. They might have raised the one of their liability for the demurrage stipulated by the conventions of the charter party. They, however, admitted it, and sought to show that the agreement had been met, or that they were excused from performance by the facts they sought to prove. To permit them now to introduce this new defense would do an injustice to the libelants, which cannot be permitted.

A decree in favor of the libelants and against the respondents for the payment of the sum of \$12,000, with interest thereon from February 16, 1917, together with costs, may be submitted.

THE FRANCES L. SKINNER.

(District Court, W. D. Washington, N. D. July 23, 1917.)

No. 3685.

ADMIRALTY ⚓123—STIPULATION FOR COSTS—"GREATER OR BETTER SECURITY."

Admiralty rule 29, which provides that "in all * * * maritime causes any party having an interest in the subject-matter may at any time on two days' notice move the court on special cause shown for greater or better security," must be construed in connection with rule 8, which requires a libelant to file a stipulation with surety in the sum of \$250, conditioned for the payment of all costs and expenses adjudged against him, and on motion and proper showing he may be required to increase the amount of such stipulation.

In Admiralty. Suit by Charles E. Wood against the steamship Frances L. Skinner, formerly called Sesostris; D. E. Skinner, claimant. On motion by claimant for additional security for costs. Motion granted to extent of \$800.

Bogle, Graves, Merritt & Bogle, of Seattle, Wash., for libelant.
Hastings & Stedman, of Seattle, Wash., for respondent.

NETERER, District Judge. The claimant has brought on for hearing his motion, which has been duly served and noted, to require the libelant to furnish additional security for costs in the sum of \$3,000, founding his motion upon admiralty rule No. 29. He files

affidavit, in support of the motion, that libelant is a nonresident of this district and state; that the cause of action is based upon an agreement entered into between libelant and one Bruno J. Mijeras, a citizen and resident of Tapichula, Mexico, and that the allegations with relation to said contract in the libel are denied; that libelant claims relief to the extent of \$75,000, and the claimant was required to execute a bond to the United States marshal in the sum of \$80,000; that the premium on the bond is \$800; that the stipulation in the sum of \$250 is wholly inadequate; that it will be necessary to take testimony in Mexico, and in the city of San Francisco, and New York. No denials to the affidavit of the claimant are filed. The libelant appeared upon the hearing of the motion and objected to the entry of any order requiring additional security for costs, contending that the stipulation in the sum of \$250, required by the rules, had been filed, and that rule 29 has no application.

Admiralty rule No. 8 provides that:

"No libel * * * shall be received except * * * on special order of the court, or when otherwise provided by law, unless a stipulation for costs shall first be entered into by the parties, conditioned that the principal shall pay all costs and expenses against him by the court in such cause; such stipulation to be with at least one surety, a resident of the district, or an authorized bonding company, and to be in the sum of \$250.00."

Rule 29 provides that:

"In all * * * maritime causes, any party having an interest in the subject-matter, may at any time, on two days' notice, move the court on special cause shown, for greater or better security."

These two rules must be construed together. The object of a rule requiring security for costs is to save harmless a claimant in the event the libelant's claim is not well founded. The liability under this stipulation is not limited, but requires payment of all costs and expenses. Effect must be given to the words employed. Webster defines "better" as "having good qualities in a greater degree than another; greater in amount; larger; more;" and defines "great" to be "more than ordinary in degree." The ordinary or normal amount of a stipulation for costs is \$250. If rule 29 does not authorize security in greater amount, consideration cannot be given to the terms employed. "Greater" or "better," I think, must be held, in view of the requirements of rule 8 to pay all costs, to imply that, when it is made to appear that the expenditures already incurred are larger than the amount of the stipulation, the claimant may require additional security, not only when the financial status and standing of the surety is impaired, but to increase the amount of the stipulation, when it is made to appear that the amount is inadequate to afford the protection which rule 8 purposes to give. That the rule has application is recognized in *Lowndes v. The Phoenix* (D. C.) 36 Fed. 272. The record is conclusive that the libelant has already required the outlay by the claimant of \$800, and additional costs will be entailed by the taking of depositions in refutation of the claims of the libelant, and, should the court determine on the final hearing that the claim of the libelant is not well founded, the claimant would not be afforded the protection that the court rules attempt to give by the stipulation provided in

rule 8; the libelant being a nonresident of the district and state and having no property within the jurisdiction. Additional security in the sum of \$800, the amount of premium paid for the bond, I think, would be ample at this time, under the record as it appears.

An order may be taken requiring additional security in the sum of \$800, within 10 days.

THE FRANCES L. SKINNER.

(District Court, W. D. Washington, N. D. November 12, 1917.)

No. 3685.

1. SALVAGE ⚡39—LIEN FOR SALVAGE—NATURE OF SERVICE.

In order to give a maritime lien for salvage service, it must have been performed in salving property in peril on navigable waters, which might otherwise be destroyed, and must also have contributed immediately to the preservation or rescue of the property. It is a further condition that the lien claimant must have held in actual possession or kept near the imperiled property with the means at command and actually employed to preserve and save it.

2. ADMIRALTY ⚡10—SALVAGE ⚡16—JURISDICTION—MARITIME CONTRACT.

In 1907 an ocean steamship was cast on shore in a heavy storm on the coast of Guatamala, and was left on the land 100 feet from high-water mark. Five years afterward libelant and others on request of the owner, undertook to float the steamer in accordance with a plan of libelant, by excavating around it and making a canal to the sea. The machinery and appliances used were all placed on the land. After proceeding for a time with the work, it was temporarily suspended to permit libelant to go for further appliances, and on his return the owner refused to permit him to proceed or to remove his machinery. Some four years afterward the vessel was finally floated by another contractor, using, as alleged, the plan of libelant, who thereupon brought a suit in rem against the vessel, which had passed into other hands. *Held* that, the vessel having ceased for years to be engaged in commerce and navigation, and resting on dry land, the contract was not maritime, but was of the same nature as a contract to build a vessel, and was not within the jurisdiction of a court of admiralty. *Held*, further, that there was not such a continuity of service, or of offer and readiness to perform service, as would support a lien for salvage.

In Admiralty. Suit by Charles E. Wood against the steamship Frances L. Skinner, formerly the Sesostris; D. E. Skinner, managing owner, claimant. On exceptions to libel. Exceptions sustained, and suit dismissed.

Bogle, Graves, Merritt & Bogle, of Seattle, Wash., for libelant.
Hastings & Stedman, of Seattle, Wash., for claimant.

NETERER, District Judge. The libel in this case alleges that:

"In October, 1912, the German steamship Sesostris, now known as the Frances L. Skinner, was lying high and dry on the coast of Guatamala, near the Mexican border, broadside to the sea, at a point about 100 feet from the high-water mark. She had been carried on shore in a heavy storm about five years theretofore, and at said time libelant, acting on his own behalf and on the behalf of the owners named, at the request of Bruno C. Hijeres, then owner of the said ship, undertook the work of floating said steamer. He conceived and developed a plan of floating her by digging around the boat

to the level of the sea, and then pumping out the basin around the steamer with sand pumps, relying upon the oozing in of the water around the ship through the sand for the necessary flotation of the steamer in the basin. On the steamer being floated by the plan contemplated, she would be turned head on to the sea and be moved out to deep water through a narrow canal to be dug through the sand; the sides of the canal being protected with sheath piling. * * *

"During 1913 he pumped out a large basin on the starboard side of the steamer, and found that the water made its way through the sand as anticipated, and that the vessel could ultimately be floated in the manner contemplated. * * * But the progress actually made showed clearly that the vessel could be salvaged at reasonable cost, according to the plan adopted by libelant, and she subsequently was salvaged in pursuance to such plan."

It is then alleged that, after performing certain labor in carrying out the conceived plan, libelant left the vessel, with the owner's consent, and came to the United States for the purpose of getting additional appliances and means with which to prosecute the work, and returned in January, 1914, when the owner refused to allow the libelant to continue the work or do anything further in or about the salvage of the steamer, and refused to surrender to libelant his engines, boilers, pumps, piping, and other salvage equipment and material, but appropriated all of such appliances and materials to his own use, and proceeded to use them in efforts to save the steamer in accordance with the plan first conceived and first put into operation by libelant. The efforts of the owner, however, were not successful; but in 1915 and 1916, as the libelant is informed, other salvors, including the British Columbia Salvage Company, Limited, continued the salvage operations on the steamer in pursuance to the plan conceived and adopted by the libelant. It is alleged that libelant succeeded to the interest of his associates.

The claimant excepts to the libel, on the ground that the vessel at the time of the alleged salvage service was not at sea, or on the coast of the sea, nor within public navigable waters, nor on the shore thereof; that it was not engaged in maritime commerce, or capable of being so engaged; that the service alleged to have been rendered was not in "salvaging property from any peril of the sea"; that such service was rendered entirely upon land; that the said steamer, while upon dry land, 100 feet from shore, where it has remained for more than five years, was not subject to salvage service, and there is no maritime lien in favor of the libelant for the salvage.

[1] In the absence of statute, the finder of a thing lost on land belonging to another has no lien upon it for services performed or expenditures made in preserving the property and finding the owner; but, from consideration of public policy and commercial necessity, maritime law has established different rules for property which is lost at sea. The Supreme Court of the United States (The Blackwall, 10 Wall. 1, 19 L. Ed. 870) said:

"Salvage is the compensation allowed to persons by whose assistance a ship or her cargo has been saved in whole or in part from impending peril on the sea, or in recovering such property from actual loss, as in case of shipwrecks, derelicts, or recapture."

The universal rule, however, is that, before a maritime lien can attach, the property must be salvaged from the perils of the sea. As Judge

Betts, in *The Perseverance*, 19 Fed. Cas. No. 11,017, at page 308 (No. 11,017), said:

"The essential requisite of a contract, to bring it within the jurisdiction of an admiralty court, is that it must be one which is to be performed on the high seas, or which has relation to a maritime service. The most enlarged interpretation of the term 'maritime,' as applied to the jurisdiction of this court, has not been extended beyond subjects or engagements which are necessarily connected with services to be rendered on tide waters. * * *

Salvage service, it is said in *Sonderburg et al. v. Ocean Towboat Co.* (*Woods et al. v. Same*) 3 Woods, 146, Fed. Cas. No. 13,175:

"* * * Is a reward for a meritorious service performed in saving property in peril on navigable waters, which might otherwise be destroyed, and is allowed as an encouragement to persons engaged in business on such waters, and others, to bestow their utmost endeavors to save vessels and cargoes in peril."

Judge Dillon, in *Salvor Wrecking Co. v. Sectional Dock Co.*, 21 Fed. Cas. at page 283 (No. 12,273), said:

"The admiralty jurisdiction, and peculiar liens, rights, and remedies which the admiralty recognizes and enforces, spring out of the movable character of the vessels and vehicles which are instruments of navigation, commerce, and trade."

An indispensable ingredient of salvage service is having contributed immediately to the preservation or rescue of property in peril at sea. In November, 1846, the *John Wurts* was discovered floating on Sandy Hook Bay, bottom up, dismantled, filled with water, and deserted, by the sloop *Hickory*. The sloop was not able to tow the wreck, and came to the masters of the schooners *Elizabeth*, *David Cromwell* and *Vinyard*, and it was agreed that they and the crew of the sloop should proceed to the wreck and tow her to port, and through their efforts it was taken to Staten Island. It appears that prior to this time, on the 8th or 9th day of September, on a voyage from the North River and New York, below Sandy Hook, the *John Wurts* was wrecked and all on board perished. The claimant was also owner and master of the cargo, and shortly after her loss, employed the schooner *Excelsior* and other vessels with a steamboat, to endeavor to save the wreck and cargo. They succeeded in raising her and towed her several miles, when she escaped from them and again sank under 10 fathom water, her bows in the sand, and her stern just out of the water. All of the expense of these proceedings was paid by the claimant, except those of the schooner *Excelsior*. On the 24th day of September, an agreement in writing was entered into by the claimant and managing owner of the *Excelsior* that the *Excelsior* would undertake the salvage of the vessel and cargo and to deliver them near Jersey City for 50 per centum on the amount saved, and that allowance should also be in full compensation for services already rendered by his vessel and crew under the employment of the claimant. About the 6th or 7th of October, with apparatus prepared to raise it the *Excelsior* proceeded to the wreck and passed a large chain under its stern, but she had not force enough to move it; the chain was secured around the wreck and the *Excelsior* and her crew went back to the city for further assistance. They had been engaged about

twelve hours in this service. On the 13th of October, the *Excelsior* and another vessel started to go to the wreck again, but were driven off by a heavy gale of wind. A day or two after the wrecked schooner was seen drifting to the eastward, past Fire Island, and was subsequently reported off the east end of Long Island. After a heavy blow from the eastward she was again seen drifting to the westward, past Fire Island, towards the New Jersey shore. When information was received of this last movement of the wreck, the *Excelsior* was sent to Fire Island to search for it, but could discover nothing of it. The *Excelsior* was then engaged by the owners in another wrecking adventure near Fire Island. The *Excelsior* was after that further dispatched to New York Bay in search of the schooner, but without success. On the 9th of November, the libelants fell in with the schooner, as stated. Judge Betts said:

"Upon the facts in this case the claim of Jones and owners of the *Excelsior* to salvage cannot be allowed. It lacks the indispensable ingredient of salvage service, that of having contributed immediately to the preservation or rescue of the property in peril at sea. The circumstances in proof do not demand of the court a decision upon the point, how far a person must be directly employed aiding the recovery of a wreck to constitute him a salvor. Nor am I disposed to lay down the rule that he must make it certain the property was saved by his assistance; but I am not aware of any principle which invests him with the rights and privileges of a salvor, until it is rendered reasonably probable upon the evidence that his labor or skill have contributed towards protecting property exposed to instant peril at sea from ultimate loss or further damage." *The John Wurts*, Fed. Cas. No. 7,434.

And again:

"The right of a salvor results from the fact that he has held in actual possession or has kept near what was lost or abandoned by the owner or placed in dangerous exposure to destruction, with the means at command to preserve and save it, and that he is actually employing those means to that end."

[2] It is contended by the libelant that it is immaterial whether the vessel was within the ebb and flow of the tide, or not, nor as to the time it lay upon the beach above the high-water mark; that the libelant conceived the plan to rescue the ship and with the owner's consent proceeded to carry out the plans for a time; and that the owner's intended use for the vessel was for trade and commerce upon the high seas, and is within the admiralty jurisdiction, and places emphasis upon *The Old Natchez* (D. C.) 9 Fed. 476, *The Genesee Chief*, 12 How. (53 U. S.) 443, 13 L. Ed. 1058, *The Steamship Jefferson*, 215 U. S. 130, 30 Sup. Ct. 54, 54 L. Ed. 125, 17 Ann. Cas. 907, and *The Ella* (D. C.) 48 Fed. 569. In the case of *The Old Natchez*, salvage was claimed for services rendered to a dismantled steamboat moored on a navigable river undergoing repairs for the purpose of being fitted for use as a wharfboat. The court said:

"Salvage is compensation for a maritime service rendered in saving property or rescuing it from impending peril on the sea, or on a public navigable river or lake, where interstate or foreign commerce is carried on."

The *Genesee Chief* was a proceeding in rem to recover damages occasioned by a collision on Lake Ontario, and the issue determined was that admiralty jurisdiction extends to the navigable rivers and

lakes of the United States without regard to the ebb and flow of the tides of the ocean.

In *The Jefferson*, the court merely held that a vessel used for navigation and commerce does not cease to be subject to admiralty jurisdiction because temporarily in a dry dock without water actually flowing around her; in this case the recovery was sought by persons rendering assistance in extinguishing a fire on the *Jefferson* while she was in a dry dock, these parties operating from a boat in the tidewater.

The *Ella*, *supra*, during an extraordinary storm in August, "was carried 1,200 to 1,500 feet beyond the ordinary water's edge and beached on the shore of the Elizabeth river, near Norfolk, far beyond the reach of the tide." In September following the master, for an agreed price, secured a contractor to launch the schooner, who promptly began working, and "in several weeks moved her about twice her length," and then abandoned the adopted plan of operation and employed a dredge to dig a canal, and launched her on the 9th day of March, following. The court (48 Fed. 571) said:

"Benedict says that 'towing or 'otherwise moving' a vessel of commerce is a maritime contract, within the cognizance of admiralty."

Emphasis was placed in this case upon the phrase "otherwise moving," and no doubt held to apply to the vessel in or out of the water. I do not think that Benedict could have intended to mean that "otherwise moving" could apply to any moving of the vessel other than in the water; "towing" is an act which can be performed only in the water, and "otherwise moving," under the rule *eiusdem generis*, must mean moving in a like manner, or like condition, as can be employed by towing, and the moving must have relation to some power applied in the water, or efforts which are not disassociated therefrom. The schooner *Ella* was, however immediately engaged in commerce, which had been interrupted by the storm, and at once libellant proceeded with the work of rescue. In the instant case the vessel was cast upon the shore in 1907, and five years thereafter the libellant and others, "at the request of * * * the then owner of the ship, undertook the floating of the steamer."

The libellant in the instant case was not engaged in a business on the sea or connected therewith. He conceived the plan, and employed stationary machinery and appliances. The vessel was not exposed to any immediate peril of the sea; the peril had long since passed; there is no allegation of exposure to peril; she had long been withdrawn from commerce; there was no "spontaneous meritorious service performed" in the protection of the property. The only claim that can be made to admiralty jurisdiction is the fact that the vessel was cast upon the shore by the sea. Conceding that in the first instance the matter may have been within the admiralty jurisdiction, did the relation of the vessel to this jurisdiction change when the sea receded, and commerce was abandoned? The law looks to the proximate and not remote cause as the source of jurisdiction. The Supreme Court of the United States, in *The Jefferson*, 20 How. (61 U. S.) 393, at page 401, 15 L. Ed. 961, said:

"The admiralty jurisdiction, in cases of contract, depends primarily upon the nature of the contract, and is limited to contracts, claims, and services, purely maritime, and touching rights and duties appertaining to commerce and navigation."

Admiralty jurisdiction does not extend to the building of a vessel or work upon or materials furnished in the construction. *The Jefferson*, supra; *The Winnebago*, 205 U. S. 354, 27 Sup. Ct. 509, 51 L. Ed. 836.

Was the service performed of the same character and in the same class as services performed in building the vessel, under the circumstances applicable to this vessel? The intention to engage the vessel in course of construction in commerce is as strong as was the intention to re-enter the vessel in issue in commerce. At the time of the contract the vessel bore the same relation to the sea as a vessel under construction. The allegations as to labor performed are indefinite, and appear more of an experimental character than services to rescue. The machinery and appliances employed are stationary, and have no maritime relation. The recovery is primarily based upon the plans conceived and outlined, which it is alleged to have afterwards been adopted. The last work done was at the close of the working season in 1913. An effort was made to resume work in January, 1914, but was denied by the owner. No further services were rendered or efforts made with relation to the claims in the libel. The libelant has not held actual or constructive possession, nor kept near the vessel, ready to engage in the work of rescue, and did not resume the work, or offer so to do, when the owner failed in his efforts and the British Columbia Salvage Company, Limited, was engaged. There is not that continuity of relation between the libelant and the vessel, from 1913-14 and the launching of the ship in 1917, as to support a maritime claim, and the claim, if any, is "stale," and may not be asserted in admiralty.

THE BARGE NO. 4.

THE DELMAR.

(District Court, E. D. Virginia. March 7, 1918.)

1. COLLISION ⚡57—HARBOR RULES—ENFORCEMENT.

Rules and Regulations of the Board of Harbor Commissioners of the Port of Norfolk, Portsmouth, and Norfolk County, § 18, declaring that no tows exceeding 700 feet in length shall enter or depart from the harbor, is valid and enforceable in courts of admiralty, as well as in state courts, particularly as it is in furtherance of the purposes of commerce.

2. COLLISION ⚡57—RULES—APPLICABILITY.

The regulations duly promulgated under Act Cong. May 28, 1908, c. 212, 35 Stat. 428, limiting the length of hawsers on tows of seagoing barges navigating in the inland waters of the United States to 75 fathoms, are applicable to a tow en route from Port Norfolk to Cape Charles, which has to cross Chesapeake Bay, which at that point is over 20 miles wide, and meets the waters of the Atlantic Ocean.

3. COLLISION ⚡66—PROCEEDINGS—EVIDENCE AS TO FAULT.

On libel against a tug and barge in tow for collision, evidence held to show that a proper lookout was not maintained, either on the tug or

the barge, and that, if such lookout had been maintained, the accident could have been avoided.

4. COLLISION ☞61—LIBELS—RESPONSIBILITY.

A tug and barge in tow held wholly responsible for a collision with a motorboat; the tow being in violation of regulations prescribed under Act Cong. May 28, 1908, c. 212, as well as local harbor regulations, and neither the tug nor the barge maintaining a proper lookout. Hence, as the occupants of the motorboat were drowned, responsibility cannot be escaped by attributing the fault to the motorboat.

5. COLLISION ☞139—DAMAGES—DEATH OF PERSON INJURED.

As a result of a collision for which a tug and barge in tow were wholly liable, four respectable colored people were drowned, the launch in which they were riding being capsized and sunk. Of the four, two were men and two young women, about 16 years old, one of whom, as a nurse, earned \$2 a week. The master and owner of the launch was a negro of exceptional honesty and character, 45 years old, married, and the father of a large family. He was in good health and earned \$3 a day. The other man, who worked steadily at his trade, at which he earned \$2.50 a day, was 29 years of age, married, and the father of three small children. Held, that \$7,500 should be awarded for the loss of the life of the master, \$4,500 for the death of the other man, while \$1,500 each should be awarded for the deaths of the two women.

6. COLLISION ☞133—DAMAGES—DESTRUCTION OF VESSEL.

Where a gasoline launch, about 30 feet long, 6 feet broad, and 3½ feet deep, with a wooden house or cabin extending from a point about 6 feet abaft the stem, and extending aft to a point about 6 feet from the stern, for which the master had paid \$1,000, was sunk as the result of a collision wholly the fault of a tug and barge in tow, an award of \$600 was proper.

In Admiralty. Libel by Lillie Wilkins, administratrix of the estate of Alexander Wilkins, deceased, against the New York, Philadelphia & Norfolk barge No. 4, and the steam tug Delmar, to recover for loss of life caused by collision, in which the administrators of Edward Bishop and others intervened. Decree for libellant and petitioners.

This libel was filed to recover for loss of the life of Alexander Wilkins, on the 29th day of October, 1916, about 6 o'clock p. m., caused by a collision at a point northerly of and in the vicinity of the can buoy at the entrance to the West Norfolk channel from the main channel of the Elizabeth river, Norfolk, Va., between an unnamed gasoline launch, in which the deceased, Edward Bishop, Elizabeth H. Simmons, and Lubertia Howell were at the time, and barge No. 4, with 28 loaded railroad freight cars on board, in tow of the tug Delmar, whereby the launch was capsized and lost, and the four persons on board drowned. Administrators for the three persons named, other than the libellant, filed their petitions in said libel case, under the rule.

The gasoline launch was about 30 feet long, 6 feet broad, 3½ feet deep, with a wooden house or cabin extending from a point about 6 feet abaft the stem, and extending aft to a point about 6 feet from the stern, and at the time of the accident, was in charge of Wilkins, her owner and master, and Bishop was acting as engineer. Barge No. 4, designed for the transportation of railroad freight cars between Norfolk and Cape Charles, is 340 feet long, 50 feet broad, and 1,174 tons net register, and was being towed on a hawser of some 80 or 90 fathoms long, by the steam tug Delmar, 112.3 feet long, 26.9 feet broad, and 11.7 feet deep, and 130 tons net register, 294 tons gross.

The libellant alleges that on the date named the launch was proceeding, at about 6 miles an hour, up the Elizabeth river to the westward of the channel, bound for Norfolk, the course of the launch being in a general southeasterly direction, parallel to the main channel extending between Lambert's Point and Pinner's Point; and the Delmar, with the barge in tow, was proceeding

from the New York, Philadelphia & Norfolk terminal at Port Norfolk, bound for Cape Charles. As the tug proceeded out of the West Norfolk channel, and began to shape her course for the northward, the launch stopped her engines, and waited for the barge to follow the tug; but, instead of doing so, it made a shorter turn than the tug, and took a course to the westward of the can buoy at the entrance of the West Norfolk channel, heading in the direction of said launch, which was drifting under the influence of a strong flood tide. The launch immediately proceeded to back to avoid the barge, but the latter swung in towards the launch faster than the launch could get away, so that the cable from the barge to the tug caught the bow of the launch, tipping it over on its port side, where it lay until the forward part of the barge struck it, and carried it under water, drowning all on board, and the launch was a total loss. At the time of the collision the weather was cloudy and calm, and the tide flood.

The libellant charges the following faults against the Delmar: That she was navigating in the harbor with a tow which, including the length of the Delmar, exceeded the length of 700 feet, contrary to the harbor regulations, the hawser being 540 feet long; that she was not manned by a competent master and crew; that she was navigated without a competent lookout properly stationed and attending to his duties; that she was proceeding at an illegal rate of speed and on the west side of the channel, and that she did not observe the launch lying to the westward of the channel, and the course of her tow, in time to take precautions against running down the launch—and further charges as faults against the barge that it was not managed by a competent master and crew; that it did not have a competent lookout, properly stationed and attending to his duties; in that it was part of a tow which, including the length of the Delmar, exceeded 700 feet, and navigated in the harbor of Norfolk; that it did not follow the course of the Delmar, but steered to the port and westward of the can buoy at the entrance of the West Norfolk channel, and thereby without warning ran down the launch, which was waiting for it to pass on the course of the tugboat; and that, when the collision became imminent, the towing hawser was not turned loose from the barge, as it easily could have been.

The respondent admits collision with a gasoline launch at about the time stated in the libel, but contends that it occurred in the main channel of the Elizabeth River, nearly opposite black spar buoy No. 11, and denies generally the facts relating to the collision as alleged in the libel, and particularly charges that the launch, before and when it passed the Delmar, was proceeding up the river on the extreme eastern edge of the channel, the Delmar at the time proceeding out of the West Norfolk channel, and shaping her course to the northward, so as to keep to the starboard side of the main ship channel, after passing Lambert's Point piers. It also denies that the barge did not follow the tug, or that it headed in the direction of the launch, or that the launch was drifting under the influence of a strong flood tide, and alleges that the tug, proceeding down the channel on her usual and proper course, with the barge following in her wake, passed the launch starboard to starboard, when about opposite the merchandise piers at Lambert's Point, the launch at that time being several hundred feet to the eastward of the tug, and well over on the eastern side of the main ship channel, the launch and tug having interchanged "salute" whistles, when about abreast of each other. Shortly afterwards, the tug heard distress signals from the barge, then observed that the launch had suddenly, unexpectedly, and without warning, changed her course in the wake of the tug; that the bow of the launch struck the forward end of the barge, and immediately sank; that nothing could have been done, either on the part of the tug or the barge, to avoid the collision, and no other maneuver was possible, save to stop the tug's engines, which was done.

Respondent also charges that the launch was at no time on the port side of the tug or barge, but, on the contrary, that she was far to starboard; that the launch was navigated by unskillful, unlicensed, and negligent navigators; that she was not in charge of an experienced and careful master; that she had no efficient lookout properly stationed; and, further, that the decedent, Wilkins, being master of and in charge of the launch's navigation, was guilty

of negligence contributing to the collision, which is a bar to a recovery by his administratrix herein.

John W. Oast, Jr., and R. T. Thorp, both of Norfolk, Va., for libelant and petitioners.

Thomas H. Willcox and Floyd Hughes, both of Norfolk, Va., for respondents.

WADDILL, District Judge (after stating the facts as above). From the above statement of the case, it will readily be observed that the parties are utterly at variance as to how the accident occurred, and where the collision took place. Libelant insists that the launch in which decedents lost their lives approached from the West Norfolk side of the channel, and was in collision with the barge on its port side; and the respondent, that the launch approached on its starboard, the Norfolk, or eastern, side of the channel. Respondent asserts that the collision occurred at a point about opposite Merchandise Pier No. 2, at Lambert's Point; whereas, libelant says it took place something higher up the river, between that point and spar buoys 32 and 32a. These differences will be discussed later, and the court will first consider the charges of negligence against respondent as to the undue length of the tow, and especially the hawser, the inefficiency of the navigators of the tug and tow, and the failure to have efficient look-outs upon the tug and barge.

[1] First. The collision occurred within the harbor limits of the city of Norfolk. Section 18 of the Rules and Regulations of the Board of Harbor Commissioners of the Port of Norfolk, Portsmouth and Norfolk County, in effect at the time of the happening of the occurrence, prescribes that no tows "exceeding 700 feet in length shall enter or depart from the harbor." This rule is valid and enforceable in the courts of admiralty, as well as in the state courts, and certainly, so far as the same is in furtherance of the purposes of commerce, it should be observed, respected, and enforced by the courts of admiralty. *The United States v. St. Louis, etc., Transp. Co.*, 184 U. S. 247, 254, 255, 22 Sup. Ct. 350, 46 L. Ed. 520; *The Margaret J. Sanford*, *The Strathleven* (D. C.) 203 Fed. 331, 335.

[2] Under regulations duly promulgated under the act of Congress of May 28, 1908 (35 Stat. 428, c. 212), hawsers on tows of seagoing barges navigating in the inland waters of the United States are limited in length to 75 fathoms, and should in all cases be as much shorter as the weather or sea will permit. The tow, as well as the hawser in use at the time of the collision, were both greater in length than prescribed by the state and federal statutes. The tug was 129 feet long, the hawser 90 fathoms, or 540 feet, and the barge 340 feet, making more than 1,000 feet for the entire tow, which exceeded the local regulation by 300 feet, and the hawser 15 fathoms, or 90 feet, longer than allowed by the federal statutes.

The suggestion is made that the federal statute has no application, because the tow was not intended to go to sea. This contention is more technical than real, as the tow was en route from Port Norfolk to Cape Charles, having to cross Chesapeake Bay, over 20 miles wide,

where the waters of Hampton Roads, Chesapeake Bay, and the Atlantic Ocean meet, and combined form substantially the open sea. Moreover, if neither the harbor rules nor the act of Congress prescribed or regulated the length of tows and hawsers, ordinary prudence, maritime skill, and good seamanship would suggest the impropriety of operating a tow and hawser of the length in question here, in passing from Port Norfolk channel out and through an exceedingly narrow and circuitous course, extending from the point of departure at Port Norfolk to and beyond Lambert's Point, and which was almost constantly crowded with shipping, and doing so was a menace to navigation. The safer, if not the only, course would have been for the tug to have made fast alongside of the car float, where it could promptly and effectively control the barge's movements, and at least its hawser should have been most materially shortened, towed as it was. Rules and Regulations of Board of Harbor Commissioners, § 18; Act Cong. May 28, 1908, c. 212, § 14, 35 Stat. 428 (Comp. St. 1916, § 7969), and regulations duly promulgated pursuant to the statute of December 7, 1908; *United States v. Transp. Co.*, 184 U. S. 247, 22 Sup. Ct. 350, 46 L. Ed. 520, *supra*; *The Jamestown* (D. C.) 114 Fed. 596; *The Manhattan* (D. C.) 181 Fed. 229, 233; *The Margaret J. Sanford* (D. C.) 203 Fed. 331; *The Teaser* (C. C. A.) 246 Fed. 222; *The Dorset* (this day decided, March 7, 1918) 250 Fed. —.

[3, 4] Second. The libellant charges that the tug was not manned by a competent master and crew, was without a lookout, and navigating at an improper speed, and that the barge was not in charge of a competent master and crew, and did not have a lookout properly stationed, and that the barge failed to follow the course of the tug. These charges are not infrequently formally made. In this case, both as respects the tug and barge, they become most material. The navigation was at night, over a circuitous course, in a busy channel, and the tug was admittedly without a lookout. The master says that he alone was in the pilot house, that he did not carry a lookout over this part of the course, and acted both as master and lookout, and he had one deck hand, who was aft on the port side of the tug fixing the lines. He further admitted that his duty required him frequently to look backward in order to observe the course and movement of the barge.

Considering the navigation of the barge, on the occasion in question, we have only the testimony of one person from her, namely, the head fireman, who was in charge of her navigation, her master being absent. He seems to have been aided by an assistant fireman, who was in the engine room, and a deck hand whose whereabouts in the barge he did not know. The barge was equipped with a bridge, running from one side to the other, and sufficiently high to permit the passage of freight cars beneath it. At each end of the bridge was a house, or quarters for the accommodation of the crew, and in the middle was the pilot house, from which the operation of the barge was directed. This acting captain was an unlicensed man, who said he had never qualified for license to run or steer boats, "or anything of that sort." He was acting as lookout, as well as master, and admits that he was the

only lookout on that occasion. In his position in the pilot house on the bridge of the barge, he was not so located as to be an efficient lookout, even assuming that he could perform the services of master, pilot, and lookout at the same time, and he concedes it was impossible from where he was to see objects or small craft on the waters, in close proximity to the car float, over the tops of the cars. Manifestly, this barge master was inexperienced, and it was impossible for him to perform the treble functions required of him. Moreover, as is evident from the result in this case, good seamanship required, while operating tows of this character over the course in question, that a lookout should be stationed upon the forward end of the barge, immediately over the water, from which position he could see and observe objects ahead, and from either side, from which danger might be anticipated. *The Vedamore*, 137 Fed. 844, 70 C. C. A. 342. Had such lookout been so stationed, this little gasoline launch, from whatever direction it appeared, would have been seen, and could have been readily warned off, as it was only 30 feet long, and could almost certainly, in her own length, have swung around and away from the impending peril in which it had been entrapped. Besides, a lookout so stationed could, as shown by the testimony, have released the trigger, thrown off the hawser, and dropped it overboard. The collision could thus have been avoided, regardless of whether the launch approached the car float on its starboard or port side. *The Colorado*, 91 U. S. 692, 698-701, 23 L. Ed. 379; *The New York*, 175 U. S. 204, 20 Sup. Ct. 67, 44 L. Ed. 126; *The Michigan*, 63 Fed. 280, 287, 288, 11 C. C. A. 187; *The Vedamore*, 137 Fed. 844, 70 C. C. A. 342; *The Viking* (D. C.) 201 Fed. 424, 427; *The Wilbert L. Smith* (D. C.) 217 Fed. 981, and cases cited; Rules of Navigation, art. 18, Act June 7, 1897, c. 4, § 1, 30 Stat. 100 (Comp. St. 1916, § 7892).

Third. This brings us to the question of whether the collision occurred as contended for by the libelants, or as insisted upon by the respondents; and it may be said that it is more or less difficult to determine the exact manner and place of the happening of the accident, because the actors therein on one side are no longer living to give their account of what occurred. The four persons on the launch were all suddenly drowned, and the craft in which they were traveling sunk and destroyed, and never afterwards found.

The libelants were enabled to call a disinterested witness, who was near the scene of the accident, crossing the harbor, and who made a report of the occurrence. He was passing from West Norfolk to Lambert's Point in a rowboat, and claims to have seen and observed the accident. He describes it as having happened on the western side of the channel, higher up the river than as contended for by respondent, and the tug as having gone to the eastward of the buoy at the entrance to the West Norfolk cut channel, and the barge to the westward thereof.

Respondent insists that it has broken down the testimony of this witness, and that his evidence cannot be relied upon. In this view the court does not concur, save as respects the location of the accident and the going of the tug to the eastward of the buoy at the mouth of

the cut channel. As to these the witness is most likely mistaken, and probably confused one buoy with another, which he might readily have done, crossing a large sheet of water in the dark. The four buoys involved, namely, spar buoy 4, nun buoy 2, and spar buoys 32 and 32a, all in small area, might naturally have been mistaken one for the other. With these exceptions his testimony seems to be entirely clear and positive, and is not without support from disinterested witnesses offered by the respondent, namely, the master of the C. & O. tug, and the master of the tug Clark, whose vessels were in the vicinity at the time. This witness evidently confused spar buoy 32a, at the mouth of the West Norfolk cut, with nun buoy No. 2, as the one around which the tug passed to the eastward, in the direction of the deep water channel, and then angling up at that point, and the failure of the barge to follow in the wake of the tug; or he had reference to the maneuver of the tug after it had proceeded a little further down stream, and made its departure at the curve in the channel just below spar buoy No. 32. If the gasoline launch was to the westward of mid-channel, as claimed by this witness, and the accident occurred as he claimed, it would naturally have taken place upon the tug's making its departure, after rounding either one or the other of the two buoys indicated.

The court is inclined to believe, from the whole testimony, that the collision took place nearer the point claimed by the respondent than that by the libelant, namely, off the merchandise piers at Lambert's Point, and after the tug made the last-named departure. The first witness called by the respondent, C. T. Powell, the master of the C. & O. car float, when giving his direct statement, comes pretty near placing the launch where the libelant's witness Jones says it was; that is, to the westward of the car float. It is true, on examination by counsel, he subsequently placed the launch to the eastward of the barge, though his last statement is greatly weakened by what he first stated; and the testimony of the master of the tug Clark, also called by the respondent, and who was also in the immediate vicinity of where the launch would have been, if to the eastward of the barge, as claimed by the respondent, saw nothing whatever of it. The testimony of these two disinterested witnesses corroborates that of libelant's witness Jones as to the location of the launch to the westward side of the barge. In the view of the court, in the result it is not very material whether the collision occurred at the exact place or precisely as claimed by either party; and it is inclined to think that the preponderance of the testimony is to the effect that the launch was to the starboard side of the car float at the time of the collision.

Assuming this to be the fact, the court sees no reason why the collision should have occurred, had the tug and tow been navigating prudently, as well respecting the length of the tow and hawser, and the presence of a proper lookout, as in the matter of the speed with which it was proceeding.

Fourth. Considering just how the collision occurred, after the launch passed the tug at a distance of some 100 feet away, and subsequently came into collision with the starboard end or side of the barge, as described by respondent's witnesses, especially by the master of the

barge and the fireman from the Delmar (the last named, who claims to have been standing on the starboard side of the Delmar, and saw and observed all that occurred), it may be said that their version of the affair is highly improbable. The last witness, Moore, testified:

"And after she passed the boat, and hauled out for the stern of the boat, like she was going across the stern between the barge and the tugboat, and it looked to me like she had got so near the stern of the boat that she seen the cable, and she tried to haul her back, and she did not have time to haul her back, and she went bow on to the barge. Q. Which side of the barge did she hit? A. The starboard side, the corner."

The acting master of the barge, Hudgins, thus described it:

"A. The launch come back to the Delmar, and changed her course apparently to cross our hawser between the barge and the tug, and I reached for the whistle, which was right over my head, and before I got hold of it the launch had changed her course again, and showed me her green light. Q. What did you do then? A. I took my hand down, and immediately the launch switched her course again, and showed me her red light, and headed across the hawser, and I got hold of the cord and blew the danger signal. Q. What did the launch do? A. She did not do anything, unless she hit herself behind the barge. Q. Do you know where she was hit? A. Between the end and the starboard quarter of the barge."

The testimony is undisputed in this case that the navigator and owner of the launch was an experienced water man, had spent years in the shipyard business and handling launches, and to suppose that he would have been guilty of such folly as this testimony shows it to have been, with friends aboard, is most improbable; in other words, that he came up within 100 feet of the tug, and with the car float following behind, with its lights burning, saluted the tug as he passed, and immediately proceeded to navigate around behind it, and between it and its tow, and into the hawser of the tow, first showing his red and then his green light. Such action on his part meant sudden destruction; when he could, if the situation was as claimed by these witnesses, have simply starboarded his helm, and in an instant gone away from, and not into, either the car float or the hawser. It seems to the court entirely manifest that, if the collision did occur from the starboard side, as claimed, it was at a time when the tug had made its departure at the curve in the channel, and in the immediate vicinity of where the collision occurred, in a northeasterly direction, and that at the moment the car float, some 200 yards away in the dark, had not changed its course to follow in the wake of the tug, but was moving apparently in a northwesterly direction, and the launch was caught in the angle, as the car float, upon the long hawser, began to be affected by the pulling of the tug, and curved into and upon the launch, striking it with its starboard bow.

The respondent's witness Moore gives strong support to this contention, as follows:

"Q. Had you been up long enough to see whether the barge was following right behind the tug? A. It was following as near behind the tug as she could, coming round."

And later on:

"Q. Was the barge kind of turning round, or was it straight behind the tug? A. It was straightening behind the tug, but not directly straight. Q.

Was it a kind of going over to port a little? A. Going from the launch over to the left."

With a view of showing how this accident happened, the court has gone somewhat into detail, conscious of the fact that it is difficult to determine with certainty, especially where the actors on one side are all dead. The conclusion reached is that the real cause was the manner in which the tug and tow were being navigated at the time. The tow was confessedly of undue length; on an improper hawser; both tug and barge without proper lookouts, and proceeding at an unsafe rate of speed, at night, along a difficult course, in plain violation of the laws, statutes, rules, and regulations prescribed for their movement, and contrary to what good seamanship would have suggested; and as a consequence the gasoline launch, on which the libellant's and petitioners' intestates were lawfully traveling, was caught, run down, and all on board lost. The negligence on the part of the respondent was sufficient within itself to, and does, account for the accident, and those liable therefor will not be permitted to cast the responsibility upon others, or have them share their burden, by suggesting possible faults of those whose voices are still, when their own acts of omission and commission fully account for the disaster. *The Pennsylvania*, 19 Wall. 125, 136, 22 L. Ed. 148; *The City of New York*, 147 U. S. 72, 85, 13 Sup. Ct. 211, 37 L. Ed. 84; *The Martello*, 153 U. S. 64, 74, 14 Sup. Ct. 723, 38 L. Ed. 637; *Lie v. San Francisco, etc., Steamboat Co.*, 243 U. S. 291, 298, 37 Sup. Ct. 270, 61 L. Ed. 726; *The Georgetown (D. C.)* 135 Fed. 854, 857; *Baltimore Steam Packet Co. v. Coastwise Transportation Co. (D. C.)* 139 Fed. 777, 779.

[5, 6] Fifth. The only question remaining for consideration is the amount of damages to be awarded to the libellant and petitioners for the loss of the lives of their intestates, and for the value of the launch. The fixing of these amounts is never free from difficulty, as so many different considerations have to be taken into account. Here the lives of four worthy and respectable colored people were lost. The master and owner of the launch, Alexander Wilkins, was a man of exceptional standing. His employer, the owner of the Core Marine Railway, testified that he knew him well; had employed him for 32 years; that he was a caulker and carpenter, making \$3 a day every day; and that he was a man of large experience in handling and navigating launches; that his general character, and as respects sobriety, was as good as any man's could be, and that he never saw him take a drink, or smelled whisky on him; that he was a good man at everything, and an honest man, one that he trusted with his business and money in his absence; that he sold him the launch, and it was worth \$1,000. Wilkins was a married man, 45 years of age, in good health, and left a widow and nine children, whose ages ran from 22 years to nine months.

Edward Bishop was 29 years old, and left a widow and three small children. He was a wagoner, earning \$2.50 a day, and worked steadily. The two young women were 16 years old; one of them worked as a nurse, and earned \$2 a week; the other was not at work.

The court's conclusion is that an award of \$7,500 should be made

for the loss of the life of Wilkins, and \$600 for loss of the launch, \$4,500 for the life of Edward Bishop, and \$1,500 each for those of Elizabeth Hix Simmons and Lubertia Howell.

SUMMERTIME v. LOCAL BOARD, DIVISION NO. 10, et al.

(District Court, E. D. Michigan, S. D. November 20, 1917.)

No. 5986.

1. HABEAS CORPUS ⇨54—CONSCRIPTION ACT—PETITION FOR RELIEF AGAINST DRAFT BOARD.

Where petition for habeas corpus and certiorari directed to a local board, under Conscription Act May 18, 1917, c. 15, 40 Stat. 76, does not show that the petitioner, denied exemption claim as an alien who has not declared his intention to become a citizen, has complied with the requirements of the act and the regulations thereunder, or has ever presented to the local board and district board the reason of ignorance assigned in his petition for such failure, he not having resorted to the procedure provided by the act before praying for relief from the District Court, the relief asked must be denied.

2. ARMY AND NAVY ⇨20—POSSIBLE ABROGATION BY CONSCRIPTION ACT.

The mere fact that an alien was exempt from military service by a treaty with his government, entered into by the United States before the enactment of Conscription Act May 18, 1917, does not necessarily entitle him to exemption from the operation of the Conscription Act, since a treaty, like any other law of the United States, constitutionally may be suspended by Congress.

3. ARMY AND NAVY ⇨20—DRAFT ACT—ALIEN—RIGHT TO EXEMPTION.

Petitioner against local and district draft boards for habeas corpus and certiorari to nullify their decision that he, a nondeclarant alien, was not entitled to exemption from the operation of Conscription Act May 18, 1917, was not deprived by the act of any right of exemption to which he was previously entitled, but, on the contrary, the act expressly provides for such exemption to be claimed as prescribed.

4. ARMY AND NAVY ⇨20—DRAFT ACT—ALIEN—JURISDICTION OF DRAFT BOARD.

Under Conscription Act May 18, 1917, c. 15, § 5, 40 Stat. 80, requiring aliens to register, and providing that all persons so registered shall remain subject to draft into the forces authorized, unless exempted or excused as provided, petitioner, a registrant under the act, was not excluded from its operation merely because he was a nondeclarant alien; but the local draft board had jurisdiction to pass on the question whether he was entitled to the exemption provided in the act.

5. HABEAS CORPUS ⇨54—DRAFT ACT—PETITION TO NULLIFY ACTION OF DRAFT BOARDS.

Petition against local and district draft boards for habeas corpus and certiorari to nullify their decision that petitioner, a nondeclarant alien, was not entitled to exemption from the operation of Conscription Act May 18, 1917, must be denied, in the absence of allegations that petitioner has been deprived of fair hearing, that the draft board has grossly abused its discretion, or failed to comply with the provisions of the statute or rules and regulations, or that petitioner has fully exhausted his legal remedies.

Petition for habeas corpus and certiorari by James Summertime against Local Board, Division No. 10, and others. Petition denied, without prejudice to petitioner's right to file an amended petition within 10 days.

Anthony Maiullo, of Detroit, Mich., for petitioner.
John E. Kinnane, of Detroit, Mich., for respondents.

TUTTLE, District Judge. This is a petition filed by the petitioner, James Summertime, an alien who has not declared his intention to become a citizen of the United States, alleging that such alien has been unlawfully conscripted under the so-called Conscription Act, and is being illegally detained by the military authorities at Camp Custer, in this division and district, and praying for writs of habeas corpus and certiorari directed to the authorities concerned in his detention. The petition alleges that the said alien registered in accordance with the terms of said act; that he at no time received notice to appear for examination under the act, and was not informed that it was necessary for him to so appear; that the local board already mentioned claims to have mailed notices to him; that on October 12, 1917, he appeared before said local board and filed a claim for exemption, and affidavit in support of such claim; that said board mailed such claim and affidavit to the district board, with a letter stating that he had been certified for service, and on notice from the Adjutant General had appeared for transportation to the military training camp at Camp Custer, where he had been sent on September 22, 1917, and that he had just then presented a claim for exemption on the ground that he was an alien who, through ignorance, did not present exemption claims at the proper time; that in response to such letter the district board notified the local board that there was nothing to indicate that the local board had made any mistake, and that in its opinion the case should not be reopened. The petition alleges that, about October 25, 1917, petitioner filed with said local board a petition asking for a reopening of his case on the grounds that he was an alien who had never declared his intention to become a citizen of the United States; that he was not called before said board for examination; and that under a treaty between the United States and Italy, of which he is a subject, dated February 26, 1871 (17 Stat. 848), he is exempted from compulsory military service in the United States; that this petition was forwarded to the district board, which board unlawfully and illegally refused to reopen his case.

[1] Without entering into a complete discussion of the question as to the extent of the jurisdiction of this court to review decisions of the local and district boards under the Conscription Act, or attempting a full statement of the nature of the general question involved, or the various phases of it which may require consideration under varying states of fact, into which I do not deem it necessary to go in the present case, I think it sufficient at this time to point out that petitioner does not allege that he has been deprived of a fair hearing by the local or district board, or that the notice which he claims not to have received was not in fact mailed to him at the address given on his registration card, as required by section 25 of the rules and regulations governing the draft, or that his name was not posted in the offices of the local board in a place accessible to the public view, as required by such section, or that his name was not given to the press with a request for publication, as also required by such section. Nor

does the petition allege that, at the time he first appeared before the local board and filed his claim for exemption, the time for filing such claim had not expired. It does not appear that he even attempted to explain to the local board, at the time his case first came before it, or, on appeal, to the district board, why he had not filed this claim within the time and in the manner prescribed by the aforesaid rules and regulations. In other words, it does not appear that he has complied with the requirements of the act and the regulations thereunder, or that he has ever presented to the local board and district board the reasons here assigned for such failure. Not having resorted to the procedure provided by this statute before praying for relief from this court, the relief asked must, under the circumstances disclosed in this petition, be denied. *United States v. Sing Tuck*, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917.

[2] The mere fact that this alien was exempt from military service by a treaty entered into before the enactment of the present statute does not necessarily entitle him to exemption. It is well settled that a treaty, like any other law of the United States, may constitutionally be repealed or suspended by Congress, which, of course, must assume the responsibility for such action. *Cherokee Tobacco Cases*, 11 Wall. 616, 20 L. Ed. 227.; *Head Money Cases*, 112 U. S. 580, 5 Sup. Ct. 247, 28 L. Ed. 798.

[3-5] Section 14 of the Conscription Act provides that:

"All laws and parts of laws in conflict with the provisions of this act are hereby suspended during the period of this emergency."

Under section 5 of the act, petitioner was required to register, and such section also provided that:

"All persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this act provided."

Furthermore, the Conscription Act did not deprive petitioner of any right of exemption to which he was previously entitled, but, on the contrary, expressly provided for such exemption, to be claimed in the manner prescribed by such act.

Without going fully into a statement of my reasons, I deem it sufficient on this point to state that I have no doubt that petitioner was not excluded from the operation of this act merely because he was a non-declarant alien, but that the local board had jurisdiction to pass on the question whether he was entitled to the exemption provided in the act. As already stated, it is not alleged that petitioner has been deprived of a fair hearing, or that the board has grossly abused its discretion or has failed to comply in any respect with the provisions of the statute or rules and regulations, or that petitioner has fully exhausted all the remedies given by law.

In the absence of any such allegations the petition is hereby denied, without prejudice to the right of petitioner to file an amended petition at any time within 10 days from this date. An order will be entered in accordance with the terms of this opinion.

HASTORF v. LEONHARD MICHEL BREWING CO.

(District Court, E. D. New York. February 6, 1918.)

1. WHARVES ⇨20(3)—ACTION FOR NEGLIGENCE—DEFENSES.

Where the known condition of a berth was such as might be expected to produce injury to a boat, it is no defense to a suit for such an injury that other boats had loaded there without injury.

2. WHARVES ⇨20(7)—INJURY TO VESSEL—LIABILITY FOR NEGLIGENT CONDITION OF DOCK.

A corporation, owner of a dumping board, which it rented, *held*, under the evidence, to have had no interest in its operation which rendered it liable for an injury to a scow from the negligent condition of the loading berth.

In Admiralty. Suit by Albert Hastorf against the Leonhard Michel Brewing Company. Decree for respondent.

Foley & Martin, of New York City, for libelant.

Macklin, Brown & Purdy, all of New York City, for respondent.

CHATFIELD, District Judge. Action for damages caused by the sinking of the dumper *Adelphia* in front of a dumping board at Bond and Third streets, in the Gowanus Canal, on or about the 5th day of September, 1914. The testimony shows that the injuries to the vessel were caused by stranding when partially loaded, and the liability for said injuries would fall upon the party subjecting the boat to the improper strains caused by loading in such position. There is nothing to indicate failure on the part of the persons handling the boat, either in the way of improper maintenance of lines or negligence in breasting the boat off, and the issue of the case comes down to the question of responsibility for failure to dredge the berth before its use in the manner in question. It appears that the barge had been chartered on the 23d of July, and that at various times in August boats had gone aground at this dump; but apparently the condition of the bottom became worse, and, if it did not, the circumstances upon the 3d, 4th, and 5th of September, when the *Adelphia* was being loaded, so combined as to inflict injury which may have accidentally been avoided upon previous trips to the dump.

[1] The first question to be considered is whether or not negligence is shown by such condition of a berth as to cause that injury which might reasonably be expected, even though a number of vessels had previously undergone the risk and escaped without danger. It has been held in many cases, where public and common use of a sidewalk or street, without injury to the passer-by, is admitted, that the evidence of the situation and such public use might throw some light upon the question of negligence in leaving the place in such condition that accident would not ordinarily be expected, but from which it did in fact occur. But in the present case we have an injury occurring from what might reasonably have been expected to produce injury, and evidence that it did not previously happen does not present any defense.

[2] The real question in the case is as to the responsibility of the

respondent for the conditions shown. It appears that the Michel Brewing Company is a corporation, which under its charter has certain powers, including the owning and running of a brewery, distillery, or refrigerating plant, the construction and use of wharves or docks in connection therewith, the purchase of interests in other property, and the holding of property anywhere in the United States, and the usual powers in relation to the transaction of necessary business in connection with the trade operations just specified. It owns the property at which this dumping board is located, and previously rented the same to a contracting firm for the removal of ashes and such materials. It was admittedly within the scope of respondent's charter to use the dumping board as a dock or berth for any scow that might be bringing or taking away material from the brewery, or in connection with the business of the brewery itself; but it did not have authority to conduct a public dump.

The respondent pleads freedom from liability for the condition of the berth and for the maintenance of the same when in the possession of a tenant, and in order to establish the existence of such a tenant has introduced evidence to show an agreement during the summer of 1914 with certain individuals doing business under the name of the Bond Development Company. It further appeared in the testimony that this Bond Development Company was the name under which the individuals concerned expected to be incorporated; but no such corporation was actually formed, and no certificate of doing business under this name was filed.

One of the serious issues of fact in the case is with respect to the relations of the parties who were doing business under the name of the Bond Development Company. It is admitted that Joseph Donnelly and D. Guernsey Odell were associated in the enterprise, and that one Thomas B. Rogers acted as general manager and was interested in the business, although he appears from the testimony not to have been in a position to put in money in forming the corporation. He in fact was the practical man, and the individual who seems to have interested the others in undertaking this business, which had been surrendered by a corporation previously removing materials from the dump. As has been said, the corporation was never formed. Rogers' management did not bring in immediate profits, and possession of the dump was surrendered, and operations ceased on the day on which the Adelpia sank in the berth in front of the dump.

The Michel Brewing Company is brought into the matter through transactions with John Michel, the son of Leonhard Michel, the president of the company. John Michel was also secretary and treasurer of the brewery and a director in the same. While the Bond Development Company was going into operation, the C. F. Harms Company, which in turn chartered boats from Hastorf and other owners as occasion required, exacted from the Michel Brewing Company a guaranty for payment of charges against the Bond Development Company for dumpers to be used at the dumping board in question.

It appears that neither the Michel Brewing Company nor the C. F. Harms Company knew that the Bond Development Company had

no actual existence, and both parties, as well as the libelant, Hastorf, treated the Bond Development Company as a corporation or an actually existing partnership. There is no dispute that the brewing company, at the instance of John Michel, as manager of the brewing company, guaranteed payment to the Harms Company of all charges for dumpers, "for our account, to be used in connection with the Bond Development Company or its successors, at Bond and Third street board, Brooklyn, N. Y."

The charge is made, by the Harms Company and by the libelant, that the brewing company was planning to operate this dump through a subsidiary corporation, because of the lack of power in the brewing company to conduct a dumping board business under its charter, and that John Michel so stated the situation to the Harms Company.

The libelant also offered the testimony of John Donnelly, one of the two men admittedly operating under the name of the Bond Development Company, to show that, not only had the Bond Development Company advanced no further than the form of voluntary oral partnership, but also that John Michel, as an individual, was a full partner in the transaction. From this testimony it would appear that John Michel might have been anticipating personal benefit as a partner in the dumping business, in addition to his interest in the brewery, and that he might have had some motive in seeking a personal share in its profits, if the brewery was unable of itself to manage or conduct the dump, and if from that fact the only return to the brewery as such would be rental of the property. John Michel strenuously denies this claim of partnership, and its determination is probably immaterial to the question of responsibility for the injuries received by the Adelpia.

The admitted facts are that the individuals who were doing business under the name of the Bond Development Company, rented from the brewing company the right to use the slip in question for the purposes of a dumping board. Whether the individuals comprising the Bond Development Company could be fined for evasion of the law requiring registration of that name with the county clerk of Kings county, or whether John Michel is responsible as one of the partners in the firm called the Bond Development Company, is immaterial; for there is no evidence in the case that the brewing company, or John Michel, as manager, was to receive from the operations of the Bond Development Company more profit than the rent of the dumping board. Even if John Michel as an individual was to get this profit, it seems to have been concealed from the brewing company, and the guaranty by the brewing company of the charges for towing, wharfage, and labor on all scows used for account of the brewing company would not cover responsibility for the manner of loading by any corporation or firm which might rent the dump from the brewery.

Counsel in their briefs have devoted much argument to a discussion of liability of the brewing company for the accident in question, from the standpoint of *ultra vires*. While it must be held that the brewing company would still be liable for a tort, the evidence does not show that the brewing company was acting as principal, through an agent;

but, on the contrary, it appears that the brewing company was the landlord, and that its tenants were individuals, whose motives and acts have involved the landlord in an apparent sharing in what actually and legally was not such responsibility as would make the respondent (the landlord) liable for the injuries sustained.

The libel must be dismissed.

DE BEKKER v. FREDERICK A. STOKES CO. et al.

(District Court, S. D. New York. February 27, 1918.)

1. COURTS ⇨493(3)—FEDERAL COURT—PENDENCY OF SUIT IN STATE COURT.

Where the enrollment of a decree of the state court, divesting defendant of literary property in copyrighted work and vesting it in complainant, was imminent, the question whether a bill for infringement of copyright could be maintained in the federal court will be disposed of, though the state court's decree had not become *res judicata*, and recovery for infringement depended on the vesting of the copyright in complainant.

2. JUDGMENT ⇨828(3)—FEDERAL COURT—PROCEEDING IN STATE COURT—COPYRIGHTS.

Where a decree of the state court revested complainant with literary property in a copyrighted work and assessed damages for infringement, complainant could not, no infringement thereafter appearing, maintain suit in the federal court for infringement of the copyright, because dissatisfied with the damages awarded by the state court; for, unless the decree of the state court revested the copyright in complainant, he had no standing in the federal court, and, if its decree in that particular was conclusive, it must be deemed conclusive as to the assessment of damages.

In Equity. Bill by Leander J. De Bekker against the Frederick A. Stokes Company and another. Bill dismissed.

Harold G. Aron, of New York City, for complainant.

Briesen & Schrenk, of New York City, for defendants.

AUGUSTUS N. HAND, District Judge. The Stokes Company, by a contract made in 1907 with the complainant, agreed to copyright an encyclopedia of music, which he had composed for them. They were to pay him a royalty, and had the exclusive right to print, publish, and put on the market the work. The contract also provided that, if they should desire "to sell the work outside of the regular trade—that is, by subscription, mail order, premium, special advertising, or other similar methods—they were to have the privilege of purchasing the complete rights for such special sales for the sum of \$150, no royalty being payable for sales in these special ways."

The Stokes Company took out the copyright to the publication, and held the record title to it, pursuant to the above contract, published several editions, and paid the prescribed royalty. Thereafter, in 1910, they arranged with the University Society to issue the publication as part of a ten or twelve volume encyclopedia of music, and credited the complainant with \$150 upon his indebtedness to them, on the theory that such a publication was covered by the terms of the contract.

After this publication, the complainant sued, in the New York Supreme Court, the same defendants named in this suit, alleging that the publication of the copyrighted work as part of a ten-volume musical production was such a fundamental breach of contract that the entire agreement should be rescinded. This suit resulted in an interlocutory judgment in the New York court that the agreement be rescinded, that further publication be enjoined, and that the possession and control of the literary property in the copyrighted work be revested in the complainant as of the 5th day of October, 1910.

The original judgment was entered May 22, 1914, but the publication proceeded by reason of orders which were granted suspending the effect of the interlocutory judgment until November 20, 1916, when proceedings in the New York appellate courts resulted in the affirmance of the interlocutory judgment. This judgment appointed Wilbur Larremore, Esq., referee, to state the accounts between the parties, and decreed that the complainant was entitled to "such damages as flow from the breach of the contract," and was further entitled to royalties as prescribed by the contract on all sales up to the entry of the interlocutory judgment. Mr. Larremore held that the only damages which were established were royalties to the amount of \$1,169.40, at the rate prescribed in the contract, and his report to that effect is before the New York Supreme Court for confirmation. The principal practical objection that Mr. De Bekker makes is that this referee received evidence of overhead charges, and thus found that there was no profit made by the University Society in its publication of the copyrighted work, although there was an actual excess of receipts over manufacturing costs.

[1] By reason of dissatisfaction with results in the state court, the complainant presses the suit in this court for infringement of copyright, and seeks damages and profits since October 5, 1910, the date as of which the New York court decreed that the contract was rescinded and the copyright was revested in Mr. De Bekker. Both parties have discussed the interlocutory judgment of the state court and whether it is res adjudicata here. If it is not, this court clearly has no jurisdiction, for then the copyright would still be vested in the Stokes Company, and Mr. De Bekker could by no possibility sue in a federal court for infringement. If, by reason of the technical rule that only an enrolled decree is res adjudicata, the state judgment is not yet probative, still a final judgment will soon be entered in that court, and the legal rights of the parties have already been defined by the highest court of that state. It therefore seems proper to discuss a situation which, if not existent, is imminent, so that I shall assume for the purpose of argument that the New York court judgment is res adjudicata.

[2] Now, the complainant here went into the only court which either could rescind his contract or give him any relief under it at the time he first brought suit. He did not merely obtain a rescission, but asked for the very damages he is seeking here, and has been given the relief he sought for. His only right to damages at the time he sued arose from the breach of his contract. He holds no copyright, except as he may be given title to it under the New York judgment by reason of

the breach of contract and consequent rescission. If, therefore, he has suffered a tortious invasion to the copyright, title to which was re-vested in him by judgment of the New York Supreme Court, he clearly elected to seek adequate remedy in a court of competent jurisdiction, asking from it both damages and profits arising out of the breach. These damages and profits the New York court had jurisdiction to award down to the date of the final decree. Such an action inherently based upon the contract amounted to a waiver of the tort for which he seeks to obtain redress in this court. In the state court he sued for breach of contract; in this court he sues for infringement, which is a tort, and seeks relief against it in this court of equity. He was by the interlocutory judgment of the state court allowed to prove any damages and profits which he might be entitled to, as well as the royalty prescribed by the contract. He has only failed to secure damages and profits from the referee because the latter held that he had not sufficiently proved either.

I can see no possible reason for allowing a suitor, who is dissatisfied with damages the state tribunal has allowed, to enter another court in the hope of more liberal treatment. He might have the right to do so before final judgment is awarded in the state court, if this court had independent jurisdiction; but the very existence of its jurisdiction is dependent upon the decree of the state court revesting title to the copyright, and that title is only re-vested by decree of the state court awarding to the complainant herein the very damages, if provable, which he seeks to obtain here. No sales of the copyrighted publication since November 20, 1916, have been proved. Consequently no infringement has been shown here, outside of the period covered by the damages which have been allowed by the interlocutory judgment of the state court. The judgment of that court, when finally entered, will give him a relief that is complete for all acts of infringement which have occurred under any theory of the case.

I have not alluded to the contention, well supported by authority, that the title to the copyright could not be re-vested by a judgment in Mr. De Bekker, but only by an assignment by the Stokes Company, either voluntarily made or enforced by the court in invitum. *Ager v. Murray*, 105 U. S. 126, 26 L. Ed. 942; *Newton v. Buck*, 77 Fed. 614, 23 C. C. A. 355; *Jewett v. Atwood Co.* (C. C.) 100 Fed. 647. The decisions hold that the United States courts can only exercise jurisdiction, where diverse citizenship does not exist, on behalf of the record owner of the copyright. *Wilson v. Sandford et al.*, 10 How. 99, 13 L. Ed. 344; *Albright v. Teas*, 106 U. S. 613, 1 Sup. Ct. 550, 27 L. Ed. 295; *Chadeloid Co. v. Johnson*, 203 Fed. 993, 122 C. C. A. 293. I have assumed that Mr. De Bekker may have a right to invoke the aid of this court, so as to cover his rights under any situation which may arise.

The situation, therefore, comes down to this: If the proceedings in the state court are not probative, the bill must be dismissed, because the complainant is not the legal owner of the copyright in suit. If they do establish the rights of the parties, they have awarded the complainant complete relief. Upon either theory, therefore, the bill must be dismissed, with costs.

In re SCHWARTZ.

(District Court, N. D. Ohio, E. D. March 25, 1918.)

No. 6458.

1. BANKRUPTCY ⚡410—DISCHARGE—FAILURE TO APPLY.

Where a bankrupt does not apply for a discharge within the period limited by the act, he is forever barred from obtaining a discharge against the debts scheduled and provable in that proceeding.

2. BANKRUPTCY ⚡404(2)—DISCHARGE—DENIAL.

A denial of an application for discharge, not reviewed or reversed, is a final judgment, conclusive against the right of a bankrupt to obtain discharge from debts scheduled and provable.

3. BANKRUPTCY ⚡410—DISCHARGE—APPLICATION.

Where an application for discharge is made within due time, but voluntarily withdrawn, the effect is the same as if the bankrupt failed to apply for discharge within the period limited.

4. BANKRUPTCY ⚡404(2)—DISCHARGE—DISMISSAL.

Under Bankruptcy Act July 1, 1898, c. 541, § 2, subd. 15, 30 Stat. 545 (Comp. St. 1916, § 9586), declaring that the court shall make such orders, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of the act, where a bankrupt, having applied for leave to withdraw his petition for discharge and allowed the period fixed to expire without again applying for a discharge, filed a second petition, in which no new liabilities or additional assets were scheduled, the court of bankruptcy should dismiss the same without waiting for the bankrupt to apply for a discharge, as he could not obtain a discharge from those debts scheduled and provable in the original proceedings.

5. BANKRUPTCY ⚡413(9)—DISCHARGE—INJUNCTION.

In such case he should be enjoined from further applications for discharge, as the bankrupt could not obtain a discharge from those debts scheduled and provable in the first proceedings.

In Bankruptcy. In the matter of the bankruptcy of Loeb Schwartz. On petition for dismissal of the voluntary petition and to enjoin the bankrupt from filing further petitions or applications for discharge. Proceedings dismissed, and injunction granted.

A. F. Ingersoll and Schwartz & Lustig, all of Cleveland, Ohio, for petitioner.

S. A. Grossner, of Cleveland, Ohio, for bankrupt.

WESTENHAVER, District Judge. The bankrupt on December 30, 1915, was adjudicated a bankrupt upon a voluntary petition filed in the Western division of this district. On November 17, 1916, he filed his petition for discharge from his debts scheduled and provable against him in that proceeding. On January 8, 1917, specifications were filed in opposition to his discharge, which were referred to a special master to hear and report his findings of fact and conclusions of law. On January 18, 1917, the bankrupt applied for leave to withdraw his petition for a discharge, which leave was on February 12th following granted, and said application for discharge was withdrawn. On November 6, 1917, the bankrupt filed in this court his voluntary petition in bankruptcy, with schedules of debts and assets. All the

debts therein scheduled had been scheduled in the former involuntary proceeding in the Western division of this district, and the assets scheduled consist only of three items of property, which might properly be and were claimed as exempt. An adjudication in bankruptcy has been entered upon this voluntary petition.

In this situation, T. C. Keller, trustee, selected and appointed in the former proceeding in the Western division, appeared and filed a petition, setting forth, among other facts, the foregoing, and asks that this voluntary petition be dismissed, and that the bankrupt be perpetually enjoined from filing further petitions or applications for a discharge as against the creditors whose debts were scheduled and provable in the former proceeding.

[1-3] A bankrupt's petition for discharge may be filed in 12 months as of right, and upon leave of court for good cause shown must be filed within 18 months from the date of the adjudication. If the application is not made within the time thus limited, the bankrupt is forever barred from obtaining a discharge as against the debts scheduled and provable in that proceeding. It is also settled law that the denial of an application for a discharge, not reviewed or reversed is a final judgment, binding equally upon the bankrupt and his creditors. It may also be regarded as settled law that an application for a discharge made within due time, but voluntarily withdrawn, is in legal effect, the same as a failure to apply for a discharge within the time limited by law.

[4] In all these situations, either of a failure to apply within the time, or having applied and voluntarily withdrawn the application, or a denial by the court of an application for a discharge, a final and conclusive judgment is in effect rendered, which thereafter controls the relations of bankrupt and creditors, and has the same effect in law as a former adjudication upon the merits of a controversy between adverse parties.

It follows that the bankrupt by this proceeding cannot procure a discharge against the debts scheduled and provable in the former proceeding. This proceeding is in effect a new application to obtain relief, which had been applied for and denied in a former proceeding. It is the duty of this court, upon these facts being brought to its attention, to make such order, under subdivision 15, section 2, of the Bankruptcy Act, as is required in the premises; and, inasmuch as no new debts contracted since the prior adjudication in bankruptcy have been scheduled, and no additional assets are by this proceeding brought within the jurisdiction of the bankruptcy court, the proper order in the premises is one dismissing the voluntary petition herein, at the costs of the petitioner. *In re Fiegenbaum* (2 C. C. A.) 121 Fed. 69, 57 C. C. A. 409, 9 Am. Bankr. Rep. 595; *Kuntz v. Young* (6 C. C. A.) 131 Fed. 719, 65 C. C. A. 477, 12 Am. Bankr. Rep. 505; *Pollet v. Cosel* (1 C. C. A.) 179 Fed. 488, 103 C. C. A. 68, 30 L. R. A. (N. S.) 1164, 24 Am. Bankr. Rep. 678; *Armstrong v. Norris* (8 C. C. A.) 247 Fed. 253, — C. C. A. —, 40 Am. Bankr. Rep. 735.

[5] Counsel for trustee also asks that the bankrupt be enjoined from instituting any further proceedings in bankruptcy, seeking a

discharge from the debts scheduled and provable in the first proceeding; and counsel for the bankrupt herein urges that the application, both to dismiss and for an injunction, is premature, and should not be considered at all until the bankrupt makes an application to this court for a discharge.

If additional assets had been brought within the jurisdiction of this court, or if debts other than those scheduled in the former proceeding had been scheduled herein, it might be proper to permit this cause to proceed until an application for a discharge were made by the bankrupt. In that situation some relief might be afforded, both to the creditors and to the bankrupt, and the time of this court and of the referee, and the labor and expense of creditors in connection herewith, might not be wholly useless and vain. In the absence of additional assets and new debts, however, no reason exists why creditors should be compelled to expend money and time to defend an unnecessary and futile proceeding. It will be necessary, if this cause is permitted to go on, or if the bankrupt is permitted to institute new actions to obtain discharge, for creditors to attend here and before the referee, perhaps prove their claims, file specifications against an application for a discharge, give the bond usually required on opposition to discharge, and be otherwise vexed and harassed without reason or necessity.

For these reasons, not only should the bankruptcy petition be dismissed, but it is proper that the bankruptcy court, in the exercise of its equitable power, should enjoin and restrain the bankrupt from seeking by a new application to procure a discharge from the debts scheduled and provable in the prior proceeding. In *re Feigenbaum, supra*; *Armstrong v. Norris, supra*.

An order may be entered, in conformity with the conclusions herein announced, enjoining bankrupt from proceeding again within six years from date of prior adjudication to obtain a discharge from debts scheduled and provable therein. An exception may be noted on behalf of the bankrupt.

GILLISPIE v. RIGGS et al.

(District Court, N. D. West Virginia. January 19, 1918.)

No. 859.

1. FRAUDULENT CONVEYANCES ⇨241(2)—SETTING ASIDE—FEDERAL COURTS—JURISDICTION—SURETIES.

Though complainant recovered a decree in the state court against the executor of his father's estate for a devastavit committed by such executor, that decree does not establish the liability of the sureties on the executor's bond, so as to warrant complainant in maintaining a suit in the federal court to enjoin such sureties from disposing of their property until the decree should be satisfied, for a federal court of equity is without jurisdiction to intervene to set aside fraudulent conveyances of a debtor at the instance of a creditor whose debt is not acknowledged

or established by a judgment rendered, accompanied by a right to the appropriation of the property to payment, and the sureties, though the decree established the devastavit, might defend on the ground that the bond was a forgery, etc.

2. INJUNCTION \Leftrightarrow 44—JURISDICTION—ADEQUATE REMEDY.

In such case, could the judgment against the executor alone be held as giving complainant a right to the appropriation of the property of the sureties, such judgment would necessarily carry with it a vested and superior right in the court rendering the same to at once take possession and dispose of the property under execution against the executor, and hence a suit in equity in the federal court to enjoin disposition thereof should be dismissed, being unnecessary, complainant already having an adequate remedy.

3. CONSTITUTIONAL LAW \Leftrightarrow 315—DUE PROCESS OF LAW—DEPRIVATION OF PROPERTY.

Could a decree against an executor for a devastavit committed by him as such be deemed to give complainant the right to appropriate the property of the sureties under execution against the executor, the exercise of such right would be in violation of the due process of law clause of Const. U. S. Amend. 14.

In Equity. Bill by John J. Gillispie against C. B. Riggs and others. On motion to dismiss the bill. Motion sustained.

Arlin G. Swiger and J. Hanford McCoy, both of Sistersville, W. Va., Thos. P. Jacobs, of New Martinsville, W. Va., and David F. Pugh, of Columbus, Ohio, for plaintiffs.

Boreman & Carter and C. B. Riggle, all of Middlebourne, W. Va., Arthur S. Dayton, of Philippi, W. Va., and Charles Edgar Hogg, of Point Pleasant, W. Va., for defendants.

DAYTON, District Judge. The plaintiff, Gillispie, has recovered a decree in the state court against Walter R. Smith, the executor of his father's estate for a devastavit committed by him as such executor. He has instituted an action of debt on the law side of this court against Riggs and others, as sureties upon the official bond of such executor, and also filed this bill seeking to enjoin these sureties from disposing of their property until his decree is satisfied by them. Such sureties were not parties to the proceeding in the state court wherein the decree was rendered. This cause comes on upon the motion of defendants to dissolve the temporary injunction and dismiss the bill.

[1] The cases of Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358, Cates v. Allen, 149 U. S. 452, 13 Sup. Ct. 883, 977, 37 L. Ed. 804, Hollins v. Brierfield C. & I. Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113, and Adler v. Fenton, 24 How. (65 U. S.) 407, 16 L. Ed. 696, deny absolutely the right of federal courts of equity to intervene to set aside fraudulent conveyances or transfers of a debtor's property at the instance of his creditor, who, in the language of the court in Scott v. Neely, has not "an acknowledged debt, or one established by a judgment rendered, accompanied by a right to the appropriation of the property of the debtor for its payment." It is there further held that the right of trial by jury guaranteed by the Seventh Amendment to the Constitution "cannot be dispensed with except by

the assent of the parties entitled to it," and the court approves the statement made by Chancellor Kent in *Wiggins v. Armstrong*, 2 Johns. Ch. (N. Y.) 144, that a creditor, "unless he has a certain claim upon the property of the debtor has no concern with his frauds." The court further in this case considers the prior cases of *Clark v. Smith*, 13 Pet. 195, 10 L. Ed. 123, and *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52, cited in opposition, and distinguishes them; and in the subsequent case of *Cates v. Allen*, affirming *Scott v. Neely*, the court distinguished further the cases of *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873, and in the dissenting opinion, filed by Justice Brown and concurred in by Justice Jackson, the cases of *Dewey v. West Fairmont G. C. Co.*, 123 U. S. 329, 8 Sup. Ct. 148, 31 L. Ed. 179, *Stewart v. Dunham*, 115 U. S. 61, 5 Sup. Ct. 1163, 29 L. Ed. 329, and *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827, relied upon by these two dissenting Justices, were in practical effect distinguished or overruled by the majority, so far as in conflict with *Scott v. Neely*.

Therefore this bill in equity must depend on whether its plaintiff has "an acknowledged debt, or one established by a judgment rendered, accompanied by a right to the appropriation of the property of the debtor for its payment." The plaintiff insists that he has such debt by reason of the decree obtained by him against the principal in the executorial bond, in other words, that his debt is "established by a judgment rendered," and reliance is especially made upon *Stovall v. Banks*, 10 Wall. (77 U. S.) 583, 19 L. Ed. 1036, holding:

"Sureties in an administration bond are bound by a decree against their administrator finding assets in his hands, and nonpayment of them over to the same extent to which the administrator himself is bound. They cannot attack collaterally a decree made against him on such a subject."

This case came from Georgia, and, so far as I can discern, declared a common-law principle unaffected by statute. It is insisted by the counsel for these sureties here that such common-law principle has been modified in this state by statute (sections 23 and 24, c. 85, Code), carried into our Code from the Virginia Code of 1849 through sections 23 and 24, c. 130, Code Virginia 1860. It is not my purpose to construe these Code provisions and their effect upon the common-law principles enunciated in *Stovall v. Banks*; that must come, I conceive, upon the trial of the action at law pending between the parties; but admitting, for the purpose of this motion, the full effect that can be claimed for the ruling of *Banks v. Stovall*, I am compelled to the conclusion that it cannot save this bill from the effect of the ruling in *Scott v. Neely* and like cases, for several reasons:

First. As against these sureties while the judgment against the executor may bind them to admit he had assets, and devastated the same to the full amount ascertained by the decree against him, it does not compel either their assent (a) that they are bound to pay such sum, nor (b) give the plaintiff, by reason thereof, the "right to the appropriation of their property for its payment." As to the first proposition: There are a number of independent defenses which, as sureties, under given circumstances, they could make; as, for example, that

they did not sign or execute the bond—that it was a forgery; that, since the execution of it, the plaintiff, as beneficiary in it, has released them from its obligation; that their principal has, since the decree or judgment rendered against him and return of nulla bona on execution, paid the debt, or a part of it; or that they have, as sureties, paid it or a part of it.

[2] As to the second proposition, if this judgment against the executor alone is to be held as giving the plaintiff the “right to the appropriation of the property of these sureties, for its payment,” it must necessarily, being a right conferred by legal adjudication, carry with it a vested and superior right in the court rendering the judgment to at once take possession of and dispose of such property, and both the pending law cause, and this chancery one, would have no excuse for their institution. In other words, the execution that was issued against the executor could have been levied on the goods and chattels of these sureties and the judgment could have been docketed and enforced by sale of their real estate.

[3] This is not claimed, and never has been claimed, could be done, and would at once be held to violate the due process clause of the Fourteenth Amendment.

I therefore conclude this bill cannot be maintained, and the motion to dismiss it must be sustained.



THE TUB.

(District Court, E. D. Pennsylvania. January 22, 1918.)

Nos. 8, 12.

MARITIME LIENS — 65—EVIDENCE—NEGLIGENCE—BOAT BREAKING FROM ANCHORAGE.

The breaking away from her anchor of a motorboat and her consequent injury *held*, on the evidence, not due to any fault of libelant, which was making repairs on her, but was not charged with her care, but to the insufficiency of her anchor and cable, of which the owner had previously been advised.

In Admiralty. Suit by the Hall Engine Company against the gasoline power vessel Tub, Harry P. Richardson, claimant, with cross-libel. Decree for libelant, and cross-libel dismissed.

Maurice G. Belknap of Philadelphia, Pa., for libelant.
Francis B. Biddle, of Philadelphia, Pa., for the Tub.

BRADFORD, District Judge. The Hall Gas Engine Company has libeled the gasoline power vessel “Tub” for the recovery of the unpaid balance of the price of certain work, materials and repairs alleged to have been done and furnished by the libelant upon and to the “Tub” in 1913 and 1914. The libel is filed under the act of June 23, 1910 (36 Stat. 604, c. 373; Comp. St. 1916, § 7787), providing that any per-

son furnishing repairs, supplies or other necessaries to a vessel, whether foreign or domestic, upon the order of the owner shall have a maritime lien, enforceable by proceedings in rem.

It appears from the evidence that libelant is and for a number of years has been engaged at Bridesburg, Pennsylvania, in the marine gasoline engine business, and on or about October 1, 1913, agreed with Harry P. Richardson, the owner of the "Tub," to install in that vessel an open base engine of the type manufactured by the libelant, and known as the Hall engine, in place of the Globe engine then used on her; the engine so to be installed to cost \$450, and a credit of \$150 to be given to Richardson for the Globe engine which was to be the property of the libelant; that the Hall engine was duly installed on the "Tub" and Richardson then agreed to pay libelant the further sum of \$70.87 for work, labor and other incidental expenses in connection with the installation, making altogether \$370.87 due to the libelant after deducting the credit of \$150 for the Globe engine; and that Richardson subsequently paid to the libelant on account \$335, leaving a balance due of \$35.87. Richardson claims that the last mentioned sum represents his full indebtedness to the libelant, in the absence of any cross or counter-claim against the latter. But it appears from the evidence and from Richardson's answer and cross-libel that in December, 1913, the libelant agreed to install on the "Tub" a Paragon clutch in place of the Hall engine clutch in order to lessen noise and vibration, and to make no charge for the Paragon clutch, but only for the installation of the same. Pursuant to this agreement the Paragon clutch was furnished and installed. The libelant also at the request of Richardson installed on the "Tub" a magneto and deck control. For work, labor and materials necessary to the making of these and other improvements done and furnished in good faith the libelant was, I think, entitled to receive compensation somewhat in excess of \$155.52 now claimed by it. For the sake of securing an early settlement from Richardson libelant, however, reduced its bill to the above mentioned sum.

Richardson in his answer and cross-libel alleges that he has suffered damage to the amount of \$490 through the negligence of the libelant, in that by reason of delay in the repairing of the "Tub" he was deprived of her use during a certain period resulting in damage to him to the amount of \$240. This claim has been abandoned by the respondent. He further alleges that from the negligence of the libelant the "Tub" on or about January 1, 1914, broke away from her anchorage and sustained damage to the extent of \$250. The evidence does not, I think, justify the making of a demand for compensation in this connection. The breaking away of the "Tub" from her anchorage and the injury she consequently received resulted from the insufficiency of her anchor and cable, or one of them. The evidence shows that during a preceding period of more than two months Richardson's attention had repeatedly been called to such insufficiency both by the witness Wisser and the libelant, and he had repeatedly promised but carelessly omitted to correct such insufficiency. That he assumed the risk involved in it is to be gathered from his own testimony. He stated:

"Mr. Wisner did speak to me about the anchor, first about that, and I said that the anchor had held me previously for two or three seasons, and that the job would soon be over and I would be off on my way, and he need not worry about it, or something to that effect."

He further testified:

"Q. You have heard Mr. Wisner and Mr. Hall say that they urged you to get a new cable. Did they do so? A. I think possibly Mr. Hall spoke to me, and I judge he did. I do not recollect. Q. Why did you not get a new cable? A. I considered that the cable would do, when I went away I would probably outfit again, and as the boat was tied up to the slip I thought the cable would do."

The libelant did not undertake to insure the safety of the "Tub" during the installation of the Hall engine and Paragon clutch. Nor did it assume the risk of damage to the vessel from the weather. While the libelant was a manufacturer and installer of electric motor engines for small vessels, it did not have a dock in which they could lie. Wisner had a dock or slip in the vicinity at which Richardson had previously stopped, and in taking the "Tub" to Bridesburg on the occasion in question he was advised by the libelant to arrange with Wisner for the care of his vessel. He accordingly left her with him, and, as has been said, was informed of the insufficiency of the anchor and cable. The breaking away of the "Tub" from her anchorage and her consequent injury was on the evidence to be attributed to the carelessness of her owner, and not to any fault on the part of the libelant.

For the above reasons the libelant is entitled to a decree against the "Tub" for the payment of the above mentioned sum of \$155.52, with interest and costs, and to a decree dismissing the cross-libel of Richardson, with costs.

Decrees in accordance with this opinion may be prepared and submitted.

FRANCESCHI v. JONES et al.

(Circuit Court of Appeals, First Circuit. March 13, 1918.)

No. 1282.

1. MORTGAGES ⇨33(5)—CONVEYANCE AND LEASE TO GRANTOR—EFFECT.

Where the record owners of land, to which they had taken title by absolute conveyance leased it to their grantor with option to purchase, they were not mortgagees, but owners of the land.

2. JUDGMENT ⇨649—ORDER NOT ACTED ON—EFFECT.

Where, in proceedings for the settlement of the estate of one having a lease on Porto Rico lands with an option to purchase, the court made orders which by agreement of the parties treated the lessors as mortgagees, it being agreed that if payment was not made within six months the lessors should have the right to set the same aside, such orders, not having been acted on, cannot be deemed to have divested the lessors of their title so that the heirs of the lessee could convey title to the property subject only to the rights of the lessors as mortgagees, for the order really only evidenced a provisional agreement for the sale of the lands.

Appeal from the District Court of the United States for the District of Porto Rico; Peter J. Hamilton, Judge.

Bill by Antonio Franceschi y Franceschi against Walter McK. Jones and others. From a decree of the District Court of the United States for the District of Porto Rico, dismissing the bill, complainant appeals. Decree affirmed.

Jose A. Poventud, of Ponce, P. R., for appellant.

Francis E. Neagle, of New York City (Woodward Emery, of Boston, Mass., on the brief), for appellees.

Before DODGE, BINGHAM, and JOHNSON, Circuit Judges.

DODGE, Circuit Judge. Franceschi appeals from a decree of the District Court of March 2, 1916, dismissing a bill in equity filed by him December 17, 1915. In the bill he alleged that he owned an undivided eight-ninths of a plantation containing about 444 acres, called "Limon," then and since July 21, 1910, in the possession of Jones, here appellee; and that Jones, except as to an undivided interest, not exceeding the remaining one-ninth, had only a mortgagee's interest therein. He asked that Jones be ordered to deliver possession to him as majority owner, and that he be allowed to redeem the property from the alleged mortgage. Other allegations and prayers of the bill need not be here stated.

Jones was owner of the whole estate in dispute, according to the conveyances appearing of record, having bought it from its prior record owners, the succession of Vicente Alvarado; whose recorded conveyances to him are dated May 29, 1910, and March 2, 1911. The first of these conveyances transferred the property to him subject to all the equities which may have originated from a suit in equity, also in the District Court, known as "Olivieri v. Olivieri," and further referred to below. By their second conveyance, however, the grantors

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

withdrew all such reservations and conveyed to Jones full title without reservations.

Franceschi's assertion that Jones' rights were only those of a mortgagee rests wholly upon an order made on June 7, 1907, by the then judge of the District Court, in the case referred to. A final decree in said case, entered May 18, 1910, is alleged to have confirmed said order of June 7, 1907. Jones has denied, in his answer to the bill, that said order or final decree was effective for any such purpose. The circumstances under which they were made may be stated as follows:

On October 24, 1900, the widow and children of Vicente Alvarado, constituting his succession, and being the then owners of the Limon estate, here involved, leased it to Felix Olivieri for eight years, from August 1, 1900, at an annual rental of \$1,872, agreeing in the lease to sell it to him at any time, within the term thereof for \$15,600.

Olivieri died in 1901, in possession under said lease, but in arrears for the rent, and never having exercised his right to purchase. Olivieri v. Olivieri was a suit between his heirs to settle their respective claims to share in his estate, including this Limon property. A receiver appointed by the court assumed possession of all the property in dispute. On June 5, 1907, the above-mentioned lessors filed an intervening petition in the suit, praying for a decree directing the receiver to turn over the Limon estate to them, alleging that they were its owners, and that the above lease and agreement were no longer in force; \$4,130 being overdue for rent, and no steps having been taken towards the purchase contemplated. The lease or agreement provided that it should be considered as rescinded in case of failure to pay the rent, and the lessors have the right to take immediate possession.

Judge Rodey, the then District Judge, before said petition had been answered, undertook, after conference with the parties or their counsel, to enter the order or decree here in controversy, on June 7, 1907. After reciting, among other things, that the intervener's counsel had announced that all they prayed in the premises was "The payment to them of whatever sum may be found to be due them by the Olivieri estate, and to hold their lien upon the premises described therein until the same is paid," and reciting further that, "It being considered that this statement of fact will eliminate considerable controversy in the premises as to the construction of the instrument, * * * the same having been admitted by said interveners to be a mortgage lien," the order went on to provide:

"That all the property mentioned in the said intervening petition * * * be and the same is hereby considered to belong to the said Olivieri estate, subject to the mortgage lien of the said interveners, * * * the difference between the parties as to the amount due upon said mortgage to be hereafter duly determined by the court. It is further understood that the court, through its officers and receiver, is to make an effort to have this and other specific liens duly ascertained as to amount, and paid off with all convenient speed, and in case that sufficient money is not realized six months from this date, counsel for the said (interveners) shall have the right to move to set aside the agreement they have this day made, the same to be then subject to the discretion of the court as to being granted or not."

None of the steps contemplated by the above order were ever taken, nor was the intervening petition by the Alvarados ever answered.

More than two years later, on August 12, 1909, there was another conference of counsel with the same District Judge, resulting in a stipulation that day filed with his approval which provided for an entirely different settlement between the parties. In this the Alvarados agreed to "accept in full of their entire claim, deed, mortgage or debt" the Limon estate here in controversy, and an adjoining tract of about 446 acres; they to pay a specified sum upon receiving clear title to the whole from the Olivieri heirs and the court. But, as had been the case with the proceedings contemplated in the previous order of June 7, 1907, none of the agreements embodied in said stipulation were ever carried into effect. They were to become effective only upon the entries of certain further decrees proposed which were never entered.

Thereafter, on May 18, 1910, a so-called final decree in *Olivieri v. Olivieri* was entered by the same District Judge, who also filed on the same day certain findings of fact made by him. Adelaida Olivieri, plaintiff in the case, was declared entitled to a certain undivided share of and interest in the property left by her father. To the Limon estate no express reference was made. Neither expressly nor by implication, so far as we can see, did the court undertake to adjudge that it formed part of her father's property, or that the Alvarados stood in any other relation to it than that of its owners. The case was continued for further supplementary or incidental proceedings.

It was after the entry of this "final decree," and nearly three years after Judge Rodey's order of June 7, 1907, that Jones took title to the property from the Alvarados, as above. Having thus acquired it, he filed a petition, in July, 1910, in *Olivieri v. Olivieri*, asking that the receiver in that case be ordered to deliver possession of it to him. In a motion or answer filed July 10, 1910, Franceschi opposed the order for delivery asked for. This alleged Franceschi to be assignee of the rights to five-ninths in all of the Olivieri inheritance, and one Juan Felix Olivieri, joined with him in the motion, to represent another one-ninth. It further alleged that the court had determined that the Alvarado claim upon the Limon estate was "only a mortgage claim and lien," and that any or all the Olivieri heirs were entitled to exercise "the right of legal redemption" against Jones or whoever claimed under him.

Notwithstanding Franceschi's opposition, after a hearing in the District Court, before Judge Jenkins, who had succeeded Judge Rodey, Jones was held entitled to possession, and on July 21, 1910, the court ordered its receiver to deliver possession to him, reserving all other questions raised under his petition for further determination. By a petition dated September 14, 1911, Franceschi asked the District Court to set aside the order of July 21, 1910, alleging that it had been entered "without any jurisdiction or right for making the same." This petition was brought by Franceschi alone. In it the above order of June 7, 1907, was set forth at length, and also parts of the above final decree entered May 18, 1910. On November 15, 1911, this petition was heard and overruled by Judge Jenkins' successor, Judge Charlton. Jones' possession under the title conveyed to him by the Alvarados has thus continued, without interruption, since July, 1910.

The only rights in the property asserted by Franceschi are, as appears from his bill, rights assigned to him by heirs of Felix Olivieri at various times between May 19, 1910, and October 26, 1912. Unless he had shown that the Olivieri succession owned the property and that Jones' grantors, the Alvarados, had only a mortgagee's interest capable of being conveyed by them to him, Franceschi's bill could not be maintained and was rightly dismissed.

[1] Various dealings relating to the property, between Felix Olivieri and the Alvarados, prior to their above lease to him on October 24, 1900, appear from the record. The earliest in date was an absolute conveyance of the property from him to them, in 1878, in payment of a debt. These dealings and the documents evidencing them are reviewed in the opinion of the District Court ordering dismissal of Franceschi's bill. The District Judge concluded from them that there was nothing to show said lease to have been anything except what it purported to be on its face, a lease of the property with the option to purchase. In this conclusion we agree. It follows that the Alvarados were owners, not mortgagees, of the property at the time of Olivieri's death, and that such rights as belonged to Olivieri by virtue of his leasehold interest were, at most, all that the Olivieri succession could claim.

[2] With regard to Judge Rodey's order of June 7, 1907, the District Court considered his subsequent order on August 12, 1909, as showing that the order of June 7, 1907, could not have been regarded by the parties or by the court as settling the nature of the Alvarado claim to the property. As to the recitals of consent in said order, evidence was held admissible to show the circumstances under which it was made, and the conclusion was reached that said order was intended only as "a provisional arrangement under which the parties and the court hoped that a sale of the property would be made, whereby every one would receive what was due to him." The District Court further found that there had in effect been a disaffirmance within the six months' period referred to in Judge Rodey's order; the whole plan having fallen through, and the decree contemplated by the order having thereupon been permitted to lapse. In these conclusions we find no error, and none, therefore, in the dismissal of Franceschi's bill because of them.

The same order of June 7, 1907, has been before us upon appeal in another case from the same District Court. *Jones v. Pettingill et al.*, 245 Fed. 269, 277, 278, 157 C. C. A. 461. We find no reason to modify the views there expressed against its efficacy as a determination of title to the property here involved.

It is unnecessary, in view of the conclusions above stated, to discuss in detail the further defence asserted by Jones, that Franceschi had in any event stopped himself from asserting rights in the property adverse to Jones, such as the bill alleges, by his written agreement with Jones, dated October 29, 1912. This was an agreement made in view of a claim presented by Jones against the Olivieri succession, in *Olivieri v. Olivieri*, for unpaid rentals under the above lease; Jones having acquired the Alvarados' rights thereto. In consideration of

Jones' waiver of the claim thus presented, and of his agreement to dismiss his petition based upon them, Franceschi made sale to Jones of certain other property at an agreed price. The District Court found that Jones had consistently acted upon this agreement, and had given up the rents claimed by him. Franceschi fails to satisfy us that the District Court erred in so concluding.

The decree of the District Court appealed from is affirmed, and the appellee recovers his costs of appeal.

VULCAN METALS CO., Inc., v. SIMMONS MFG. CO.

VULCAN METALS CO., Inc., et al. v. SAME.

(Circuit Court of Appeals, Second Circuit. January 7, 1918. On Petition of Plaintiffs in Error for a Rehearing, February 13, 1918.)

Nos. 35, 36.

1. FRAUD \Leftrightarrow 11(1)—SALE—MISREPRESENTATIONS—PUFFING.

Where the buyer of vacuum cleaners and materials and machinery for their manufacture was allowed full opportunity to inspect the cleaners and test them, misrepresentations concerning their qualities and powers should be deemed mere puffing talk, which would not give rise to an action for deceit.

2. FRAUD \Leftrightarrow 11(1)—MISREPRESENTATION—SALES.

Where a seller of a large number of vacuum cleaners already manufactured, with materials and machinery for their manufacture, represented that they had not been put on the market, such representation was one of fact, the falsity of which would give rise to an action for deceit.

3. FRAUD \Leftrightarrow 64(1)—ACTIONS—EVIDENCE—QUESTION FOR JURY.

Where a buyer asserted that the seller was guilty of false representations, amounting to deceit, the question whether the seller's representatives made the representations asserted *held*, under the evidence, for the jury.

4. FRAUD \Leftrightarrow 36—MISREPRESENTATIONS—DEFENSES—RETRACTION.

A seller's retraction of a false statement made in negotiations prior to the time the parties entered into the contract is a good defense in an action for deceit by the buyer, and this is so where the seller delivered to the buyer a written retraction under circumstances warranting the belief that the buyer would inform himself of its contents.

5. FRAUD \Leftrightarrow 50—ACTIONS—BURDEN OF PROOF.

Where a buyer asserted that the seller made a false statement, and the seller defended on the ground that it had retracted the same, the burden of proving the retraction is on the seller.

6. FRAUD \Leftrightarrow 64(1)—ACTIONS—JURY QUESTION.

A statement in a written contract of sale, showing that vacuum cleaners sold had been placed on the market, cannot as a matter of law be treated as a retraction of the seller's misrepresentations that such appliances had not been placed on the market; but the question whether the statement was brought to the notice of the buyer's representatives is for the jury.

7. SALES \Leftrightarrow 124—RESCISSION—RETURN OF GOODS.

Where a buyer made no offer to return articles delivered, he cannot, despite the seller's misrepresentations, rescind the contract, and escape liability on notes given for the purchase price.

8. BROKERS Ⓒ94—AUTHORITY—REPRESENTATIONS.

A broker, who for a corporation negotiated a sale of vacuum cleaners, with machinery and materials for their manufacture, is without authority to make representations that such cleaners had not previously been put on the market.

On Petition of Plaintiffs in Error for a Rehearing.

9. SALES Ⓒ348(1)—SUBJECT-MATTER OF COUNTERCLAIM.

Under Code Civ. Proc. N. Y. § 501, declaring that the defendant may set up as a counterclaim a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject-matter of the action, and in an action on contract any other cause of action existing at the commencement of the action, a buyer, sued on notes given for the purchase price, cannot set up as a counterclaim an action of deceit for the seller's misrepresentations.

Hough, Circuit Judge, dissenting in part, and Learned Hand, District Judge, dissenting in part on rehearing.

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

Action by the Vulcan Metals Company, Incorporated, against the Simmons Manufacturing Company, begun in the state court and removed to the federal court, together with an action by the Simmons Manufacturing Company against the Vulcan Metals Company, Incorporated, and Albert Freeman, who counterclaimed. There was a judgment for the Simmons Manufacturing Company, defendant in the first action, and for it as plaintiff in the second, the counterclaim of the defendants Vulcan Metals Company, Incorporated, and Albert Freeman being dismissed, and the Vulcan Metals Company, Incorporated, and another bring error. Judgment in the action by the Vulcan Metals Company reversed, and judgment in action on notes modified, so as not to dismiss the counterclaim on the merits, and otherwise affirmed.

Writ of error to two judgments of the District Court for the Southern District of New York, entered in the first case upon a verdict directed by the court dismissing the complaint, and in the second case, upon a verdict directed by the court in favor of the plaintiff for the sum of \$43,423.04. The complaint in the first action was for deceit, brought in the state court and removed for diversity of citizenship to the District Court. The complaint in the second was originally brought in the District Court, about a month after the first suit, and was upon three notes, for \$15,000, \$12,500, and \$12,500, respectively. In the complaint on the second action the defendants set up the same facts which they laid in their complaint in deceit, and which they here pleaded as a defense to the action on the notes and as a counterclaim.

The gist of the complaint in the first action was the fraudulent procurement by the Simmons Manufacturing Company of a contract executed by the defendant Freeman on behalf of the Vulcan Metals Company, Incorporated, by which he purchased from the Simmons Company for \$75,000 all the tools, dies, and equipment owned by it for the manufacture of its vacuum cleaning machines, all manufactured machines and unassembled parts, as set forth in a schedule thereto attached, and all inventions, applications, and letters patent owned by the Simmons Company in vacuum cleaners, together with certain proposed improvements to be made thereon. The complaint further alleges that the officers and agents of the Simmons Manufacturing Company made false representations as to the character of the vacuum cleaners so sold and the extent to which they had been used upon the market, to which the Vulcan

Metals Company, Incorporated, acted to its prejudice, because the machines and patents were totally inefficient and unmarketable. The notes sued on in the second cause of action were three of those given as part of the purchase price. The District Judge directed a verdict for the Simmons Manufacturing Company in both actions, upon the theory that no actionable fraud had been made out, and the correctness of this ruling is the turning point in the case.

The plaintiff in the first action was a corporation, of which Albert Freeman, one of the defendants in the second action, was a promoter. He was an indorser of the notes, and conducted the negotiations which resulted in the purchase by him of the vacuum cleaners on behalf of the plaintiff. He testified to certain representations made to him at the time as an inducement to his entering into the contract. These representations emanated in the first instance from one Flynn, who had been apparently authorized by the Simmons Manufacturing Company to act as a broker in the sale of the machines and the patents. Flynn's authority to represent the Simmons Manufacturing Company in respect of such representations would be a turning point in the case, except for the fact that Freeman swore that the president of the company, one Simmons, and its general counsel, Barnes, had repeated all of Flynn's statements during the negotiations and that he had relied upon them. It therefore became essential to determine, since Simmons was clearly authorized to represent the Simmons Manufacturing Company, whether the misrepresentations would support an action of deceit. They were of two classes—those touching the efficiency of the vacuum cleaner; and, second, that no attempt had been made to market the machines by the Simmons Manufacturing Company.

The first of these classes is substantially the same as those contained in a booklet issued by the Simmons Manufacturing Company for the general sale of the vacuum cleaners. They include commendations of the cleanliness, economy, and efficiency of the machine; that it was absolutely perfect in even the smallest detail; that water power, by which it worked, marked the most economical means of operating a vacuum cleaner with the greatest efficiency; that the cleaning was more thoroughly done than by beating or brushing; that, having been perfected, it was a necessity which every one could afford; that it was so simple that a child of six could use it; that it worked completely and thoroughly; that it was simple, long-lived, easily operated, and effective; that it was the only sanitary portable cleaner on the market; that perfect satisfaction would result from its use; that it would last a lifetime; that it was the only practical jet machine on the market; and that perfect satisfaction would result from its use, if properly adjusted. The booklet is in general the ordinary compilation, puffing the excellence and powers of the vacuum cleaner, and asserting its superiority over all others of a similar sort. Flynn made a demonstration of the cleaner to Freeman with borax sprinkled upon the carpet, and allowed him to take one for experiment, which he retained for some time.

The second class of misrepresentations was that the Simmons Manufacturing Company had not sold the machine, or made any attempt to sell it; that they had not shown it to any one; that it had never been on the market, and that no one outside of the company officials and the men in the factory knew anything about it; that they had manufactured 15,000 of them, but before making any attempt to market it they had been told by their agent that it would be a mistake for them to attempt to sell these along with their ordinary line, which was furniture; that on that account they had withdrawn them from the market and had never made any attempt to put them out. Sweetland, one of the promoters of the Vulcan Metals Company, Incorporated, swore that Flynn had stated that the machines had been marketed, but marketed successfully. There was therefore a discrepancy between the testimony of these two representations, but for the purposes of the action it is not here material, since the complaint was based upon the representation that the machines had not been sold.

There was evidence that the machines, when exploited by the Vulcan Metals Company, Incorporated, proved to be ineffective and of little or no value, and that their manufacture was discontinued by that company not very long.

after they had undertaken it. There was also evidence that several of the Western agents of the Simmons Manufacturing Company had had the machines in stock and had attempted to market some of them; that they had been unsuccessful in these efforts, owing for the most part to the fact that the water pressures, where they had been sold, had not been sufficient to establish the necessary vacuum. Just what the vacuum was in the places where the machines were unsuccessful did not definitely appear in any of the proof.

Wilson B. Brice, of New York City (Charles H. Hyde, of New York City, of counsel), for Vulcan Metals Co., Inc.

Sullivan & Cromwell, of New York City (Clarke M. Rosecrantz and E. H. Sykes, both of New York City, of counsel), for Simmons Mfg. Co.

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

LEARNED HAND, District Judge (after stating the facts as above). [1] The first question is of the misrepresentations touching the quality and powers of the patented machine. These were general commendations, or, in so far as they included any specific facts, were not disproved; e. g., that the cleaner would produce 18 inches of vacuum with 25 pounds water pressure. They raise, therefore, the question of law how far general "puffing" or "dealers' talk" can be the basis of an action for deceit.

The conceded exception in such cases has generally rested upon the distinction between "opinion" and "fact"; but that distinction has not escaped the criticism it deserves. An opinion is a fact, and it may be a very relevant fact; the expression of an opinion is the assertion of a belief; and any rule which condones the expression of a consciously false opinion condones a consciously false statement of fact. When the parties are so situated that the buyer may reasonably rely upon the expression of the seller's opinion, it is no excuse to give a false one. *Bigler v. Flickinger*, 55 Pa. 279. And so it makes much difference whether the parties stand "on an equality." For example, we should treat very differently the expressed opinion of a chemist to a layman about the properties of a composition from the same opinion between chemist and chemist, when the buyer had full opportunity to examine. The reason of the rule lies, we think, in this: There are some kinds of talk which no sensible man takes seriously, and if he does he suffers from his credulity. If we were all scrupulously honest, it would not be so; but, as it is, neither party usually believes what the seller says about his own opinions, and each knows it. Such statements, like the claims of campaign managers before election, are rather designed to allay the suspicion which would attend their absence than to be understood as having any relation to objective truth. It is quite true that they induce a compliant temper in the buyer, but it is by a much more subtle process than through the acceptance of his claims for his wares.

So far as concerns statements of value, the rule is pretty well fixed against the buyer. *So. Dev. Co. v. Silva*, 125 U. S. 247, 256, 8 Sup. Ct. 881, 31 L. Ed. 678; *Gordon v. Butler*, 105 U. S. 553, 26 L. Ed. 1166; *Lehigh Zinc, etc., Co. v. Bamford*, 150 U. S. 665, 14 Sup. Ct.

219, 37 L. Ed. 1215. It has been applied more generally to statements of quality and serviceability. *Kimball v. Bangs*, 144 Mass. 321, 11 N. E. 113; *Neidefer v. Chastain*, 71 Ind. 363, 36 Am. Rep. 198; *Warren v. Doolittle*, 61 Ill. 171; *Hunter v. McLaughlin*, 43 Ind. 38. But this is not always so. *Iowa, etc., Co. v. Amer. Heater Co.* (C. C.) 32 Fed. 735. As respects the validity of patents it also obtains. *Reeves v. Corning* (C. C.) 51 Fed. 774; *Dillman v. Nedlehoffer*, 119 Ill. 567, 7 N. E. 88; *Huber v. Guggenheim* (C. C.) 89 Fed. 598. Cases of warranty present the same question and have been answered in the same way. *Chalmers v. Harding*, 17 L. T. (N. S.) 571; *Farrow v. Andrews*, 69 Ala. 96; *Bain v. Withey*, 107 Ala. 223;¹ *Gaar, etc., Co. v. Halverson*, 128 Iowa, 603, 105 N. W. 108; *Bartlett v. Hoppock*, 34 N. Y. 118, 88 Am. Dec. 428. *Contra, Elkins v. Kenyon*, 34 Wis. 93.

In the case at bar, since the buyer was allowed full opportunity to examine the cleaner and to test it out, we put the parties upon an equality. It seems to us that general statements as to what the cleaner would do, even though consciously false, were not of a kind to be taken literally by the buyer. As between manufacturer and customer, it may not be so; but this was the case of taking over a business, after ample chance to investigate. Such a buyer, who the seller rightly expects will undertake an independent and adequate inquiry into the actual merits of what he gets, has no right to treat as material in his determination statements like these. The standard of honesty permitted by the rule may not be the best; but, as *Holmes, J.*, says in *Deming v. Darling*, 148 Mass. 504, 20 N. E. 107, 2 L. R. A. 743, the chance that the higgling preparatory to a bargain may be afterwards translated into assurances of quality may perhaps be a set-off to the actual wrong allowed by the rule as it stands. We therefore think that the District Court was right in disregarding all these misrepresentations.

[2, 3] As respects the representation that the cleaners had never been put upon the market or offered for sale, the rule does not apply; nor can we agree that such representations could not have been material to *Freeman's* decision to accept the contract. The actual test of experience in their sale might well be of critical consequence in his decision to buy the business, and the jury would certainly have the right to accept his statement that his reliance upon these representations was determinative of his final decision. We believe that the facts as disclosed by the depositions of the Western witnesses were sufficient to carry to the jury the question whether those statements were false. It is quite true, as the District Judge said, that the number of sales was small, perhaps not 60 in all; but they were scattered in various parts of the Mountain and Pacific States, and the jury might conclude that they were enough to contradict the detailed statements of *Simmons* that the machines had been kept off the market altogether.

The *Simmons Manufacturing Company* insists that there was no evidence that *Simmons*, who was the only party authorized to speak for that company, knew that the goods had ever been put on sale, and it is quite true that there was no such direct evidence. It is at least arguable whether the evidence was sufficient to allow a jury to

¹ 18 South. 217.

say that Simmons had known of these efforts. The results of the sales seem to have come to the knowledge only of the local agents, but we think a jury might say that the fact of their sale and the decision of the agents to sell them might have been authorized by the home office, and that Simmons might have known of both. While, therefore, if the case turned only upon Simmons' knowledge of the failure of the machines upon sale, we should hardly think the evidence sufficient to justify any inference that he did know, yet, since the fraud alleged was of the fact of sale alone, the evidence did not justify a directed verdict. Such a misrepresentation might have been material to Freeman in the execution of the contract, since, if he did learn that they had been on sale, he might well have insisted that the results of those sales should be disclosed before he proceeded. Sweetland's testimony to the contrary only discredits Freeman's statements; it cannot be itself the basis of any recovery.

[4-6] The next question is as to whether any such misrepresentations were conclusively cured by the recital in the contract of purchase as follows:

"The party of the first part [the Simmons Company] has been engaged in the manufacture of a certain type of vacuum cleaning machines, and the parties of the first and second part [the National Suction Cleaner Company] have been engaged in the sale thereof."

We all agree that an adequate retraction of the false statement before Freeman executed the contract would be a defense. Whether this be regarded as terminating the consequences of the original wrong, or as a correction of it, is of little importance. Further, we agree that, even if Freeman had in fact never learned of the retraction, it would serve, if given under such circumstances as justified the utterer in supposing that he would. For example, a letter actually delivered into his hands containing nothing but a retraction would be a defense, though it abundantly appeared that he had never read it. His loss might still be the consequence, and the reasonable consequence, but for the letter, of the original fraud; but the writer would have gone as far as necessary to correct that fraud, and we should not be disposed to hold it as an insurer that its correction should be effective. Judge WARD and I, however, do not think that such a recital in such a place was certain to catch the eye of the reader, and that therefore neither was the defendant's duty of retraction inevitably discharged, nor, what is nearly the same thing, did the defendant show beyond question that Freeman actually saw it. As a retraction the recital was a defense, and the defendant had the burden of proof. As notice to Freeman actually conveyed, it may have been only evidence upon the causal sequence between the wrong and the injury; but we attach no great significance to that distinction. The fact that he signed the contract appears to us to be some evidence upon which the jury might say that he could not have seen the recital. That depends upon how much importance they think he attached to the original representation, and that depends in turn upon what they thought of his story. If they did believe that the representation was of critical consequence in his decision, they might infer that he did not see it, or he would

not have gone on without some explanation. The very silence of the testimony upon the question might be taken to infer that he had not noticed it, even at the trial, just as it might also be taken to indicate that he had fabricated the whole story, and hoped the recital would escape the notice of the defendant. In any event, the interpretation of the whole transaction appears to us not to be so clear that reasonable people might not come to opposite conclusions upon it, and that involves a submission to the jury. It is perhaps of some importance that no allusion to the recital appears in the record.

[7, 8] It results from the foregoing that the judgment in the action for deceit must be reversed. In the action upon the notes the judgment upon the notes will be affirmed, because the Vulcan Metals Company, Incorporated, did not make any offer to return the machines, tools, and patents, which were not shown to be without any value, and consequently it was in no position to rescind. The judgment in that action dismissing the counterclaim must, however, be reversed, since the counterclaim involved the same facts as the complaint in the action for deceit. Flynn's agency appears in this record only by his declarations, and he was not shown to have any authority to speak for the Simmons Company. He was at most only a broker, and as such his representations in the negotiations as to the prior conduct of the Simmons Company touching sales of machines were not within his authority. The same applies upon this record to Barnes, the general counsel of the defendant. The proof of their authority may, of course, be different upon the next trial, as to which we naturally have nothing to say. However, no representations should be allowed as to the efficiency, durability, or economy of the cleaners, and the case should be tried upon the sole issue whether the defendant, through duly authorized agents, represented to Freeman that the goods had not been put on sale when in fact they had, whether this representation was material to Freeman's execution of the contract, whether the insertion of the recital into the contract was all that was reasonably necessary by way of retraction, and, if not, whether Freeman did not actually read it in the contract.

Judgment in the action of deceit reversed, and new trial ordered. Judgment in the action on the notes affirmed so far as it gives judgment on the notes, and reversed so far as it dismisses the counterclaim, and new trial upon the counterclaim ordered.

HOUGH, Circuit Judge (dissenting in part). The one point on which I cannot agree with the majority is the effect of the statement (it makes no difference whether it is called a "recital" or by some other name) contained in a contract which was signed by Freeman before he suffered any loss and at the moment he entered into obligation. The opinion of the court holds that this retraction or correction cannot be judicially held adequate or sufficient to conclude Freeman, if "in fact [he] did not see it." But he never denied seeing it; and the majority holding is in effect that, though signature of contract is admitted, and reading of all of it not denied, yet, in the absence of a specific admission of reading with comprehension, a case was made

for the jury, because there is no presumption of reading, or at least of the intelligent reading, of an admittedly signed contract.

A man is held to be bound by a contract because he is presumed to know what it means and says; as the greater includes the less, I should consider him bound to a comprehension of the ordinary meaning of the words employed. The present ruling seems to me but a direction as to how to give evidence upon another trial.

On Petition of Plaintiffs in Error for a Rehearing.

PER CURIAM. We have concluded that the judgment in this action on the notes should be modified, so as to affirm the money judgment in favor of the plaintiff below, and to dismiss (but not upon the merits, as was done below) the counterclaim interposed. This counterclaim is substantially the action for deceit. That it did not constitute a defense was sufficiently set forth in our previous opinion.

[9] Whether the same allegations of fact can be used as a counterclaim is a question that depends upon the construction of section 501, Code Civ. Proc. N. Y. The cause of action is on the contract evidenced by the notes in suit; the counterclaim is in tort, and therefore the question is whether such tort cause of action arises out of the transaction set forth in the complaint or is "connected with the subject of the action." Underlying and governing this question of procedure is the legal fact that this action of deceit presupposes and recognizes a contract valid and enforceable. If there was not such a contract, this particular action of deceit could not exist, and no effort is or can be made in this proceeding to set aside, invalidate, or nullify either the contract evidenced by the notes or the contract out of which the notes arose. That this counterclaim did not, in the language of the statute, arise out of the contract or transaction set forth in the complaint, is too plain for argument; whether it is "connected with the subject of the action" is a question which we resolve in favor of plaintiff below. The question is often difficult, but, as was said in *Carpenter v. Manhattan, etc., Co.*, 93 N. Y. 556, "the counterclaim must have such relation to and connection with the subject of the action that it will be just and equitable that" the controversy be settled in one action. If a more rigid or formal test be looked for, the best is that of reciprocity. *Adams v. Schwartz*, 137 App. Div. 235, 122 N. Y. Supp. 41, and cases cited.

Making application of this test, could the payees of the notes, when sued in deceit, set up the notes as a proper counterclaim? Certainly not. The action of the lower court in dismissing the counterclaim on the merits naturally followed from its disposition of the action of deceit; the writ of error herein complained of what was done. We sustain the writ only in so far as the counterclaim was dismissed on the merits, modifying the judgment below by striking out those words. The judgment is otherwise affirmed.

LEARNED HAND, District Judge (dissenting). I think the judgment on the notes should be reversed, along with the judgment on the counterclaim, and that both should go back for the new trial.

NILE IRR. DIST. et al. v. GAS SECURITIES CO.

(Circuit Court of Appeals, Eighth Circuit. February 1, 1918.)

No. 4953.

1. TAXATION ⇨249—IRRIGATION DISTRICTS—EXCLUSION OF LANDS.

While Rev. St. Colo. 1908, § 3458, declares that in no case shall any land be taxed for irrigation purposes which from any natural cause cannot be irrigated or is incapable of cultivation, yet, as the exemption provided by section 3440 with respect to lands already irrigated is lost, unless claimed, the exemption contained in section 3458 is waived, where entrymen on public lands, instead of objecting to the inclusion of their lands within an irrigation district, petitioned for inclusion as soon as they should acquire a freehold title.

2. WATERS AND WATER COURSES ⇨226—IRRIGATION DISTRICTS—EXCLUSION OF LAND.

The provision for payments on inclusion of lands in an irrigation district, contained in Rev. St. Colo. 1908, § 3474, is for the benefit of the district, and may be waived; hence lands, having been included within a district, cannot be excluded therefrom because compliance with the provision was not required.

3. WATERS AND WATER COURSES ⇨226—IRRIGATION DISTRICTS—EXCLUSION.

Under Rev. St. Colo. 1908, § 3484, the board of directors of an irrigation district cannot exclude lands therefrom on petition of the owners, where there are outstanding bonds.

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Suit by the Gas Securities Company against the Nile Irrigation District and others. From a decree for complainant, defendants appeal. Affirmed.

Walter S. Coen, of Ft. Morgan, Colo., and Max D. Melville and I. B. Melville, both of Denver, Colo., for appellants.

Platt Rogers, James Grafton Rogers, and Edmund Rogers, all of Denver, Colo., for appellee.

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

MUNGER, District Judge. The District Court enjoined the directors of a Colorado irrigation district, on the application of a holder of its bonds, from making an order excluding lands alleged to be embraced in the district. An appeal is prosecuted from that decree. The district was formed under the laws of Colorado providing for the organization and management of irrigation districts. Sections 3440-3494, Rev. Stats. of Colorado 1908. In a general way this portion of the statutes is modeled upon the Wright Act, adopted by California in 1887 (St. 1887, p. 29), and its subsequent amendments, but there are some important differences between them. The general scheme of organization requires petitions for the formation of the district to be presented to the county board and a hearing to be accorded to those interested, and then the county board may make an order defining the district's boundaries. A vote of landowners in the district follows on

the question of ratification of the organization. If bonds are issued, a proceeding may be had in the state court for the confirmation of the issue. Section 3440 of the Colorado Statutes is as follows:

"Whenever a majority of the resident freeholders owning lands in any district desire to provide for the irrigation of the same they may propose the organization of an irrigation district under the provisions of this act, and when so organized each district shall have the powers conferred or that may hereafter be conferred by law upon such irrigation district: Provided, that where ditches, canals or reservoirs have been constructed before the passage of this act, such ditches, canals, reservoirs and franchises, and the lands watered thereby, shall be exempt from the operation of this law, except such district shall be formed to purchase, acquire, lease or rent such ditches, canals, reservoirs and their franchises."

Section 3441 provides for petitions by freeholders of the proposed district asking the county board to create the district and to define its boundaries, and for notice by publication of a hearing upon the application. Section 3442 gives the county board power to fix the boundaries of the district, but contains this proviso:

"Provided, that said board shall not modify such proposed boundaries described in the petition so as to change the objects of said petition or so as to exempt from the operation of this act any land within the boundaries proposed by the petition susceptible to irrigation by the same system of waterworks applicable to other lands in such proposed district; nor shall any land which will not in the judgment of the board be benefited by such proposed system be included in such district if the owner thereof shall make application at such hearing to withdraw the same."

Other provisions of the statutes are as follows:

Section 3450: "All waters distributed shall be apportioned to each landowner pro rata to the lands assessed under this act within such district. The board of directors shall have power to lease or rent the use of water or contract for the delivery thereof to occupants of other land within or without the said district at such prices and on such terms as they deem best, provided the rental shall not be less than one and one-half times the amount of the district tax for which said land would be liable if held as a freehold."

Section 3458: "It shall be the duty of the county assessor of any county embracing the whole or a part of any irrigation district, to assess and enter upon his records as assessor in its appropriate column, the assessment of all real estate, exclusive of improvements, situate, lying and being within any irrigation district in whole or in part of such county. Immediately after said assessment shall have been extended as provided by law, the assessor shall make returns of the total amount of such assessment to the county commissioners of the county in which the office of said district is located. All lands within the district for the purposes of taxation under this act shall be valued by the assessor at the same rate per acre: Provided, that in no case shall any land be taxed for irrigation purposes under this act, which from any natural cause cannot be irrigated, or is incapable of cultivation."

Section 3471: "The holder or holders of title, or evidence of title, representing a majority of the acreage of any body of land adjacent to or situate within the boundaries of any irrigation district, may file with the board of directors of said district a petition in writing, praying that such lands be included in such district. The petition shall describe the tracts, or body of land owned by the petitioners, but such description need not be more particular than is required when such lands are entered by the county assessor in the assessment book. Such petition shall be deemed to give the assent of the petitioners to the inclusion in said district of the lands described in the petition, and such petition must be acknowledged in the same manner that conveyances of land are required to be acknowledged."

Section 3473: "The board of directors, at the time and place mentioned in

said notice, or at such time or times to which the hearing of said petition may adjourn, shall proceed to hear the petition, and all objections thereto, presented in writing by any person, showing cause as aforesaid, why said petition should not be granted. The failure of any person interested to show cause, in writing, as aforesaid, shall be deemed and taken as an assent on his part to the inclusion of such lands in said district as prayed for in said petition."

Section 3480: "Any tract of land included within the boundaries of any such district, at or after its organization, under the provisions of this act, may be excluded therefrom, in the manner herein prescribed, but such exclusion of land from the district shall not impair or affect its organization, or its rights in or to property, or any of its rights or privileges of whatever kind or nature; nor shall such exclusion affect, impair or discharge any contract, obligation, lien or charge for or upon which it would or might become liable or chargeable, had such land not been excluded from the district."

Section 3484: "The board of directors, if they deem it not for the best interest of the district that the lands mentioned, in the petition or some portion thereof, should be excluded from said district, shall order that said petition be denied; but if they deem it for the best interest of the district that the lands mentioned, in the petition, or some portion thereof, be excluded from the district, and if there are no outstanding bonds of the district, then the board may order the lands mentioned in the petition, or some defined portion thereof, to be excluded from the district."

A petition was presented to the county board for the organization of the appellant district, and the county board made an order, after a hearing, defining its boundaries. Subsequently bonds were issued by the district, and the District Court, after a hearing upon the regularity of the proceedings, confirmed the issue of bonds. At the time the district was organized its boundaries included some lands that were a part of the public domain, and which were occupied by claimants who had initiated entries under the homestead and desert land laws of the United States. After the district was organized, and before the claimants had made final proofs or had earned the right to have patents issued to them, these occupants of the public land presented a petition to the district board for the inclusion of these lands in the district. Each agreed to use diligence to make final proof and to acquire title, and in the meantime to rent the use of water from the district in accordance with the irrigation district statutes and to pay therefor an amount equal to $1\frac{1}{2}$ times the amount of the district tax for which the land would be liable, if it had been held as a freehold at the time the district was organized. It was further agreed that when final proof was made and title was acquired the petition should operate as a petition for the inclusion of the land in the district and that the petitioners would pay to the district a sum equal to the amount that they would have been required to pay as assessments for the payment of the district's bonds, if these lands had been included in the district at its organization. After final proofs had been made on some of these lands, the district board passed a resolution including them in the district. Afterwards these landowners and some of the petitioners who had not made final proofs filed a request that the district board exclude their lands from the district. This bill was filed to enjoin the district board from making an order of exclusion of the lands. The board admits that it will make the order unless restrained in this suit, and claims the right to do so because portions of these lands from natural causes cannot be irrigated and are incapable of cultivation, and because the

board had not required the owners of lands included to pay their pro rata shares of past-due assessments and offered proof of these defenses; but the trial court was of the opinion that neither of these grounds justified the board's proposed action and enjoined it from making any order excluding lands embraced in the district.

[1] Appellants' claim that the board may exclude land, if from natural causes it cannot be irrigated or is incapable of cultivation, because, under the provisions of section 3458 above cited, such lands cannot be taxed for irrigation purposes, and there is no other reason for retaining them in the district. The claim is not without support of authority under somewhat similar statutes. *Andrews v. Lillian Irr. Co.*, 66 Neb. 458, 92 N. W. 612, 97 N. W. 336; *State v. Several Parcels of Land*, 80 Neb. 424, 114 N. W. 283; *Sowerwine v. Central Irr. Dist.*, 85 Neb. 687, 124 N. W. 118; *Wight v. McGuigan*, 94 Neb. 358, 143 N. W. 232. See, also, *Lundberg v. Green River Irrigation Dist.*, 40 Utah, 83, 119 Pac. 1039; *Laws of Utah 1909*, c. 74, § 19. The general rule under such irrigation statutes is that the objection that lands will not be benefited by inclusion in an irrigation district must be made by landowners at the time the district is organized, when a hearing is afforded for that purpose, or it will be waived. *Board of Directors of Modesto Irrigation Dist. v. Tregea*, 88 Cal. 334, 26 Pac. 237; *Cullen v. Glendora Water Co.*, 113 Cal. 503, 39 Pac. 769, 45 Pac. 822, 1047; *Knowles v. New Sweden Irr. Dist.*, 16 Idaho, 217, 101 Pac. 81; *Oregon Short Line R. Co. v. Pioneer Irrigation Dist.*, 16 Idaho, 578, 102 Pac. 904; *Smith v. Progressive Irr. Dist.*, 28 Idaho, 812, 156 Pac. 1133; *Hanson v. Kittitas Reclamation Dist.*, 75 Wash. 297, 134 Pac. 1083; *Herring v. Modesto Irr. Dist. (C. C.)* 95 Fed. 705-722; *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 168, 17 Sup. Ct. 56, 41 L. Ed. 369.

The provision for exemption from taxation found in section 3458 of the Colorado Statutes is not more explicit than the provision found in section 3440, whereby lands watered by ditches constructed before the passage of the act are exempted from the operation of the act, which includes the right of taxation. In the case of *Wilder v. Board of Directors of South Side Irr. Dist.*, 55 Colo. 363, 135 Pac. 461, the Supreme Court of Colorado, construing the terms of this irrigation act, held that a landowner, who would have been entitled to the protection of the proviso in section 3440, waived the benefit of its terms, if he did not appear at the hearing for the organization of the district, or at the proceedings for confirmation of the bond issue, and submit his objections to inclusion in the district. If one whose lands are already watered by a sufficient system of irrigation may be included in the district for failure to make such objection, there is no reason why one whose lands cannot be watered by the proposed plan should not also make his objections in a similar manner, or be held to have waived the right to object subsequently. No objection is shown to have been made by petitioners, either to the formation of the district or to the confirmation of the issue of bonds; but on the contrary, petitioners gave their formal written assent to be included in the district after final proofs had been made on their lands and title was acquired, and agreed

that the board could proceed on such petitions to receive their lands into the district. Section 3471 of the Colorado Statutes enacts that such a petition by one holding evidence of title shall be deemed to give the assent of the petitioners to the inclusion of the lands within the district. The effect of such a petition by an entryman of the public lands is also to give his assent to such inclusion, when he has earned the right to a patent, and has made no objection either to the formal inclusion of his lands or to the confirmation of the issue of bonds. *Cannon v. Hood River Irr. Dist.*, 79 Or. 71, 154 Pac. 397; *Carson v. Cudworth*, 26 Colo. App. 131, 140 Pac. 935.

[2, 3] By the terms of section 3474 of the Colorado Statutes, the board of directors, to whom is presented a petition for inclusion in an irrigation district, may require, as a condition precedent to granting its prayer, that the petitioners pay to the district such respective sums, as nearly as can be estimated by the board, as the petitioners would have been required to pay to the district as assessments for the pro rata share of bonds issued. The petition that was presented to the board contained an agreement for the payment of such amounts, but the board made the order of inclusion without first requiring payment by the petitioner. This provision was for the benefit of the district and is not made a condition precedent by the statute, and the board waived the requirement of payment at that time by its action in including the lands. Under the terms of section 3484 of the Colorado Statutes, the board has power to exclude lands from the district, upon petition of the owners thereof, but their power is subject to the limitation that there are no outstanding bonds of the district. As the lands upon which final proof was made were included in the district, the board was without power to exclude them therefrom, and the injunction was properly issued restraining the board from taking such action.

Some questions have been argued as to the right of the board to exclude the lands of claimants under the public lands laws, who had not made final proofs; but, as it is not shown that an order had been made including such lands, the subject does not require further attention.

The decree will be affirmed.

FRANKE v. MURRAY.

(Circuit Court of Appeals, Eighth Circuit. February 14, 1918.)

No. 5053.

1. ARMY AND NAVY ⚡20— CONSTITUTIONAL LAW ⚡62— DELEGATION OF LEGISLATIVE POWERS—AUTHORITY.

Selective Draft Act May 18, 1917, c. 15, 40 Stat. 76, is valid, in so far as it authorizes the President to make rules and regulations for its enforcement having the effect of law, and is not open to attack as a delegation of legislative authority.

2. ARMY AND NAVY ⇨20—"DESERTERS"—WHO ARE—"PERSONS SUBJECT TO MILITARY LAW."

Selective Draft Act, § 2, provides that all persons drafted into the service of the United States shall, from the date of the draft or acceptance, be subject to the laws and regulations governing the regular army. Articles of War (Rev. St. § 1342, as amended by Act Aug. 29, 1916, c. 418, § 3) art. 2, 39 Stat. 651 (Comp. St. 1916, § 2308a), declares that all officers and soldiers belonging to the regular army, all volunteers, from the date of their muster or acceptance, and all other persons lawfully called, drafted, or ordered into or to duty or for training in the service, from the dates they are required by the terms of the called draft or order, are persons subject to military law. *Held*, that one certified into military service under the Draft Act is from the date of the draft subject to military law, and to punishment as a deserter on account of his refusal to obey the summons.

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

3. ARMY AND NAVY ⇨20—ARMY—OATH OF ENLISTMENT.

Articles of War, art. 109, requiring every soldier at the time of his enlistment to take an oath of allegiance, applies only to voluntary enlistment, and one certified into military service under the Selective Draft Act cannot escape liability to military law because he had not taken the required oath.

4. ARMY AND NAVY ⇨20—PUNISHMENT—VIOLATION OF SELECTIVE DRAFT ACT.

The provision of Selective Draft Act, § 6, that it shall be a misdemeanor to violate any of the provisions of the act or regulations made thereunder, does not preclude punishment under military law by one subject thereto, because he was duly certified into the service; the section itself expressly excepting those subject to military law.

5. ARMY AND NAVY ⇨20—CONSTITUTIONAL LAW ⇨318—DUE PROCESS OF LAW—WHAT CONSTITUTES.

While, under the Selective Draft Act, questions of exemption on account of membership in a religious sect opposed to war is for determination of the local and district boards, and their finding cannot be reviewed by the courts, unless they were without jurisdiction or denied a fair hearing, registrants are not deprived of due process of law.

6. ARMY AND NAVY ⇨20—SELECTIVE DRAFT ACT—EXEMPTIONS.

The determination by local and district boards provided for by the Selective Draft Act of questions of exemption is conclusive, and cannot be reviewed by the courts, unless the boards were without jurisdiction, or a fair hearing was denied.

7. ARMY AND NAVY ⇨20—STATUTES ⇨158, 159—REPEAL—EFFECT.

Repeals by implication are never favored, and only when the two acts are totally inconsistent will the older be held repealed by the later. Therefore Articles of War, art. 2, defining persons subject to military law, is not repealed by section 6 of the Selective Draft Act, declaring that a violation of any of the provisions of the act shall be a misdemeanor.

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Petition by Robert Henry Franke for writ of habeas corpus against Col. Cunliff H. Murray. From a judgment discharging the writ and remanding petitioner to custody, he appeals. Affirmed.

The appellant, a citizen of the United States, between the age of 21 and 31, filed a petition for a writ of habeas corpus, alleging that he is unlawfully imprisoned and deprived of his liberty by the respondent, commandant

of Jefferson Barracks, in the county of St. Louis, state of Missouri. He stated in his petition that he was duly enrolled and registered under the act of Congress of May 18, 1917, known as the "Selective Draft Act"; that subsequently he was informed by notice from the local board that he had been drafted for service in the military establishment of the United States under said act of Congress; that in response to said notice he attended upon said board, and claimed exemption under the terms of said act, on the ground that he was a member of a well-recognized religious sect and organization, whose principles and creed forbid its members participating in war in any form, and that his religious convictions were against war or participation therein, which claim was by the board rejected; that, having been found physically qualified for service, he was duly notified to report for transportation to a military encampment of the United States, for the purpose of being assigned to duty as a member of said military establishment of the United States; that he refused to appear in response to the notice given him, whereupon he was arrested and taken into custody by direction of the board, and turned over to the respondent as a deserter from the army of the United States, to be tried by a court-martial; that his detention is without due process of law and in violation of the Constitution.

Upon presentation of the petition, a writ of habeas corpus was granted by the District Court. The respondent produced the appellant and made a return to the writ, denying that the petitioner was a member of any religious sect or organization whose creed and principles forbade its members to participate in war in any form. The response also set up all the steps which were taken by the board, and which were in strict conformity with the act of Congress and the mobilization regulations of the President of the United States. To this return the petitioner filed what may be termed a reply, denying that he deserted the military service of the United States, and that he was a deserter, as he never was in the military service of the United States, never having taken the oath as a soldier. The hearing was had on the pleadings, no evidence being introduced by either party, whereupon the writ was discharged, and the appellant remanded to the custody of the respondent. From this judgment this appeal is being prosecuted.

Chester H. Krum, of St. Louis, Mo. (Kurt von Reppert, of St. Louis, Mo., on the brief), for appellant.

Lieut. Col. Nathan William MacChesney, Judge Advocate, N. A., U. S. Army, of Chicago, Ill., and Walter N. Davis, Sp. Asst. U. S. Atty., of St. Louis, Mo. (Arthur L. Oliver, U. S. Atty., and Joseph Wheless, both of St. Louis, Mo., and William J. Martin, of Chicago, Ill., on the brief), for appellee.

Before HOOK and SMITH, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge (after stating the facts as above). The grounds upon which it is sought to reverse the judgment of the court below are: (1) That in order to be a deserter one must be in the actual military service, and that until he has been sworn in as a soldier he has not lost his status as a civilian. (2) If he has committed any offense, or violated any of the laws of the United States, he subjected himself to civil prosecution only, under the provisions of section 6 of the Conscription Act. (3) That Congress had no power to authorize the President to make any rules and regulations which should have the effect of law, that being a delegation of legislation which is not permissible under the Constitution.

[1] As to the last claim, it is sufficient to say that it was adversely

disposed of by the Supreme Court in *Arver v. United States*, 245 U. S. 366, 38 Sup. Ct. 159, 62 L. Ed. —, opinion filed January 7, 1918.

[2] To sustain the first proposition, counsel rely on *Houston v. Moore*, 5 Wheat. 1, 5 L. Ed. 19, and *In re Grimley*, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636. Neither of these cases is applicable to the issues in this case, or the acts of Congress under which appellant is held. In *Houston v. Moore* the question before the court was, whether a statute of the state of Pennsylvania, which provided that a militiaman of that state was subject to trial by a court-martial of the state for failing to respond when called, was constitutional. The contention was that Congress alone had that power, and a statute of a state is therefore unconstitutional. This was denied by the highest court of the state of Pennsylvania, and upon writ of error to the Supreme Court of the United States that judgment was affirmed; the court holding that, in the absence of action by Congress, the state possessed that power.

In *Re Grimley* the only question involved was that of a voluntary enlistment, hence does not apply to a Selective Draft Act, such as is the act of Congress of May 18, 1917. *McCall's Case*, Fed. Cas. No. 8,669. Section 2 of the Selective Draft Act provides:

"All persons drafted into the service of the United States * * * shall, from the date of said draft or acceptance, be subject to the laws and regulations governing the regular army."

This, of course, includes the Articles of War, as members of the regular army are subject to trial by court-martial. Article 2 of the Articles of War (section 1342, Rev. St., as amended by Act Aug. 29, 1916, c. 418, 39 Stat. 650, U. S. Comp. St. 1916, § 2308a) provides:

Persons Subject to Military Law. The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law,' or 'persons subject to military law,' whenever used in these articles: Provided, that nothing contained in this act, except as specifically provided in article two, subparagraph (c), shall be construed to apply to any person under the United States naval jurisdiction, unless otherwise specifically provided by law.

"(a) All officers and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft or order to obey the same."

There is therefore no room for doubt that, under the Selective Draft Act and the Articles of War, the appellant having been drafted into the service of the United States, he became from the date of said draft, and certainly after acceptance and notice, subject to the laws and regulations governing the regular army, including the Articles of War. The laws governing voluntary enlistments cannot be applied to involuntary enlistments by draft or conscription.

[3] It is also claimed that the time when he became a soldier, within the meaning of the law, is regulated by article 109 of the Articles of War. But that article only refers to voluntary enlistments. It reads, "At the time of his enlistment every soldier shall take the fol-

lowing oath or affirmation," and then follows the form of the oath. But as the petitioner did not enlist, but was drafted under the Selective Draft Act, this article does not apply.

[4] The claim that, if the petitioner committed any offense, he can only be prosecuted in a civil court, and that therefore a court-martial is without jurisdiction, is equally untenable. The contention of counsel is that, as section 6 of the Selective Draft Act makes it a misdemeanor to violate any of the provisions of the act or the regulations made thereunder, the appellant can only be tried in a civil court. But that section expressly excepts those subject to military laws. It therefore applies only to those "not subject to military laws," and as we hold that the petitioner is, under the Selective Draft Act, subject to military law, the contention must fail.

[5, 6] The claim of appellant that he is a member of a well-recognized religious sect or organization, whose creed and principles forbid the members participating in war in any form, cannot be raised in a collateral proceeding like this. That was a question to be determined under the act of Congress, first by the local board, and upon appeal by the district board. That provisions of this nature constitute due process of law, under the constitutional guaranty, has been frequently and uniformly held. That it applies to the act in question has been decided by the United States Circuit Court of Appeals for the Second Circuit in *Angelus v. Sullivan*, 246 Fed. 54, — C. C. A. —, and by District Courts in *United States ex rel. v. Heyburn* (D. C.) 245 Fed. 360, *In re Hutfliis*, 245 Fed. 798, and *United States ex rel. v. Finley*, 245 Fed. 871. It is only when the action of such a board was without jurisdiction, or if, having jurisdiction, it failed to give the party complaining a fair opportunity to be heard and present his evidence, that the action of such a tribunal is subject to review by the courts. *Chin Yow v. United States*, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369; *Gegiow v. Uhl*, 239 U. S. 3, 36 Sup. Ct. 2, 60 L. Ed. 114. But no such claim is made by appellant. On the contrary, he admits in his petition that he had a fair opportunity to be heard and present his evidence.

[7] It is further claimed that article 2 of the Articles of War was repealed by implication by section 6 of the Selective Draft Act. But there is no merit in this claim. Repeals by implication are never favored, and only when the two acts are totally inconsistent and irreconcilable will the older act be held to be repealed by the later. No repugnancy has been pointed out by counsel, and none can be found. *Frost v. Wenie*, 157 U. S. 46, 15 Sup. Ct. 532, 39 L. Ed. 614; *United States v. Greathouse*, 166 U. S. 601, 17 Sup. Ct. 701, 41 L. Ed. 1130; *Washington v. Miller*, 235 U. S. 422, 428, 35 Sup. Ct. 119, 59 L. Ed. 295; *Chase v. United States*, 238 Fed. 887, 152 C. C. A. 21. In *Washington v. Miller*, the court said:

"Such repeals are not favored, and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably cannot be given to both."

The judgment of the District Court was right, and is affirmed.

SUHOR et al. v. GOOCH.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1918.)

No. 1514.

1. APPEAL AND ERROR Ⓒ1202—BILL OF REVIEW—LEAVE TO FILE BILL.

After a decree of a District Court has been affirmed or reversed by the appellate court, the question whether a party should be allowed to file a bill of review in the District Court must be passed upon by the appellate court.

2. EQUITY Ⓒ456—BILL OF REVIEW—LEAVE TO FILE BILL.

Leave to file a bill of review in an equity case on the ground of after-discovered evidence must have the same support as a motion for new trial on the same ground in a law case, and counter affidavits may be filed in the appellate court.

3. EQUITY Ⓒ447(1)—BILL OF REVIEW—LEAVE TO FILE BILL—GROUNDS.

The recognized condition of leave to file a bill of review is that the appellate court must be convinced (1) that the alleged newly discovered evidence would probably lead to a different result and (2) that due diligence was used to discover it before the trial.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond; Jeter C. Pritchard, Judge.

Suit in equity by Margaret Corwin Radcliffe Gooch against Annie Wayne Suhor and George Suhor, her husband, the Old Dominion Trust Company, as trustee, the Old Dominion Trust Company, as curator of the estate of W. H. Gooch, deceased, and the Old Dominion Trust Company. Decree for complainant, which on appeal of defendants was reversed. 244 Fed. 361, 156 C. C. A. 647. On petition for leave to file bill of review. Denied.

Edward P. Buford, of Lawrenceville, Va. (Marshall R. Peterson, of Lawrenceville, Va., C. T. Baskervill, of Boynton, Va., and S. E. Williams, of Lexington, N. C., on the brief), for the motion.

S. S. P. Patteson and H. M. Smith, Jr., both of Richmond, Va. (Robert E. Henley, of Richmond, Va., on the brief), opposed.

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

WOODS, Circuit Judge. Immediately before the marriage of W. H. Gooch and Margaret C. Radcliffe on October 14, 1915, an antenuptial contract was executed by which Gooch promised in consideration of marriage that he would pay, or cause or provide to be paid one year after his death, to the Old Dominion Trust Company \$50,000 in trust to pay the interest to his wife, Margaret, for her life or widowhood, and upon her death or second marriage to pay the principal as directed by his will, and upon failure of testamentary disposition to his children or their issue. Gooch died shortly afterwards from a pistol shot supposed to have been self-inflicted. On January 24, 1916, his widow instituted this suit against Gooch's daughter, Mrs. Suhor, and her husband, and the Old Dominion Trust Company, to have the antenuptial contract annulled on the ground that Gooch obtained her

signature to it by imposition and fraud. The District Court in a formal decree held that the allegations of the bill were sustained by the evidence and set aside the settlement as fraudulent. On the 6th day of July, 1917, this court filed a decree reversing the judgment of the District Court and dismissing the bill. 244 Fed. 361, 156 C. C. A. 647. Thereafter the appellee by her counsel moved that this court so modify its decree as not to prejudice the rights of the appellee "to file in the District Court an amended and supplemental bill in the nature of a bill of review on the ground of after-discovered evidence, and to grant leave to the District Court in its discretion to allow the appellee to file said bill of review and to prosecute the same to final decree in said court." Afterwards argument was heard upon the right of the appellee to such an order without the support of affidavits setting forth the alleged newly discovered evidence and the reasons for the failure to offer it at the trial. The court held that the motion should not be disposed of without a showing by affidavits or otherwise tending to convince the court of the propriety of granting the motion. Thereafter affidavits in support of the petition were filed and the court allowed counter affidavits to be filed by appellant.

[1] The question whether the petitioner should be allowed to file a bill of review in the District Court must be passed upon by this court. *Southard v. Russell*, 57 U. S. 547, 14 L. Ed. 1052; *United States v. Knight*, 66 U. S. (1 Black) 488, 17 L. Ed. 80; *Rubber Co. v. Goodyear*, 9 Wall. 805, 19 L. Ed. 828; *Kissinger Iron Co. v. Bedford*, 123 Fed. 91, 59 C. C. A. 221; *Angle v. United States*, 162 Fed. 264, 89 C. C. A. 244.

[2] Leave to file a bill of review in an equity case on the ground of after-discovered evidence must have the same support as a motion for a new trial on the same ground in a law case. *Talbott v. Todd*, 5 Dana (Ky.) 196. Counter affidavits may be filed in the appellate court denying the allegations of the petition and the moving affidavits. *Blandy v. Griffith*, 3 Fed. Cas. No. 1530; *Dexter v. Dexter*, 7 Fed. Cas. No. 3860; *Loth v. Loth*, 116 Mich. 634, 74 N. W. 1046.

[3] The recognized condition of the leave to file a bill of review is that the appellate court must be convinced (1) that the alleged newly discovered evidence would probably lead to a different result, and (2) that due diligence was used to discover it before the trial. *Rubber Co. v. Goodyear*, supra; *Angle v. United States*, supra (4th Cir.); *Society of Shakers v. Watson*, 77 Fed. 512, 23 C. C. A. 263; *Jourolman v. Ewing*, 85 Fed. 103, 29 C. C. A. 41; *Tufting Machine Co. v. Buser*, 158 Fed. 83, 85 C. C. A. 413, 14 Ann. Cas. 192; 2 Daniell, Eq. Pr. 1577; 2 Foster's Fed. Pr. 1408; *Hatcher v. Hatcher*, 80 Va. 169; *Quick v. Lilly*, 3 N. J. Eq. 255; *Simpson v. Watts*, 6 Rich. Eq. (S. C.) 364, 62 Am. Dec. 392.

The affidavits and additional letters offered are directed first to the desire of Gooch to marry Miss Radcliffe. This appeared clearly in the original trial. The opinion of this court to the effect that Gooch was reluctant to enter into the marriage because of his fear of complications growing out of his past life and anxiety as to the success of the venture did not negative his desire to marry Miss Radcliffe. Evi-

dently his reluctance and anxiety were overcome by his desire to marry the complainant. The letters now presented from Gooch to Mrs. Radcliffe express affection for her daughter and his desire to marry her, and apprehension of unpleasant action from Miss Dickerson. In one of these letters Gooch also states that he was not worth half so much as people thought he was. These letters were in the possession of Mrs. Radcliffe along with several others which were in evidence at the first trial. The least degree of diligence would have enabled the plaintiff to introduce those which are now presented.

It is next claimed that the plaintiff's counsel were taken by surprise by the testimony of Mr. Patteson to the effect that Miss Radcliffe said before the marriage that she had seen a copy of the marriage contract and knew all about it, and that hence they did not have present the witnesses whose testimony they now offer who could have disputed this statement. The plaintiff had every reason to anticipate that the defendant would try to show in every possible way that the contract was fairly executed, and she was therefore put on notice to have in attendance on the court all the witnesses who were present when the contract was made. Besides, the absent witnesses were within a night of Richmond by railroad, and due diligence, required that the showing of surprise should have been made to the District Court during the trial. Had it been made, there is no reason to doubt that the plaintiff would have been allowed time to produce the witnesses.

The testimony of the clergyman, Mr. Hamrick, who officiated at the marriage, is not necessarily in conflict with that of Mr. Patteson. He was a well-known minister of the gospel, and no sufficient reason has been shown why the plaintiff could not have ascertained where he was and had him present at the trial. ○

Plaintiff relies with much apparent earnestness upon allegations made by Mrs. Lucy A. Gooch, the divorced wife of W. H. Gooch, in an action brought by her since the decision of this case in the District Court. In 1910 Mrs. Lucy A. Gooch obtained a divorce from W. H. Gooch and agreed to accept as alimony income for her life on \$36,000. In September, 1916, she filed her bill in the circuit court of Mecklenburg county, Va., alleging among other things that W. H. Gooch had obtained from her settlement of her claim for alimony for much less than her due by fraudulently transferring his property and falsely representing its value. The method of perpetrating this alleged fraud was set out in full in her bill. The state circuit court sustained the demurrer of Mrs. Margaret C. Gooch, the last wife, to this bill and the cause is now on appeal in the Supreme Court of Appeals of Virginia. The complainant, Margaret C. Gooch, now alleges that she was not aware of the facts constituting the alleged fraud on Gooch's first wife at the time of the trial, and therefore could not avail herself of this evidence of Gooch's dishonesty and concealment.

To say the least, there is grave doubt whether the facts alleged to have constituted a fraud in the settlement of the first wife would have been competent evidence of fraudulent concealment in the contract with the second wife. But, waiving that, the settlement with the first wife was well known to the complainant before the trial, for Gooch's

marital troubles were matters of public notoriety after his suicide. There was nothing whatever to prevent the complainant from inquiring into the fairness of the settlement with Mrs. Lucy A. Gooch. So far as it appears here, all the facts alleged by Mrs. Lucy A. Gooch tending to show fraudulent imposition upon her would have been elicited by inquiry and examination of public records.

The alleged newly discovered evidence does not warrant the court in reopening and commencing over this long and expensive litigation. All of this evidence would have been made available by due diligence at the first trial; but, considering the case as if it were all before the court, we do not think it should have the effect of changing the result. Re-examination of the evidence taken at the trial in connection with the alleged newly discovered evidence confirms the court in its conviction that the marriage settlement was on the part of W. H. Gooch ungenerous, but not fraudulent.

Mrs. Gooch accepted it with the natural expectation of large liberality to her after the marriage. Disappointment in this expectation by the suicide of Gooch was a strong reason why Mrs. Suhor should relieve the young wife of her father at least from the limitation of the settlement for life or widowhood. But courts cannot relieve against the failure of a mere expectation unsupported by a promise.

Motion denied.

ROBERTS v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 11, 1918. Rehearing
Denied April 1, 1918.)

No. 3029.

1. CRIMINAL LAW ⚡1177—SENTENCE—EFFECT OF PARTLY ERRONEOUS SENTENCE.

That through a clerical error a defendant was sentenced on each of eight counts of the indictment, although two of the counts had been withdrawn from the jury, was not prejudicial to the defendant, it is not ground for reversal when the punishment imposed was not greater than might have been imposed on any one of the counts.

2. CONSPIRACY ⚡43(8)—EXTORTION BY INFORMER—SUFFICIENCY OF INDICTMENT.

An indictment for conspiracy to violate Criminal Code (Act March 4, 1909, c. 321) § 145, 35 Stat. 1114 (Comp. St. 1916, § 10315), which makes it a criminal offense if any one shall "under threat of informing, or as a consideration for not informing, against any violation of any law of the United States," etc., it is not necessary to aver that the person threatened had in fact violated any law of the United States. Such an indictment also *held* to sufficiently describe the offense charged, in the absence of any motion for a bill of particulars.

3. CONSPIRACY ⚡43(9)—SUFFICIENCY—PERSONATING UNITED STATES OFFICER.

Under Criminal Code, § 32 (Comp. St. 1916, § 10196), which makes it a crime if any person, "with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employé acting under the authority of the United States, or any department, or any officer of the government thereof, and shall take upon himself to act as such, or shall in such pretended character demand or obtain

from any person, or from the United States, * * * any money," etc., the substance of the offense is the false assumption of federal authority when accompanied with fraudulent intent, and an indictment thereunder need not allege that defendant pretended to be any particular officer or agent of the United States, but it is sufficient to charge that he claimed authority thereunder.

4. CONSPIRACY ⇨44½—CRIMINAL PROSECUTION—VARIANCE.

Where an indictment for conspiracy avers that defendant conspired with persons, to the grand jury unknown, and there is no evidence to the contrary, the truth of the averment of want of knowledge by the grand jury will be presumed.

5. CRIMINAL LAW ⇨423(1)—CRIMINAL PROSECUTION—EVIDENCE.

Where a person enters into a conspiracy after its formation, the acts and declarations of the other conspirators before he entered are admissible in evidence against him.

6. CRIMINAL LAW ⇨1170(1)—CRIMINAL PROSECUTION—TRIAL.

The exclusion of evidence offered by defendant on trial for conspiracy held not error.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington.

Criminal prosecution by the United States against John W. Roberts. Judgment of conviction, and defendant brings error. Affirmed.

The plaintiff in error was indicted jointly with one Leo F. Coyne on September 8, 1916, in the United States District Court for the Western Division of Washington, Northern Division, for violation of sections 37, 32, and 145 of the Penal Code of the United States. The indictment contained eight counts. A motion to quash the indictment was denied, and demurrer thereto overruled. The case proceeded to trial of the plaintiff in error alone. The court withdrew counts 1 and 4 from the consideration of the jury, and the jury returned a separate verdict of guilty on each of the remaining six counts of the indictment. The judgment of the court, as it appears in the transcript of record before us, was that the defendant was guilty of violating sections 37 and 32 of the Penal Code of the United States, and that he be punished by being imprisoned for the term of 15 months on each of the eight counts. From the judgment entered thereon the plaintiff in error brings this writ of error.

Beeler & Sullivan, John J. Sullivan, and William R. Bell, all of Seattle, Wash., and Benjamin L. McKinley, of San Francisco, Cal., for plaintiff in error.

Clay Allen, U. S. Atty., of Seattle, Wash.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). It appears from the evidence that one Clifford Yarborough arrived in Seattle from Tennessee about February 28, 1916, with his illegitimate daughter, aged about 17 years, whose mother was a colored woman. He had attempted to legally adopt this daughter in Indiana, but adoption had been refused by the courts. He came to Seattle a stranger, intending to locate in that locality with his daughter, and brought with him about \$7,500 in gold for investment. He procured lodgings in an inferior part of the city, consisting of one room with a small kitchen behind. A bed and separate cot were provided, and father and daughter remained in those quarters for about a week, then removing to a better locality and occupying two rooms.

The second day after arriving in Seattle Yarborough made a chance acquaintance with a man named Moore, to whom he disclosed the fact that he was a stranger with money to invest, but desired to go to work for awhile and get acquainted in the community before investing permanently; also, that he had a young daughter with him. Moore related the conversation and meeting with Yarborough to one Lonigan, who lived in the same boarding house with Moore, and Lonigan expressed a desire to meet Yarborough, to see if he could not interest him in some business enterprise. Moore and Lonigan called upon Yarborough at the first-named lodging house, and later they met the defendant Coyne in the lobby of a hotel. The latter, having an appointment elsewhere, invited them to walk with him along the street. The invitation was accepted, and Lonigan told Coyne about Yarborough, and asked him if he had something he could sell him, or some proposition to put up to him. Coyne said at once that he could very easily interest him in many propositions. He said he could sell him a ranch, a livery stable, or put him in the hay and grain business, or sell him a bunch of horses. He said it would be very easy to stick a man like this, and that, if he could not get the money that way, he could get it some other way. He then inquired the particulars about Yarborough's daughter, and proposed to take Moore and Lonigan to the defendant Roberts, who, it appears, was operating a private detective business in Seattle. Moore told Lonigan and Coyne, that, as far as anything like that was concerned, they could count him absolutely out.

A few days afterwards Moore and Lonigan had some further conversation concerning the Yarboroughs, when Lonigan said he would like to see Yarborough about the original proposition of going into the hay and grain business. They accordingly visited Yarborough's apartment and saw the daughter, but Yarborough was out at the time, and they did not see him then, and they did not see either of them again. At this point both Moore and Lonigan disappear from the case. At about this same point of time Coyne tells the defendants Roberts about Yarborough; tells him where the latter is stopping, and that he has a very young girl with him. Roberts proceeds to the place where Yarborough had been stopping, and claims to have received from the lady of the house information tending to show that there were improper relations existing between the Yarboroughs. Roberts was referred to their new address. He returned to his office, and then with Coyne called on the Yarboroughs.

There is evidence tending to show that Roberts and Coyne represented themselves to Yarborough and his daughter as government officers, and stated that he had violated the White Slave Act (Act June 25, 1910, c. 395, 36 Stat. 825 [Comp. St. 1916, §§ 8812-8819]) in every state he had passed through with the girl; that it was not believed that she was his daughter, and that he was under arrest; that Yarborough insisted that the girl was his daughter, and that he was not guilty of any wrongdoing; that the defendants maintained their attitude, and Yarborough finally asked if he could not give bail, showing his bank book, with a deposit noted of over \$7,500, and asking per-

mission to wire his attorney in Tennessee; that Roberts and Coyne told him he could not give bail; that it was not necessary to wire an attorney; that he would be held for the federal grand jury, which would not meet for six or eight months; that after considerable discussion it was suggested that possibly bail could be received, and it could be arranged on the Monday following, this interview taking place on Saturday evening; that the suggestion was made by Roberts that, if Coyne was willing to remain with Yarborough and watch him, possibly arrest need not be made at that time; that Yarborough consented to this arrangement, and upon the suggestion of Coyne and Roberts that there would be more privacy in a hotel, the belongings of Yarborough and his daughter were hurriedly packed in trunks, and they, with the defendant Coyne, then went in an automobile to the Hotel Perry in Seattle, and took a suite of rooms which Coyne arranged for, composed of three rooms with a private hallway, with only one entrance into the main hallway; that the defendants Coyne and Roberts remained with Yarborough and his daughter, either alternately or together, continuously from Saturday evening to Monday following, during which time it was pretended that they desired to befriend Yarborough and his daughter, even though it would render them liable for neglect of official duty, and it was suggested that if Yarborough would send his daughter back to her mother in Indiana or Tennessee, and would himself leave the country for a year, they would not arrest him, and the matter would blow over in the meantime, and, if he saw fit to compensate the defendants for their assistance, he could do so; that on Monday the defendants went with Yarborough to the bank, and were with him when he withdrew all his money therefrom; that they returned with him to the hotel and arranged that \$2,000 should be left with the defendant Roberts, to be placed by him at interest, and that said sum was then and there paid over to the defendants; that Coyne and Yarborough went to another bank and deposited \$500, to be sent to Indiana in stipulated payments for the care of the daughter, and that on that night the daughter was sent on her journey to Indiana, the defendants accompanying her and Yarborough to the depot; that the defendant Roberts left Yarborough and Coyne after the departure of the daughter, but that Coyne remained with Yarborough until he was on board a boat sailing for British Columbia that night, in charge of one Collins, selected by Coyne to guard Yarborough; that Yarborough eluded his guard in British Columbia, and went back East.

[1] 1. The indictment contained eight counts. Upon the trial of the case and at the conclusion of the evidence the court withdrew counts 1 and 4 from the consideration of the jury, leaving the charges contained in counts 2, 3, 5, 6, 7, and 8 for their consideration. The jury rendered a verdict of guilty on each and all of the six counts. The court, in its judgment as it appears in the transcript of record before us, imposed a punishment of 15 months' imprisonment on each of the eight counts, to run concurrently. It is manifest that the recital that the judgment is on each of the eight counts is a clerical error. The verdict was only on six counts, and only six counts were

before the court at the time of the sentence. The judgment must therefore have been on the six counts, instead of on the eight counts; and as the maximum penalty that might be imposed by the court upon each of the counts 2 and 8 was a fine of not more than \$10,000, or imprisonment for not more than 2 years, or both, and the maximum penalty that might be imposed by the court upon each of the counts 3, 4, 5, 6, and 7, is a fine of not more than \$1,000, or imprisonment for not more than 3 years, or both, it follows that the imprisonment of 15 months on each of the counts was within the penalty that might have been imposed on each of the counts, and, as the imprisonment on each count was to run concurrently with each of the others, the judgment was in effect a judgment upon a single count. The defendant will not be prejudiced, therefore, by reading the judgment as upon six counts, and it will be held that such were its terms.

2. The assignments of error charge insufficiency of the indictment, insufficiency of the evidence to sustain the verdict and judgment, and errors in the admission and rejection of evidence.

[2] Section 145 of the Penal Code provides that:

"Whoever shall, under a threat of informing, or as a consideration for not informing, against any violation of any law of the United States, demand or receive any money or other valuable thing, shall be fined," etc.

The second count charges the defendant with having conspired to violate this section of the Penal Code. It is objected to the sufficiency of this count that it fails to allege that Yarborough had violated the White Slave Act, or any other law of the United States, or that the defendant had reasonable grounds for believing, or did believe, that Yarborough had violated the act. In other words, the contention is that it must be alleged and proven that Yarborough had violated the White Slave Act, or that the defendant had reasonable ground to believe or did believe he had violated the act, and, unless one or the other of these elements is alleged and proven, the defendant cannot be convicted of the crime charged against him. If this construction of the statute be adopted, it would lead to the absurd result that the statute would defeat itself. It is doubtful whether any convictions could be had under it, if it were so construed. The purpose of the statute is clearly to make it an offense for any person to demand or receive money or other valuable thing for threatening to inform, or as a consideration for not informing, against any violation of any law of the United States. It has been held that it is not necessary to state what particular law has been violated by the person threatened (*United States v. Fero* [D. C.] 18 Fed. 901, 904); and surely, if it is not necessary to state what particular law has been violated by the person threatened, it is not necessary to allege and prove that the victim has actually violated a particular law of the United States. Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion. *Church of the Holy Trinity v. United States*, 143 U. S. 457, 460, 12 Sup. Ct. 511, 36 L. Ed. 226; *Henderson v. Mayor of New York*, 92 U. S. 259, 268, 23 L. Ed. 543; *United States v. Kirby*, 7 Wall. 482, 486, 19 L. Ed. 278; *Oates v.*

National Bank, 100 U. S. 239, 244, 25 L. Ed. 580; *Lau Ow Ben v. United States*, 144 U. S. 47, 59, 12 Sup. Ct. 517, 36 L. Ed. 340; *United States v. Corbett*, 215 U. S. 233, 242, 30 Sup. Ct. 81, 54 L. Ed. 173; *Pickett v. United States*, 216 U. S. 456, 461, 30 Sup. Ct. 265, 54 L. Ed. 566.

There is also the further objection to the sufficiency of the second count that it does not inform the defendant of all the necessary elements of the charge against him, so that he might properly prepare his defense. The offense is charged in the language of the statute, with the added detail that the defendants charged Yarborough with having violated the White Slave Act. The defendants are also charged with having committed 14 separate and distinct overt acts to effect the object of the conspiracy. We are of opinion that the count sufficiently states the material circumstances of the offense. It clearly charges the illegal act complained of; that is to say, the conspiracy to commit an offense against the United States, and the requisite fraudulent intent—states the date and place of the commission of the act charged, and the statutory offense which the defendants charged Yarborough with having committed, and the demand for money under a threat of informing, and as a consideration for not informing, against him. There is no suggestion that there was a want of knowledge of the crime charged against the defendants, or of any surprise concerning the same upon the trial of the case. Nor is there any intimation that any request was made for a bill of particulars concerning the details of the offense charged. We must therefore hold that the count sufficiently charges the crime of which the defendant was convicted. *Lamar v. United States*, 241 U. S. 103, 116, 36 Sup. Ct. 535, 60 L. Ed. 912; section 1025 of the Revised Statutes; *Connors v. United States*, 158 U. S. 408, 411, 15 Sup. Ct. 951, 39 L. Ed. 1033; *Armour Packing Co. v. United States*, 209 U. S. 56, 84, 28 Sup. Ct. 428, 52 L. Ed. 681; *N. Y. Cent. R. R. Co. v. United States*, 212 U. S. 481, 497, 29 Sup. Ct. 304, 53 L. Ed. 613; *Holmgren v. United States*, 217 U. S. 509, 523, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778.

The eighth count of the indictment also charges the defendants with a conspiracy to commit an offense charged against the United States, to wit, to violate section 32 of the Penal Code of the United States, the purpose and effect of which was to falsely assume and pretend to be officers of the United States authorized to make arrests in criminal cases under the laws of the United States, and in such pretended character to demand and obtain from Yarborough money and other valuable things. To this charge there is added the detail that the offense charged against Yarborough was his violation of the White Slave Act, and the defendants are also charged with 13 specific overt acts to effect the object of the conspiracy. The same considerations for holding the second count sufficient require us to hold the eighth count sufficient.

[3] 3. The third, fifth, sixth, and seventh counts charge the defendants with intent to defraud Yarborough by falsely assuming and pretending to be officers acting under the authority of the United States. In count 3 they are charged with having assumed and pretended to

be officers and special agents of the Department of Justice, charged with the duty and authority of enforcing the penal laws of the United States, particularly the White Slave Act. In count 5 they are charged with assuming and pretending to be officers acting under the authority of the United States authorized to make arrests in criminal cases. In count 6 they are charged with having assumed and pretended to be officers acting under the authority of the United States, and charged with the duty and authority of enforcing the penal laws of the United States, particularly the White Slave Act. In count 7 they are charged with having assumed and pretended to be officers acting under the authority of the United States authorized to make arrests in criminal cases.

In *United States v. Barnow*, 239 U. S. 74, 78, 36 Sup. Ct. 19, 60 L. Ed. 155, the defendant was charged, as in these counts, with the violation of section 32 of the Penal Code. The indictment in that case contained six counts. The specific charge in each of the counts was that the defendant falsely assumed to be in the employ of the United States, acting under the authority of the United States, to wit, an agent employed by the government to sell a certain set of books entitled "Messages and Papers of Presidents." It was admitted that there was not in existence such an employé or such an employment as it was alleged the defendant pretended. The Supreme Court held that the mischief to be cured was the false pretense of federal authority when accompanied with fraudulent intent, and it was pertinently suggested that such a pretense would rarely be made for benevolent purposes. It was further held that the prohibition of the statute was not confined to the false personation of some particular person or class of persons, but extended to any false assumption or pretense of office or employment under any department or officer of the government, if done with an intent to defraud, and accompanied with any of the specific acts done in the pretended character. Under this construction of the statute the six counts before us are clearly sufficient; and they are sufficient under the rule stated in *Lamar v. United States*, supra, in alleging with the other particulars there mentioned the official character of the officer whom the accused were charged with having falsely personated.

[4] 4. Under the objection that the evidence is insufficient to sustain the verdict and judgment, it is contended that the court should have instructed the jury to acquit the defendants on counts 2 and 8—the conspiracy counts—because the defendants are charged to have conspired "with divers and sundry other persons to the said grand jurors unknown." It is claimed that Moore and Lonigan and Collins were coconspirators, and that this fact was known to the grand jury, and that they should have been so charged in the two counts of the indictment; that this omission constitutes a fatal variance between the allegations of the counts of the indictment and the proof.

In *Coffin v. United States*, 156 U. S. 432, 451, 15 Sup. Ct. 394, 39 L. Ed. 481, it was held that where there is an averment that a person or matter is unknown to the grand jury, and no evidence upon that subject is offered by either side, and nothing appears to the contrary,

the truth of the averment or want of knowledge in the grand jury is presumed. The evidence taken upon the trial in this case is not all in the transcript of the record before us, but a careful examination of the evidence in the record does not in our opinion show that either Moore, Lonigan, or Collins were coconspirators. The recital of what the evidence tends to show, heretofore made in this opinion, was made in part to present all there is in this question, and in our opinion it fails to show that Moore, Lonigan, or Collins were coconspirators to do any act made criminal by the statute, but tends rather to show that they were not. The only circumstance tending to a different conclusion with respect to Lonigan is contained in the opening of the United States attorney, who, in making a general statement of the facts he expected to prove, said:

"By the way, I should say at this time that his honor will instruct you that, where the indictment in a given case charges that certain defendants conspired together and with each other and with divers other persons unknown to the grand jurors, you will consider the relations of those unknown persons in the case, and Lonigan in this instance is one of those unknown persons."

This statement is not evidence. The United States attorney says it was inadvertently made, and we think it so appears from the evidence in the case. In any event, there is nothing in the record showing the evidence presented to the grand jury upon this subject, and their want of knowledge that Moore and Lonigan and Collins were coconspirators will be presumed.

5. The general objection, that the evidence was not sufficient to support the verdict and judgment, must be overruled. There was evidence, as before stated, tending to show that the defendant Roberts represented himself to the Yarboroughs as a government officer, and that he accused Yarborough of having violated the White Slave Act. Further, it appears that Roberts participated with Coyne in practically imprisoning the Yarboroughs in their rooms at the hotel, and in their deportation from Seattle. The suggestion of the Supreme Court in *United States v. Barnow*, *supra*, that pretenses of this character would rarely be made for benevolent purposes, is applicable here. The jury had the right to draw the conclusion from the facts proven that the defendant was guilty as charged.

[5] 6. We do not find that the admission of evidence relating to matters that occurred prior to Roberts' connection with the case was in any way prejudicial to the defendant Roberts. This evidence was purely introductory, and was only significant in the light of the testimony relating to the proceedings in which the defendant Roberts afterwards participated. Besides, the evidence was admissible under the familiar rule that, where a person enters into a conspiracy after its formation, the acts and declarations of the other conspirators before he entered are admissible against him. This rule is, of course, only applicable where he adopts the conspiracy in its original design and purpose, and this the evidence in this case tended to show the defendant Roberts did. 12 Cyc. 438. It is not our province to weigh this evidence.

[6] 7. It is assigned as error that the court refused to admit certain testimony offered by the defendant on the trial of the case. We

have examined the record carefully, and do not find any error in the ruling of the court with respect to the matters referred to. It appears that Yarborough signed a written statement on May 24, 1916, concerning the facts in this case, for the information of some government officer. It is claimed that in this statement Yarborough did not say that Roberts had represented himself to be an officer of the government. When the witness Yarborough was on the stand for the government, he was interrogated by counsel for the defendant about this statement, and he then said he did not remember what he had stated on that subject. Counsel for the defense called upon the United States attorney for this written statement, which was refused. It appears that counsel for the defense had an exact copy of this statement in his possession at that time, and it was upon that statement that he conducted the cross-examination of Yarborough, for the purpose of showing a contradiction. As the statement had no other value, and was not used for any other purpose, the defendant was not prejudiced because he did not obtain possession of the statement in the possession of the United States attorney.

The refusal of the court to allow the witness Collins to testify as to how much money Coyne subsequently spent on a trip to El Paso, Tex., is assigned as error. It is claimed by counsel for the defendant that this money was a considerable sum, and was expended in paying the expenses of Coyne, the witness, and two women on this trip; that this money may have been received from Yarborough, and, if so, the jury, if it knew the particulars, could draw the conclusion that Roberts did not have anything to do with it. We are of opinion that this evidence was too remote, indefinite, and uncertain, and was properly excluded.

Finding no reversible error in the record, the judgment is affirmed.

COMPAGNIE MARITIME FRANÇAISE v. MEYER et al.

(Circuit Court of Appeals, Ninth Circuit. February 4, 1918.)

No. 3018.

1. SHIPPING Ⓒ132(5)—DAMAGES TO CARGO—UNSEAWORTHINESS OF VESSEL.

Proof that a French bark, within four days after leaving Brest on a voyage from Rotterdam to San Francisco, without having encountered weather which was unusual at the season, was found to be leaking, so that she had to be pumped each day thereafter until she reached the vicinity of Cape Horn, when, meeting stormy weather, the leak increased, and she was obliged to seek a harbor of refuge, and that, when her cargo was discharged for repairs at Buenos Ayres, one rivet was found to be gone from her bottom, others were loose, cement was broken from some of her plates, and some were bent, *held* sufficient to show that she was unseaworthy at the beginning of the voyage, although she was surveyed at that time, and to render her liable for the damage to her cargo.

2. SHIPPING Ⓒ137—DAMAGE TO CARGO—LIABILITY OF VESSEL—HARTER ACT.

The exemption of a vessel and owner from liability for damage to cargo resulting from faults or errors in navigation or management of the vessel, granted by section 3 of the Harter Act (Act Feb. 13, 1893, c. 105,

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

27 Stat. 445 [Comp. St. 1916, § 8031]), is on the distinct condition that the owner shall show that the vessel was in all respects seaworthy and properly manned, equipped, and supplied for the voyage, or, if that cannot be established, that he used due diligence to make her so, and this is not sufficiently shown by proof of visual inspection only, without making further tests, of a vessel about to sail from Rotterdam, around Cape Horn, to San Francisco.

Appeal from District Court of the United States for the First Division of the Southern Division of the Northern District of California; Robert S. Bean, Judge.

Suit in admiralty by the Compagnie Maritime Française, owner of the French bark *Duc d'Aumale*, against Hermann L. E. Meyer, George H. C. Meyer, Hermann L. E. Meyer, Jr., J. W. Wilson, and John M. Quaile, partners under the style of Meyer, Wilson & Co., and cross-libel against the vessel. Decree for respondents on cross-libel, and libellant appeals. Affirmed.

The French bark *Duc d'Aumale* was chartered by the appellees to carry a cargo of coke and pig iron from Rotterdam to San Francisco. On September 19, 1907, she left Rotterdam, and was towed to Brest, and thence on September 24th she proceeded on her voyage. Five days later she encountered squally weather, and on the 29th 23 centimeters of water were found in her hold, and thereafter water continued to come in at the rate of one centimeter an hour, necessitating pumping 20 minutes each morning and evening. The vessel did not put into a port for repairs, but continued on her voyage. On November 22d, when she had arrived at 49° 37' south latitude, and 66° 21' west longitude, and in the neighborhood of Cape Horn, she encountered stormy weather, and a high sea, which caused her to roll heavily. The leak increased until there were 1 meter and 65 centimeters of water in the hold. The master then made for the Falkland Islands, where, on November 25, the ship was beached at Roy Cove. There she remained aground until February 13, 1908, having 14 feet of water in her hold. She was finally towed to Port Stanley, where she remained until April 5, 1908, and thence she proceeded under her own sail to Montevideo, and thence to Buenos Ayres, where she arrived on May 5th. There the cargo was discharged, and the ship was placed in dry dock for repairs. It was found that one rivet was gone from her bottom, and several other rivets were loose and leaking; that cement was broken from the butt ends of several plates, and some plates were bent. On July 18, 1908, the vessel sailed with her cargo for San Francisco, where she arrived November 19, 1908, with her cargo badly damaged. There the owners sued the appellees for the freight, and the appellees libeled the ship on a claim for damages to the cargo. The two suits were consolidated, and tried as one. The court below found that the vessel was unseaworthy at the commencement of the voyage, either because of a defective hull, or the improper stowage of her cargo, or both, and a decree was entered in favor of the appellees for the sum of \$2,242.72 and costs.

Andros & Hengstler, Louis T. Hengstler, and Golden W. Bell, all of San Francisco, Cal., for appellant.

Edward J. McCutchen, Ira A. Campbell, and McCutchen, Olney & Willard, all of San Francisco, Cal., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1]: We think that the evidence sufficiently shows that the vessel was unseaworthy when she started upon her voyage from Rotterdam. The evidence produced to show that she was at that time seaworthy as to her hull consists in the fact that before loading she was surveyed

by two experts appointed by the French consul at Rotterdam, also by the surveyor to the Bureau Veritas, and by the agents of the owner, and the testimony of those who made the inspection. The evidence that she was unseaworthy is the fact that so soon after starting upon her voyage, and without encountering unusual weather, she sprung a serious leak, which leak increased when the usual stormy conditions in the neighborhood of Cape Horn were met, and the condition of her bolts and plates when she was placed upon the dry dock at Buenos Ayres. That the weather which resulted in the first leak was not unusual is shown by the log, which is admitted to be correct. The log shows that up to the first watch of September 28, 1907, all sails had been set. The log then recites:

In the first watch: "Squally weather, strong rain; wind blows to the southwest and shifts to the northwest; gaff topsail and main jib torn; royals and upper topgallant sails and staysails and spanker taken in." In the next watch: "The same kind of weather; strong breeze; a large swell from the northwest; the topgallant sails taken in; unbent the main jib; violent squalls; strong winds; heavy sea; set the topgallant sails and mizzen staysail." Next watch: "Cloudy weather and squally; strong breeze; heavy sea from the west-northwest; the same sail as during the preceding watch." Next watch: "Squally weather; strong breeze; furled the mainsail at 6 o'clock." Next watch on the same day: "The same weather; very strong swell; violent squalls." The next day, "midnight of the 28th to midnight of the 29th," in the first watch: "Fine weather; some squalls; strong breeze, becoming less at the end of the watch." Second watch: "Fine weather; fine breeze, set the mainsail, royal, spanker, and staysail."

The evidence was that such weather was not unusual or unexpected in that vicinity at that season of the year. It has been held by this court and by other courts that the development of a serious leak, occurring from no mishap or accident within a short period of time from leaving port, is evidence from which it may be presumed that the vessel was not seaworthy at the time of leaving. In *The Warren Adams*, 74 Fed. 413, 20 C. C. A. 486, Judge Wallace, for the Circuit Court of Appeals for the Second Circuit, said:

"Where a vessel, soon after leaving port, becomes leaky, without stress of weather, or other adequate cause of injury, the presumption is that she was unsound before setting sail."

Other decisions to the same effect are *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.*, 94 Fed. 180, 36 C. C. A. 135; *The Aggi* (D. C.) 93 Fed. 484; *The Artic Bird* (D. C.) 109 Fed. 167; *Oregon Bound Lumber Co. v. Portland & Asiatic S. S. Co.* (D. C.) 162 Fed. 912; *Steamship Wellesley Co. v. C. A. Hooper & Co.*, 185 Fed. 735, 108 C. C. A. 71; *Carolina Portland Cement Co. v. Anderson*, 186 Fed. 145, 108 C. C. A. 257; *Benner Line v. Pendleton* (D. C.) 210 Fed. 67.

The appellant contends that, if the presumption of unseaworthiness is to be indulged upon facts such as those which controlled decision in the cases above cited, it is no stronger than the presumption of seaworthiness which obtains as a matter of law, and as expressed in *The Chattahoochee*, 173 U. S. 540, 550, 19 Sup. Ct. 491, 495 [43 L. Ed. 801], where Mr. Justice Brown, referring to the Harter Act said:

"By the third section of that act [Comp. St. 1916, § 8031] the owner of a seaworthy vessel (and, in the absence of proof to the contrary, a vessel will

be presumed to be seaworthy) is no longer responsible to the cargo for damage or loss resulting from faults or errors in navigation or management."

But the presumption which was affirmed in the *Chattahoochee* Case was obviously only a prima facie presumption such as that which was recognized in *Lunt v. Boston Marine Insurance Co.* (C. C.) 19 Blatchf. 151, 6 Fed. 562, and *Pickup v. Thames Insurance Co.*, 3 Q. B. Div. 594, a presumption which obtains in the absence of proof to the contrary, and which may be overcome by proof that the vessel developed a seriously leaky condition within a short time after leaving port, showing that she must have been unseaworthy before the voyage commenced. It is to be observed, however, that the language of Mr. Justice Brown in the *Chattahoochee* Case was relied upon in *The Wildcroft*, 130 Fed. 521, 65 C. C. A. 145, in which the Circuit Court of Appeals for the Third Circuit held that there is a presumption that the owner of a steamship performed his duty in making her seaworthy, and properly manning, equipping, and supplying her for the voyage she was about to make, and that this presumption will support the burden of proof imposed until it is overthrown or controverted by some evidence. But on the appeal from the decision, that doctrine was rejected by the Supreme Court in *The Wildcroft*, 201 U. S. 378, 26 Sup. Ct. 467, 50 L. Ed. 794, where the court said that the owner "is bound to furnish a seaworthy and properly equipped ship for the purpose of the voyage. Whether he has done so is a matter peculiarly within his own knowledge. * * * The law says, in substance, that when the owner can show that he has discharged this duty he shall be relieved from errors of navigation and management on the voyage, over which he has not such direct control," and while affirming the decision of the Circuit Court of Appeals, the Supreme Court said:

"But we are unable to agree with the views expressed in the opinion of the learned Circuit Court of Appeals, to the effect that where a ship owner seeks the protection of the immunity afforded by the Harter Act under section 3, reliance may be had upon the presumption of law that the vessel was seaworthy at the beginning of the voyage, and that it is only in cases of conflicting proof that the burden is imposed upon the shipowner of establishing by testimony the seaworthiness of the vessel, or due diligence in that behalf, in order to have the benefit of the act."

[2] The appellant contends that assuming the ship to have been unseaworthy on leaving Rotterdam, the appellant, having used due diligence to make her seaworthy, is not liable, for the reason that the proximate cause of the damage was not unseaworthiness but fault in navigation. The third section of the Harter Act provides that, if the owner shall exercise due diligence to make the vessel in all respects seaworthy, neither the vessel nor her owner or owners shall be held responsible for damages or loss resulting from faults or errors in navigation or in the management of said vessel. It is said that the fault in management or navigation in the present case was the failure of the master to take the vessel to an accessible port for repairs as soon as he discovered her leaking condition, and that he was at fault in proceeding on the voyage around the Horn, and subjecting the vessel to

the severe strain of the stormy weather usually there encountered. In *Int. Nav. Co. v. Farr & Bailey Mfg. Co.*, 181 U. S. 218, 21 Sup. Ct. 591, 45 L. Ed. 830, the court said:

"We repeat that, even if the loss occur through fault or error in management, the exemption cannot be availed of unless the vessel was seaworthy when she sailed, or due diligence to make her so had been exercised, and it is for the owner to establish the existence of one or the other of these conditions."

In *The Wildcroft*, 201 U. S. 378, 388, 26 Sup. Ct. 467, 469 (50 L. Ed. 794), the court said:

"Where the statute has given immunity against such loss by reason of error in navigation or management, it does so upon the distinct condition that the owner shall show that the vessel was in all respects seaworthy and properly manned, equipped, and supplied for the voyage, or, if this cannot be established, that he has used due diligence to obtain this end."

In the present case the court below was of the opinion that the testimony of the experts who inspected the vessel before her voyage began was not conclusive; that the inspection was general, largely visual, and not particularly of the parts which proved defective. The evidence, we think, sustains that conclusion. There is no testimony that any of the inspectors made other than visual examination, except the witness *Le Roy*, who testified that he sounded with a hammer the ship's sides, and all accessible rivets, including those of the hull, but that he could not examine all rivets, for the reason that at that date, August 27, 1907, there was cargo in the hold. We are not convinced, therefore, that the appellant has met the burden of proof which rested upon it to show that it exercised due diligence in view of the contemplated voyage. In *The Millie R. Bohannon* (D. C.) 64 Fed. 883, Judge Brown said:

"'Due diligence' requires a carefulness of inspection and repair proportionate to the danger."

And in *The Southwark*, 191 U. S. 1, 16, 24 Sup. Ct. 1, 6 [48 L. Ed. 65], it was said that if, by failure to adopt proper and reasonable tests and furnish the required proof, "the question of the ship's efficiency is left in doubt, that doubt must be resolved against the shipowner, and in favor of the shipper." In *The Abbazia* (D. C.) 127 Fed. 495, it was said that the diligence required "is diligence with respect to the vessel, not in obtaining certificates," and in a number of cases the certificates of surveyors and inspectors giving high rating have been disregarded where vessels have been found unseaworthy in fact. *The Folmina*, 212 U. S. 354, 360, 29 Sup. Ct. 363, 53 L. Ed. 546, 15 Ann. Cas. 748; *The Ninfa* (D. C.) 156 Fed. 512, 525; *The Rappahannock*, 184 Fed. 291, 107 C. C. A. 74. The statute so exempting the owner from a general obligation of furnishing a seaworthy vessel is strictly construed. *The Caledonia*, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644; *The Irrawaddy*, 171 U. S. 187, 192, 18 Sup. Ct. 831, 43 L. Ed. 130; *Benner Line v. Pendleton*; 217 Fed. 497, 505, 133 C. C. A. 349; *The Jeanie*, 236 Fed. 463, 471, 149 C. C. A. 515; *The Germanic*, 124 Fed. 1, 5, 59 C. C. A. 521. In the *Irrawaddy* Case the court said:

"Plainly, the main purposes of the act were to relieve the shipowner from liability for latent defects, not discoverable by the utmost care and diligence."

In *Nord-Deutscher Lloyd v. President, etc., of Ins. Co.*, 110 Fed. 420, 49 C. C. A. 1, the court said:

"The obligation of due diligence to make the ship seaworthy is in all respects the same as before the Harter Act, which does not establish any new rule of diligence. The shipowner cannot now, any more than before, rely upon external appearances in place of known tests, nor can the mere selection of competent persons to inspect satisfy the requirement of due diligence."

In the *Alvena*, 79 Fed. 973, 25 C. C. A. 261, it was held that, in the inspection prior to the voyage, failure to take up one of four ceiling boards in a passageway over the limber spaces, underneath which the leak occurred, in order to examine the cement, was a lack of due diligence. That the inspection in the present case was not such as the Harter Act contemplates is strongly suggested by the fact that the vessel sprung a leak five days after starting upon her voyage, and the condition in which she was found when she was overhauled in Buenos Ayres.

The decree is affirmed.

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PEEPLER v. GEORGIA IRON & COAL CO. et al.

In re **GEORGIA STEEL CO.**

(Circuit Court of Appeals, Fifth Circuit. January 23, 1918. Rehearing Denied April 3, 1918.)

No. 3123.

1. VENDOR AND PURCHASER ⇔119—FRAUD—VACATION.

Where a purchaser of coal lands, an iron furnace, and other property was in possession, and did the development work for five years, making partial payments without objection that it had been induced to purchase through fraud of the seller's representatives, the purchaser cannot thereafter secure a rescission of the contract on the ground of such misrepresentations, for it is essential, not only that there be a misrepresentation, but that action be taken as soon as facts are discovered which give notice of the fraud, and the purchaser's development work must have disclosed the falsity of the misrepresentations asserted.

2. VENDOR AND PURCHASER ⇔119—RESCISSON—GROUNDS.

The payment by a seller of a commission to an agent, or officer of the purchaser, entitles the purchaser to avoid the sale, but he must act promptly after ascertaining the fact, so as to restore the status quo, the payment of such commissions not carrying with it any right of readjustment of price.

3. VENDOR AND PURCHASER ⇔44—FRAUD—EVIDENCE.

In considering a seller's fraudulent misrepresentations, evidence of the payment of corrupt commissions to the buyer's agents and representatives is admissible.

4. BANKRUPTCY ⇔467—REVISION—REVIEW—FINDINGS.

The trustee in bankruptcy of a corporation, which had purchased coal lands, an iron furnace, and other property, attacked the claim of holders of bonds given for the purchase price, asserting that the sale had been induced by fraudulent misrepresentations as to the value and character of

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

the property, that its value was less than a third of the price paid, that the seller paid secret commissions to officers of the bankrupt corporation, and that on account of such misrepresentations and payment of secret commissions the sale was subject to rescission. The bankruptcy court found that the misrepresentations were not of a character to authorize the reduction of the purchase price, and that the giving of commissions was not of a fraudulent character authorizing rescission, the matter being known to the purchasing corporation. *Held*, it appearing that the purchaser made an independent investigation of the property before buying, and that the arrangement for payment of commissions to its officers was made before they became officers, that, in view of the burden of proof on the trustee, the rigid rules as to the establishment of fraud, the lapse of five years before the sale was attacked, and the deference to be paid to the findings of the trial judge, the conclusion of the lower court, which was supported by the evidence, cannot be disturbed.

Appeal from the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge.

In the matter of the bankruptcy of the Georgia Steel Company. On petition of the Georgia Iron & Coal Company and others against O. T. Peeples, as trustee in bankruptcy, to review an order of the referee disallowing petitioner's claims against the estate, the order was reversed, and the claim allowed (240 Fed. 473), and the trustee appeals. Affirmed.

J. B. Sizer and S. M. Chambliss, both of Chattanooga, Tenn., Samuel B. Adams, of Savannah, Ga., and Paul F. Akin, of Cartersville, Ga., for appellant.

Alex C. King, Clifford L. Anderson, and Daniel W. Rountree, all of Atlanta, Ga. (Anderson & Rountree and King & Spaulding, all of Atlanta, Ga., on the brief), for appellees.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

BATTS, Circuit Judge. The Georgia Iron & Coal Company, owning iron and coal lands, an iron furnace, etc., having operated at a loss and become financially embarrassed, offered their properties for sale. Moses Taylor, Van Cortlandt, and others, representing the Southern Steel Company, became interested and employed C. P. Perin, a mining expert, to examine the properties. He sent a man from his office, C. M. Weld, who made a preliminary report, and, after another inspection, a final report. The negotiations did not at that time lead to a sale.

In July or August of the same year, 1906, authority to sell was conferred upon a committee acting for Atlanta banks, who were creditors of the corporation, and T. D. Meador, one of the committee, resumed negotiations with the Southern Steel Company, after having associated with himself C. E. Buek. Mr. Joel Hurt was the principal owner of the stock of the corporation, and, contemporaneously with Meador's efforts to sell the property, he was making like efforts elsewhere, demanding a larger price than Meador was undertaking to sell at, and expressing an intention to repudiate Meador's authority.

Meador and his associates reaching an agreement with Taylor, Hurt was not satisfied, and demanded changes. Meador had been promised

a commission of \$60,000; this he had agreed to divide with Buek. Buek had interested Oakley Thorne, president of the Trust Company of America. Hurt objected to the \$60,000 commission. It was explained to him that Meador was to receive only a part, and that it could not be reduced to less than \$45,000, to which amount he finally agreed. His other demands were met, and another contract was prepared and signed October 10, 1906. On September 6, 1906, a few days before the signing of the first agreement, Buek and Thorne were made directors of the Southern Steel Company. Buek, as vice president of the Southern Steel Company, appeared before the directors of the Georgia Iron & Coal Company, and stated that his company would carry out the contract of October 10th.

Contemporaneously with the purchase by the Southern Steel Company of the property, it organized the Georgia Steel Company; Buek and Thorne becoming directors. The contract was consummated in the name of this corporation. The contract involved the sale of about 52,000 acres of land, one furnace, railroad, etc., for a total purchase price of \$1,620,000. Cash to the amount of \$120,000 was paid. Bonds in the amount of \$1,000,000, secured by a first mortgage on the property, were executed by the company, and its notes for \$500,000, secured by a second mortgage, were made to the vendor company. The obligations were guaranteed by the Southern Steel Company.

On the acquisition of the property the Georgia Steel Company began the opening up of new mines, which, with other improvements, involved expenditures of about \$600,000. The plants were operated at a loss, and in 1907 default in interest resulted in a suit to foreclose and receivership. Pending suit to foreclose, negotiations were had between the debtor company and Hurt, owning most of the bonds, which resulted in the payment by the Georgia Steel Company of the notes secured by the second mortgage, which, with interest and costs, amounted to about \$650,000. After this adjustment the efforts to develop additional mines continued, and expenditures thus made, together with operating losses, amounted to between \$300,000 and \$400,000. In 1911 a suit was instituted by the trustee for the bondholders against the Georgia Steel Company, to enjoin action which was being taken by the latter to dismantle one of its plants and to remove the machinery, etc., to a part of its holdings which was in the state of Alabama. When this suit was instituted, the claims which are now made with reference to misrepresentation and payment of secret commissions, were first suggested in the cross-bill filed. After the filing of this cross-bill a substitute trustee filed an independent foreclosure suit in the same court, and a receiver was appointed. Following this creditors began bankruptcy proceedings, and, after a contest, the company was adjudicated a bankrupt, and the proceedings in the state court abandoned. Bondholders filed their claim, and the resulting contest was referred to a master. The bonds were contested upon the following grounds: It was alleged that the sale had been induced by fraudulent misrepresentation with reference to the value and character of the property; that the value of the property, instead of being in excess of \$1,500,000, was less than \$500,000; that in the sale of the property secret commissions had been given to two of the officers of

the purchasing company; that on account of these fraudulent misrepresentations, and this fraudulent giving of commissions to an officer of the buying company, the sale was subject to be rescinded; and that the claim asserted by the Georgia Iron & Coal Company should be disallowed.

The master, after lengthy hearings, filed a very able report, finding that misrepresentations had been made; that the property, when sold, was not worth more than \$500,000; that Buek and Thorne, officers of the purchasing company, had received secret commissions; and held that, considering both misrepresentations and secret commissions, while the sale could not be rescinded, the bankruptcy court would have a right to refuse to approve the claim of the bondholders. This report of the master was contested before the District Judge, and his holding as to the legal effect of the facts found was overruled; the District Judge concluding that the misrepresentations were not of a character to authorize the reduction of the purchase price, and that the giving of commissions, under the circumstances developed, was not of a fraudulent character, authorizing a rescission of the contract. From this ruling of the District Judge the trustee in bankruptcy has appealed.

The misrepresentations alleged are with regard (1) to the character of the iron ore; and (2) with reference to the extent and quality of the coal. The evidence indicated that the value of the ore depended on the persistency and continuity of the leads, and the nonexistence, below the water line, of sulphur in excessive quantities; and it is charged that Weld was led to an incorrect conclusion upon this matter by Singleton. The view that the brown ore was of a carbonate origin, that it was valuable, even below the water line, and that it existed in very great quantities, had been entertained and expressed by disinterested experts, whose reports had been relied upon by all parties. While the facts are not absolutely and definitely determined, even up to this time, the probabilities are that the valuable ore is very limited in quantity. With reference, however, to this feature of the case, there is not sufficient evidence to authorize a court of equity to hold that such misrepresentations were made as would authorize either the rescission of the contract or the readjustment of the price. Its existence, its character, and its extent were essentially matters of opinion and judgment. In the sale of mining properties both parties ordinarily take a chance.

The facts with reference to the coal deposits are somewhat more tangible. Weld's report was based almost exclusively upon the statements of Singleton. It is very apparent that Weld relied, almost entirely, upon information received from Singleton, and that fact was apparent to Singleton. There is no evidence of any direct and absolute misstatement of fact on the part of Singleton. There is, however, ample evidence of a failure on his part to disclose facts that were material, and facts which it is insisted he was under obligations to disclose under the conditions created by the character of investigation made by Weld. It appears that, prior to the examination by Weld, a very large number of holes had been sunk in an effort to ascertain

the location and extent of the coal field. In all the interviews between Singleton and Weld as to the coal, no reference was made to these efforts which had theretofore been made to ascertain whether there was coal in sufficient quantities to operate the property. Weld's conclusion, as stated in his report, was very far from the facts as they have since been developed. It is now assumed that the coal is limited in quantity, and in thin deposits, and inadequate for the successful operation of the properties.

The Georgia Iron & Coal Company insists, primarily, that Singleton was in no way authorized to speak for it, and that any misrepresentation made by him was upon his own account, and was accepted by the purchaser at his own risk. There is some evidence to indicate that the officers of the Georgia Iron & Coal Company depended upon Singleton to do the very things which he did, and subsequently—that is, after the sale had been consummated—a payment was made to Singleton for his services in making the sale. This latter action could have been taken in recognition of what was assumed to be the proper and valuable services on the part of Singleton, and as not in the discharge of a legal obligation to him. It is quite possible that Singleton, in what he conceived to be his duty to his company, directed the attention of the investigator to features favorable to the property, under the assumption that he would make an especial effort to find those which were not, and that there was no obligation on his part to give aid in these efforts.

The company denied any authority of Singleton to make any statement of any kind, and Singleton testifies that he neither made any misstatement nor concealed any pertinent fact. Assuming, however, that Singleton's conduct is chargeable to the company, and that he did fail to make statements as the result of which Weld reached incorrect conclusions, a question arises as to the extent of the duty of the seller, when the buyer undertakes to make his own investigation. It is apparent that the Southern Steel Company would not have accepted, and in fact did not accept, the statements made by representatives of the selling company. They employed a man to make the investigation, and they doubtless acted upon the report which he made, rather than upon any information which they secured from the seller. Singleton's fraud, if his conduct constituted fraud, consisted in abstaining from telling all that he knew about the coal, and in making a statement with reference to the character of the iron ore which no one is in position to say was not honestly made, even if it is now certain that his conclusion was incorrect.

[1] Most trades result from the efforts of each of the parties to benefit himself at the expense of the other. This each party perfectly well understands. The trade is not compulsory. Each party may abstain from making the contract until he is satisfied as to the facts. Something of exaggeration as to the merits of his merchandise is expected of the seller. It is so nearly conventional as to have legal recognition. Equity will relieve against fraud, but the seller's normal lack of conservatism of statement is not so characterized. All this, where the buyer relies upon the seller. Where the buyer elects to assume that the seller will not tell the truth, and relies upon his own in-

vestigation of the facts, there is even less inclination on the part of courts to interfere. If the buyer chooses to substitute his own judgment for the seller's statement, he is permitted this reasonable privilege. A court is not an agency for relieving business men from the effects of their mistakes. The common law is a product of more vigor than refinement. It encourages independence and self-reliance. The development of equity has made modifications in its crude vigor; but equity, as administered in the courts, is the output of the same peoples who made the common law, and its principles have not yet reached the lofty ideals of early Christianity, nor even the refined justice of the civil law. The line between permissible overreaching and punishable fraud is illy defined, and so it has been from the time Jacob demonstrated the profitable potentialities of the science of eugenics at the expense of Laban, even unto this day. Genesis xxx, 31-43.

[2] Under the circumstances developed in this case, the conduct of Singleton in abstaining from telling what had been done with reference to test holes for coal, was, perhaps, entirely effective as a misrepresentation. If an effort had been made to promptly set aside the transaction on account of these misrepresentations, an appeal would have been made to a court of equity which it might have hesitated to ignore. In order, however, to make a proper appeal to a court of equity to rescind a contract or readjust a price, on the ground of misrepresentation, there must not only be a material misrepresentation, intended to mislead and having that effect, but action must be taken as soon as facts are discovered which give notice of the fraud.

The sale was in 1906, and no attack was made, upon this ground, until about five years after. During this period the effort at development was continuous. All the property was in charge of the purchaser, and it can easily be assumed that every part of it was examined, and that there had been ample time and opportunity in which to ascertain the truth or the falsity of any statement which had been made by any of the parties at the time of sale. Even in 1909, when there was a fourth partial payment of the contract price, and an extension of the bonds which had been matured by nonpayment of interest, all the facts, it must be held, were either known or could have been known. The conclusion that must doubtless be reached with reference to this feature of the case is that, at the time of the purchase, the Southern Steel Company was satisfied by the report made by Weld, and believed that the property had a value largely in excess of the price paid. This belief continued, and, even when one failure after another had been experienced, there was a continuation of the hope that the next efforts would be met with success that would realize the original estimate of large profits. The purchaser continued, after he had an opportunity to know as much as any one knew, to take the chance. Who speaks tardily to a court of equity must speak convincingly.

[3, 4] A much more serious question than that presented by the allegation of misrepresentation arises out of the payment of commission to Buek and Thorne. It is a proper rule of law that when a person, by the payment of secret commissions, corrupts the officer or employé of the purchasing person or corporation, the sale may be set aside at

the suit of the latter. The facts developed in this case, however, do not bring it definitely under the terms of the law as it has been developed. Buek was primarily associated with Meador before he had any connection with the Southern Steel Company, and Thorne became interested before he had such connection. It is true that Buek and Thorne became officers of the purchasing company before the consummation of the sale. On the other hand, the negotiations which led to the sale and the execution of the original agreement between the selling and buying parties antedate Buek's official connection with the buying company. This fact was known to all the parties. Just when Buek began to have interest in the purchasing side does not appear, but the purchasers were doubtless charged with notice of the fact that Buek, even after this association began, was expecting a commission from the sellers.

The evidence indicates that when Perin was employed he came to Atlanta and there ascertained that Meador was dividing his commission with Buek. Subsequently, Perin talked to Buek about this, and was assured by Buek that he would not accept a commission, or that, if he did, it would be for the benefit of the buying company. At the time Hurt refused to carry out the original agreement made between Meador and Buek on the one side, and Taylor on the other, Taylor received a letter in which reference was made to the fact that Buek would be consulted with regard to the matter of adjusting the commissions; the letter carrying the necessary inference of some interest by Buek in the commissions. In 1911, when the readjustment of the bonds and interest was effected, another letter passed, which could very well have charged the buyers with notice of the fact that Buek had received a commission. There is nothing to indicate that the selling company at any time undertook to keep the fact of the commission secret; and it is probable that the buying company knew as much about it all the time as at the time when no longer able to carry out their contract, they began to charge that the selling company had corruptly paid the commissions.

The payment by a selling company of a commission to an agent or officer of the purchaser carries with it only one right in equity; that is, to rescind the contract. The buyer has the option to avoid the sale. He must act promptly after ascertaining the fact. So acting, he may, so long as he is in position where he can restore the original status, invoke this remedy. But this right to rescission does not carry with it any right of readjustment of price. The payment of corrupt commissions is a character of fraud that has no relationship to price. No effort has been made in this proceeding to invoke that remedy; and, if such an effort had been made, the lack of ability to restore conditions to the original status would have prevented.

The referee properly considered the evidence with reference to the payment of corrupt commissions in connection with fraudulent misrepresentations as to value. Again, however, the delay must not be ignored. The record in the case is large. While the very able briefs filed for appellants and appellees have greatly reduced the labors of the court, it is not practicable to review the facts or state the conclusions of law more fully. In view of the burden of proof upon appellants, the somewhat rigid rules as to the establishment of fraud, the great lapse

of time since the transaction complained of, and the deference to be paid the findings of the trial judge, the conclusion is reached that the evidence would not justify an appellate court in reversing the judgment rendered.

The judgment is affirmed.

WHITE et al. v. UPPER HUDSON STONE CO. et al.
BAY DREDGING & CONTRACTING CO. v. UPPER HUDSON STONE
CO. et al.

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

Nos. 58, 59.

1. SHIPPING ⚡54—CHARTERS—DEMISE OF SCOW—LIABILITY OF CHARTERER.

A charterer of a scow, under a charter which is a demise, is a bailee, and prima facie responsible for any failure to return the boat in good order, reasonable wear excepted; and this liability is not discharged by showing that the vessel had been intrusted to the care of another, and injured by that other's negligence, or while in his charge.

2. TOWAGE ⚡11(5)—INJURY TO TOW—LIABILITY OF TUG.

A motorboat, which contracted to tow a scow over a bar upon which the water was of sufficient depth at the proper state of the tide, held liable for injury to the scow by stranding on the bar in the daytime in fine weather, either due to a miscalculation of the tide or to the swell which caused her to pound when in the trough.

3. SHIPPING ⚡58(1)—CHARTERS—ENFORCEMENT OF CHARTERER'S LIABILITY BY INSURER.

The owner chartered a scow by a charter of demise, to be ordinarily employed within the limits of New York harbor. The owner maintained insurance in the form common for harbor traffic; the policy providing that it should be void if the scow was taken beyond the harbor limits. It was agreed, however, between owner and charterer, that it might be taken outside of such limits, if the charterer paid for the additional temporary insurance required, which the charterer did by procuring a rider to be attached to the owner's policy, and subject to its conditions extending the insurance for the particular trip named therein. On one of such trips the scow was injured, and the insurer paid the loss to the owner. Held, that the insurance was for the benefit of the owner, and not of the charterer, and that the insurer, as assignee of the owner, could maintain a suit to enforce the liability of the charterer under the charter party for failure to return the scow in good condition.

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

Suits in admiralty by Joseph Leslie White and William D. Quick against the Upper Hudson Stone Company, with Walter H. Gahagan, and the gasoline motorboat Ono, Louis R. Bick, trustee in bankruptcy, claimant, impleaded, and by the Bay Dredging & Contracting Company, by Louis R. Bick, its trustee in bankruptcy, against the Upper Hudson Stone Company and Walter H. Gahagan. Decree for respondents in first suit, and libelants appeal. Reversed as to respondents the Upper Hudson Stone Company and the Ono, and affirmed as to respondent Gahagan. Decree for respondents in second suit, and libellant appeals. Affirmed.

One Bleakley, owner of scow U. H. 44, chartered her to Upper Hudson Stone Company. The contract admittedly amounted to a demise, and made the charterer an owner pro hac vice and a bailee. By the terms of charter the scow was to be ordinarily employed within the limits of New York harbor. Bleakley maintained insurance on his boat in the form common for harbor traffic, insuring him (Bleakley) "on account of whom it concerns, loss, if any, payable to him" against "adventures and perils of the harbors * * * and other waters," within the limits of the harbor of New York. This policy became void if the scow was taken beyond said limits, but it was agreed between charterer and owner that the vessel might be so taken, if the charterer paid for the temporary additional insurance required.

The U. H. 44 was several times sent to Long Beach by the charterer, who each time procured from the insurer a "rider" or (as it is called in the record) a "slip attached to policy" the material words of which are as follows: "In consideration of an additional premium of \$14, privilege is hereby granted to the [scow in question] to make present trip to Long Beach and return. Warranted not to use Jack's Inlet. Subject to terms and conditions of policy. Attached to and forming part of Policy No. 6548215"—signed by insurer's agents.

The charterer employed one Gahagan to tow this and other scows to Long Beach. Gahagan's tug, however, was of too great draft to get over the bar, and the motorboat Ono (belonging to the Bay Predging & Contracting Company) did this work. Just how the Ono was employed and with whom arrangements were made is very uncertain from the record; but, before the accident out of which these suits grew, several of the Stone Company's vessels made the trip, and Gahagan rendered his bill for deep water towing, and the owners of the Ono their bill for towing beyond the entrance bar, and the bills so rendered the Stone Company paid.

In July, 1915, Gahagan's tug took the U. H. 44 loaded to the Long Beach bar, there delivered her to the Ono, and while in charge of the latter vessel she took the ground twice and received very serious injury. She was drawing $6\frac{1}{2}$ feet, and at high tide there was about 8 feet on the bar. Whether the grounding was due to a miscalculation of the tide or to the swell is perhaps uncertain. It was daylight at the time of injury, and the navigation of the Ono and scow was entirely in the hands of the former's master. After the scow was injured, the owners of the Ono devoted considerable time and effort toward her rescue. The insurer paid Bleakley under the policy for the scow's injury, and he assigned his claim against all parties in the premises to the present libelants, who are the insurer's nominees.

For the benefit of the Insurance Company, therefore, libelants brought the first of these suits, seeking to recover against the Upper Hudson Stone Company as charterer and bailee, because the U. H. 44 was not returned in good order and condition, reasonable wear and tear excepted. Under the Fifty-Ninth rule in Admiralty (29 Sup. Ct. xlvi) the Stone Company impleaded Gahagan and the Ono, alleging their negligence, or that of one of them, as the immediate cause of the scow's injury. The second action (tried with the first) is by the trustee in bankruptcy of the Ono's owner, and is an attempt to recover as a salvage award the expenses to which he was subjected in endeavoring to assist the U. H. 44.

The trial court found no fault on the part of the Ono or Gahagan, and therefore dismissed the libel in the first case, and in the second refused any award on the ground that the claim advanced was not salvage. Both libelants appealed.

Alexander & Ash, of New York City (Mark Ash, of New York City, of counsel), for appellants White and Quick.

Lampke & Stein, of New York City (Nelson Zabriskie, of New York City, of counsel), for appellant Bick.

Foley & Martin, of New York City (William J. Martin and George V. A. McCloskey, both of New York City, of counsel), for appellee Upper Hudson Stone Co.

Austin J. MacMahon, of New York City, for appellee Gahagan.

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

HOUGH, Circuit Judge (after stating the facts as above). [1] Since the relation between Bleakley, the scow owner, and the Upper Hudson Company, as charterer, was exactly that so recently restated by this court in *Hastorf v. F. R. Long, etc., Co.*, 239 Fed. 852, 152 C. C. A. 638, the charterer was prima facie responsible for any failure to return the boat in good order reasonable wear excepted. The obligation was that of a bailee, and liability was not discharged by showing that the vessel had been intrusted to the care of another, and injured either by that other's negligence or while in such other's charge. *Gannon v. Consolidated Ice Co.*, 91 Fed. 539, 33 C. C. A. 662. Therefore the negligence of Gahagan and the Ono, or of either, was only important because proof thereof would enable the Upper Hudson Company to retrieve from them the loss to which it was subjected by the nature of its contract with Bleakley.

We find it uncertain on the evidence whether there ever was any agreement by Gahagan to tow the respondent's barges all the way into Long Beach inlet or harbor. It may be that he, in the beginning of the work, employed the Ono, or sublet or farmed out to that boat some portion of his towing contract. But before the accident herein a course of business had been established by which both Gahagan and the Ono's owner dealt directly with the Upper Hudson Company; each worked independently for that company; each was a principal. From this finding of fact, it results that there is no evidence of negligence against Gahagan.

[2] As to the Ono, we discover no escape from liability. She assumed the ordinary obligation of a towing vessel; inter alia, to know the recognized channel, the tides, the draft of the tow, and with reasonable skill to judge the weather. While in her care the U. H. 44 pounded and stranded, either because her draft was too great for the bar, or the swell was such that even at highest tide she pounded when in the trough. No matter which story is true, the Ono is liable. If the water was insufficient when calm, her master inexcusably misjudged the tide; if the swell was such as to let the tow pound, he ought to have perceived that such would be the case, for it was daylight and fine weather, and there was no necessity of going over the bar on that particular tide. What was done was negligence under any state of facts suggested. *The Eli B. Conine*, 233 Fed. 987, 147 C. C. A. 661.

[3] These findings leave the Upper Hudson Company to pay whatever cannot be recovered from the Ono, and require consideration of the contention that these libelants, who may be regarded as the scow's insurers, cannot recover from the Upper Hudson Company, because that company was itself insured against the very loss and damage complained of by (in effect) the libelants themselves.

Whether one party insures another is primarily a question of fact, and, since contracts of insurance are commonly (as here) in writing, the content and purport of the writings must be first considered to ascertain even the intentions of the parties. The policy and rider in

evidence do not assist respondent's contention. The policy insures Bleakley "as interest may appear," and the rider is a part of the policy, not extending the nature of the assumed risk, nor on its face varying the parties in interest, but only widening the geographical limits within which the contract is to operate.

Doubtless a charterer has an insurable interest in the chartered vessel, and it is not legally impossible that such interest might for some purposes be covered by or in what is ordinarily the owner's policy. *Hagan v. Scottish Union, etc., Co.*, 186 U. S. 423, 22 Sup. Ct. 862, 46 L. Ed. 1229. In this case, however, the Upper Hudson Company must affirmatively prove (having pleaded the defense as new matter) that it was itself the insured on the voyage to Long Beach, and do so by means other than the written contract. The only evidence produced is the fact that respondent procured and paid for the rider; i. e., a privilege to take the boat beyond harbor limits without vitiating what Bleakley had paid for. But this was in plain pursuance of the contract with Bleakley; he never agreed to let his boat go outside the harbor with his interest uninsured, and the reasonable inference from the testimony is that the charterer agreed to keep Bleakley insured if the boat was sent outside.

It results that there was no such agreement between owner and charterer as is alleged. Whether, therefore, had such agreement been made, it would have availed against the insurer, who certainly was no party to it, is a question that need not be considered.¹

The finding of fault in the *Ono* renders it impossible to give her salvage, or any award in the nature thereof. All the services and expenses shown were rendered necessary by her negligence, and she was and is liable for that and more.

For these reasons, it is ordered that the decree in *Bay Dredging, etc., Co. v. Upper Hudson Stone Co. et al.* be affirmed, with one bill of costs, and the decree in *White et al. v. Upper Hudson Stone Co.* be reversed, and the case remanded, with directions to enter decree in favor of libelants against the Upper Hudson Stone Company and the motorboat *Ono*, execution to issue against the latter in the first instance, and said Stone Company to respond for any balance not collected by execution, said decree to carry costs in both courts. As to *Gahagan*, let the libel and petition be dismissed, with costs in both courts against the impleading respondent.

¹ *The Sydney* (C. C.) 27 Fed. 119 (appeal dismissed 139 U. S. 332, 11 Sup. Ct. 620, 35 L. Ed. 177), is in its facts nearer this case than any other reported litigation. As to the question suggested, but not discussed, see *Boston Fruit Co. v. British, etc., Co.*, 11 Commercial Cases, 169. It may be noted that, to protect the bailee, the insurance would have had to cover, not only his interest in the vessel, but his negligence in caring for her—something as to which there is no proof at all.

EDMONDS v. STERN et al.

(Circuit Court of Appeals, Second Circuit. January 18, 1918.)

No. 92.

1. COPYRIGHTS ⇨12—SUBJECT-MATTER—ORCHESTRAL SCORE FOR COPYRIGHTED SONG.

Where the purchaser of a song, having copyrighted it with the consent of the composer, prepared and copyrighted an orchestral score, the purchaser is entitled to protection of the copyright for the score, as it was substantially a new and independent composition, and represented original work, supporting an independent copyright.

2. COPYRIGHTS ⇨47—ASSIGNMENTS—CONSTRUCTION.

Where defendants copyrighted a song sold to them on a royalty basis, and with the consent of the composer prepared and copyrighted an orchestral score, the composer is not, defendants having assigned to him the copyright of the song in settlement of a controversy between them, entitled to any rights in the orchestral score, which was not assigned; the transaction in its very nature showing an intent not to lessen or change defendants' enjoyment of the score copyrighted.

3. COPYRIGHTS ⇨47—ASSIGNMENTS—RIGHTS IN COPYRIGHTED WORK.

Where the composer of a song sold it to defendants on a royalty basis, and after copyrighting the song they prepared and copyrighted an orchestral score with the composer's consent, the composer is not, by reason of the assignment of the copyright of the song, entitled to any rights in the score, which was not assigned to him; the two copyrights being entirely distinct.

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

Bill by Shepard N. Edmonds against Joseph W. Stern and Edward B. Marks for infringement of copyright. From the decree, issuing an injunction, without damages, and granting plaintiff's attorney a small fee, both parties appeal. Reversed and remanded, with directions to dismiss the bill.

Plaintiff composed the words and music of a certain song, which he sold to defendants, who copyrighted it in 1903, under a royalty agreement. With plaintiff's knowledge and consent this song was used as part of an operetta, and with like knowledge and consent defendants separately copyrighted an orchestral arrangement or medley of all the music of said operetta, which therefore contained, inter alia, an orchestration of the melody of plaintiff's song. In 1907 defendants, after some difficulty and litigation with plaintiff, and as part of a settlement and compromise thereof, assigned and transferred to plaintiff, his assigns, etc., "the copyright to the following songs [including the song now in question] composed by the said [plaintiff] and copyrighted by us." Some years later, persons employed by and acting on the suggestion of plaintiff or his counsel, bought from defendants a few copies of the orchestral arrangement or medley aforesaid, and endeavored to buy the words and music of the song itself, but without success, being informed that the song had been withdrawn from sale.

This action is upon the copyright of the song, and the infringement alleged is the sale of the above referred to copies of the orchestral arrangement, which, of course, contained no words. The court below held that this was infringement, but that plaintiff had suffered no damage and accordingly issued an injunction without damages, and granted plaintiff's attorney a small counsel fee. Both parties appealed—plaintiff complaining of refusal of damages and the smallness of the counsel fee; defendant, of any fee and the injunction.

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

Fred Francis Weiss, of New York City, for plaintiff.
Cohen & Richter, of New York City (Theodore B. Ritcher, of
New York City, of counsel), for defendants.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). Whether the act above recited constituted infringement must be decided before any question of damages or fees can be considered.

[1] The separate copyright of the orchestral score has always belonged to defendants, and that they had lawful right to have such arrangement both prepared and copyrighted cannot be denied, nor do we understand it to be contested in this case. Defendants had confessedly acquired the right to make this arrangement, and when made it was "substantially a new and distinct composition, and as such entitled to the protection of the court." *Carte v. Evans* (C. C.) 27 Fed. 862, and cases cited. Nor is this doctrine at all peculiar to musical works; the propriety of separate and independent copyright always depends upon the presence or absence of original work, as we pointed out in *West, etc., Co. v. Edward Thompson Co.*, 176 Fed. 833, 100 C. C. A. 303.

[2, 3] If, then, defendants had lawful copyright in the orchestral arrangement, it was a piece of property wholly separate and independent from that which they had in the copyright of the song. The plaintiff's knowledge of and acquiescence in what was done renders impossible any consideration of what might have been the case, had the sequence of notes in plaintiff's song melody been used as a basis for a small part of the orchestral score without his consent and approbation. When, in this condition of facts, defendants assigned the song copyright to plaintiff, and did not assign that of the orchestral score when settling and compromising their mutual differences, the transaction by its nature is strong evidence of plaintiff's continued acquiescence and approbation in defendants' ownership and enjoyment of the copyright of the orchestral arrangement.

Thus for two reasons we find no infringement of plaintiff's copyright by what defendants did: (1) There is evidence of intent in both parties not to lessen or change defendants' enjoyment of the score copyright, when plaintiff acquired the rights on which he here depends for recovery; and (2) as matter of law the mere transfer of copyright in the song had no effect whatever on the copyright of the operatic score theretofore taken out. The two things were legally separate, and independent of each other; it makes no difference that such separate and independent existence might to a certain extent have grown out of plaintiff's consent to the incorporation of his melody in the orchestration. When that consent was given, a right of property sprang into existence, not at all affected by the conveyance of any other right.

Thus the facts prevent consideration of the query (dwelt on in the court below) whether as matter of law defendants were without plaintiff's consent, entitled to sell copies of the song printed before the assignment of the copyright in suit. *Taylor v. Pillow*, L. R. 7 Eq.

418; *Howitt v. Hall*, 6 L. T. Rep. [N. S.] 348; *Troitzsch v. Ress*, 3 Times Law Rep. 773.

It follows that the decree below must be reversed, and cause remanded, with directions to dismiss the bill. The defendants will recover one bill of costs in this court, as well as costs below.

WESTERN UNION TELEGRAPH CO. v. HICKMAN.

(Circuit Court of Appeals, Fourth Circuit. January 3, 1918.)

No. 1547.

1. MASTER AND SERVANT ⇨362—MASTEE'S LIABILITY FOR INJURY TO SERVANT—WORKMEN'S COMPENSATION ACT—CONSTRUCTION—"CASUAL EMPLOYMENT."

Under the Workmen's Compensation Act of West Virginia (Acts 1915, c. 9, as amended by Acts 1915 [Ex. Sess.] c. 1), which exempts from its operation persons in "casual employment," the exemption depends, not on the nature of the work performed, but on the nature of the contract of employment, and one hired for a limited and temporary purpose, though within the scope of the master's business, is within the exception.

2. MASTER AND SERVANT ⇨289(21)—MASTER'S LIABILITY FOR INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where plaintiff, temporarily employed by defendant telegraph company to assist in repairing a portion of its line, was injured by the falling of a pole upon which he had climbed in the course of duty, which was caused by the breaking of the pole where it had become decayed below the surface of the ground, the defect not being apparent by inspection above the ground, plaintiff was not chargeable as matter of law with contributory negligence or assumption of the risk.

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

Action, at law by Charles H. Hickman against the Western Union Telegraph Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Herbert Fitzpatrick, of Huntington, W. Va. (Enslow, Fitzpatrick & Baker, of Huntington, W. Va., on the brief), for plaintiff in error. V. B. Archer, of Parkersburg, W. Va., for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. [1] In this action of negligence plaintiff in error, defendant below, set up in defense and claimed protection under the Workmen's Compensation Act of West Virginia (Acts 1915, c. 9, as amended by Acts 1915 [Ex. Sess.] c. 1) in force when the accident happened. This act, which otherwise would bar the suit, excepts from its provisions "casual employment," and plaintiff can therefore maintain his action if he was engaged in "casual employment" at the time he got hurt. The facts in that regard appear to be these:

Plaintiff was about 27 years old when he received the injuries for which he sues. His previous employment had been mainly with telephone companies, and he was an experienced, if not expert, telephone lineman. For a while before the accident he was out of work and looking for something to do. His father, James W. Hickman, an inspector for the defendant company, had been directed to repair its clock circuit in the city of Parkersburg, a job of brief duration and costing only a small sum. Under authority to get a lineman to help him, he hired his son, the plaintiff, for "not over five days," and they began the work. On the morning of the fourth day, a telegraph pole, which plaintiff had climbed to string a wire, broke down under his weight and he was thrown to the ground and severely injured. Was his employment "casual"?

The English Compensation Act, which some of our states have closely followed, excepts "a person whose employment is of a casual nature and who is employed otherwise than for the purpose of the employer's trade or business." Construing this act, the English courts have held that the kind of work done by the employé, rather than duration of service, is the determining factor. If the work pertain to the business of the employer and be within the scope of its purpose, the employment is not "of a casual nature," although the hiring be only for a short period of time. The Connecticut statute (Pub. Acts 1913, c. 138) is practically the same as the English, and accordingly the Supreme Court of that state has held (*Thompson v. Twiss*, 90 Conn. 444, 97 Atl. 328, L. R. A. 1916E, 506) that the nature of the employment was measured, not by tenure of service, but "by the character of the work." The New Jersey statute likewise exempts those "whose employment is of a casual nature."

But the West Virginia act, in defining exceptions, uses the terms "casual employment" and "persons casually employed." The equivalent exemption of persons "whose employment is but casual" appears in the Compensation Laws of Massachusetts (prior to the amendment of 1914 [St. 1911, c. 751, as amended by St. 1912, c. 571]), Illinois (Laws 1911, p. 315, as amended by Laws 1913, p. 335), Michigan (Pub. Acts [Ex. Sess.] 1912, No. 10), and Minnesota (Gen. St. 1913, §§ 8195-8230). This noticeable departure from the language of the English statute indicates a legislative intent to broaden the exception and place it on a different basis. Its apparent effect is to make exemption depend, not on the nature of the work performed, but on the nature of the contract of employment. If the hiring be incidental or occasional, for a limited and temporary purpose, though within the scope of the master's business, the employment is "casual," and covered by the exception. And so it has been held by the courts of states whose Compensation Acts have substituted "casual employment," or words of the same import, for the "employment of a casual nature," found in the English statute. In *re Gaynor*, 217 Mass. 86, 104 N. E. 339, L. R. A. 1916A, 363; In *re Cheevers*, 219 Mass. 244, 106 N. E. 861; *Aurora Brewing Co. v. Industrial Board*, 277 Ill. 142, 115 N. E. 207; *Maryland Casualty Co. v. Pillsbury*, 172 Cal. 748, 158 Pac. 1031. Thus, in the *Gaynor* Case, *supra*, in which the subject is discussed at

length, the court says that "casual" is the antonym of "regular," "systematic," "periodic," and "certain." These decisions, and the convincing reasons on which they rest, warrant the conclusion that plaintiff was engaged in "casual employment" when the accident occurred.

This conclusion finds further support in the so-called insurance feature of the West Virginia statute, under which a compensation fund is created. The premiums which make up this fund are paid by the employers on the basis of their monthly pay rolls, which are certified to the treasurer of the state, and they are authorized to deduct each month from the pay of their employes, excepting persons casually employed, 10 per cent. of the premium paid for that month. But it does not appear, and we do not understand it to be claimed, that Hickman was on defendant's pay roll for the month in which he was injured, or that any deduction from his pay for a few days' service was made or contemplated. In short, taking all the circumstances into account, it seems but reasonable to hold that plaintiff's employment was "casual" within the meaning of the West Virginia act. Certainly, as we think, the defendant was entitled to no more than the submission of the question to the jury, as was done, and their finding on that issue must be accepted as conclusive.

[2] The defenses of contributory negligence and assumption of risk may be disposed of without extended comment. There was testimony from which the jury might find that the pole which broke appeared to be in sound condition; that plaintiff looked at it before ascending, and observed nothing to suggest that it could not be climbed with safety; that it broke below the surface of the ground, where it was rotten and decayed; that discovery of this subsurface condition required the use of certain tools with which plaintiff had not been provided; that proper inspection would have disclosed the defect; that defendant employed inspectors and had some system of inspection of its clock circuit, but had not inspected the pole in question for at least a number of years; that it was necessary for plaintiff to climb this pole in doing the work for which he was hired; and that he was acting with reasonable care and prudence when the accident happened. This was sufficient, in our judgment, to take the case to the jury, and the refusal of the court to direct a verdict for defendant, on the grounds here referred to, is sustained by numerous authorities. *Western Union Tel. Co. v. Tracy*, 114 Fed. 282, 52 C. C. A. 168; *Britton v. Telephone Co.*, 131 Fed. 844, 65 C. C. A. 598; *Munroe v. Ley & Co.*, 156 Fed. 468, 84 C. C. A. 278; *Jackson Fibre Co. v. Meadows*, 159 Fed. 110, 86 C. C. A. 300; *Bush v. Cin. Trac. Co.*, 192 Fed. 241, 112 C. C. A. 499; *Heckert v. Central D. & P. T. Co.*, 218 Fed. 29, 134 C. C. A. 43; *Perry v. Electric Ry. Co.*, 72 W. Va. 282, 78 S. E. 692, L. R. A. 1916D, 962; *Corby v. Telephone Co.*, 231 Mo. 417, 132 S. W. 712; *Hulse v. Home Telephone Co.*, 164 Mo. App. 126, 147 S. W. 1124; *McGuire v. Bell Telephone Co.*, 167 N. Y. 208, 60 N. E. 433, 52 L. R. A. 437; *Southern Bell Tel. Co. v. Clements*, 98 Va. 1, 34 S. E. 951.

We have carefully examined the various assignments of error which are based upon instructions to the jury, both those given and those refused, but find none of them of sufficient merit to require discussion.

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

BOOTH, District Judge. Dossett, defendant below, was convicted of the offense of carrying liquor from a point outside the state of Oklahoma into that part of the state which prior to statehood was a part of the Indian Territory. The case is here on writ of error, and counsel for defendant urge for consideration the following assignments of error:

No. 3. Refusal by the court below to give certain requested instructions to the jury.

No. 2. Giving by the court below that part of the charge to which specific objection was taken.

No. 4. Overruling the demurrer to the indictment.

These assignments will be taken up in reverse order.

[1] The demurrer interposed contained the following grounds:

(1) "That said indictment is insufficient, and fails to allege facts showing that defendant is guilty of violating any of the laws of the United States."

(2) "That said indictment fails to allege facts sufficient to show that defendant has been guilty of introducing intoxicating liquors into the Indian country within the purview of the act of Congress."

The indictment contains the following language:

"That one Bill Dosset, on the 13th day of August, A. D. 1916, in the county of Jefferson, state of Oklahoma, in the said district and within the jurisdiction of said court, did at the time and place aforesaid, unlawfully, knowingly, willfully, and feloniously introduce and carry into the county and district aforesaid, from without the said state of Oklahoma, one quart of vinous, malt, fermented, and intoxicating liquor, to wit, whisky and beer; the portion of said county and district into which the said liquor was so introduced having been within the limits of the Indian Territory, and a part thereof, prior to the admission of the said state of Oklahoma into the Union as one of the United States of America."

Counsel for defendant in their brief say:

"The language of the indictment to which we directed the demurrer is as follows: 'The portion of said county and district into which the said liquor was so introduced having been within the limits of the Indian Territory and a part thereof prior to the admission of the state of Oklahoma into the Union.'"

And again counsel say:

"It is our contention that the indictment only by inference alleges that the place where the intoxicating liquors were introduced was formerly a portion of the Indian Territory."

We agree with counsel that the indictment is subject to criticism as to form; but defective form does not necessarily render an indictment insufficient. If the indictment contains every element of the offense intended to be charged; if it charges all the facts necessary to enable the defendant to prepare for his defense, and to plead former jeopardy in case he is again indicted for the offense after an acquittal or conviction on the present indictment; if the facts are stated, so that the court may determine whether, if proven, they would constitute in law the offense charged—the indictment will be sufficient, even though it may be defective as to grammar, and even though some element of

the offense is stated loosely and without technical accuracy. R. S. U. S. § 1025 (Comp. St. U. S. 1916, § 1691); Coffin v. U. S., 162 U. S. 664, 16 Sup. Ct. 943, 40 L. Ed. 1109; Harper v. U. S., 170 Fed. 385, 95 C. C. A. 555; Horn v. U. S., 182 Fed. 721, 105 C. C. A. 163; Morris v. U. S., 229 Fed. 516, 143 C. C. A. 584. The indictment in the case at bar was sufficient under the tests stated.

[2] The part of the court's charge to which assignment of error No. 2 relates is as follows:

"Now, the only liquor involved in this case is the liquor which the officers say they found in the car after it crossed the river and when the arrest was made."

The objection made is that this charge practically "excluded the defendant's theory, as well as his testimony." Apparently the defendant's theory, which was supported to some extent by the testimony of the defendant, was that the defendant did put into the automobile in which defendant and his companions made their trip a sack containing beer, but that this beer was all consumed before reaching the state line of Oklahoma, and that the other sack containing the whisky, which was seized by the officers after crossing the line, was placed in the automobile, not by the defendant, but by one of the other occupants of the car. The part of the charge of the court above given must be read in connection with the other portions of the charge immediately accompanying it, and when so read it cannot fairly be said either to have excluded the defendant's theory or the defendant's evidence. The particular portion of the charge mentioned was intended to exclude from the consideration of the jury the question whether the carrying of the beer to the line, or near the line, of Oklahoma, would constitute an offense. The court charged that it would not, and that the only liquor they were to consider as liable to convict defendant was the whisky which was carried across the line. Construed fairly, and in connection with the other parts of the charge, this particular part was in defendant's favor, rather than against him.

[3, 4.] Assignment No. 3 covers two instructions requested by defendant and refused by the court. They are as follows:

"You are instructed that under the evidence in this case the court is of the opinion that the same is insufficient to sustain a conviction against the defendant, and you are advised it would be your duty to return a verdict in his favor. * * * You are instructed that if you have a reasonable doubt whether or not the defendant placed the whisky in the car, or caused the same to be placed therein, in which the defendant was riding, then, under the law, you must resolve said doubt in favor of the defendant."

The first of these instructions raises the question whether there was substantial evidence to sustain a verdict and judgment of guilty. It would serve no useful purpose to discuss the testimony of the several witnesses. A careful examination has led us to the conclusion that, though the evidence was conflicting, there was substantial and sufficient evidence to sustain a verdict of guilty. The requested instruction was rightly refused. The requested particular charge on the subject of reasonable doubt was properly refused: First, because the court had fully and accurately covered the matter in the general charge; and, secondly, because the requested charge was misleading,

in that it singled out one matter to which the jury was told to apply the rule of reasonable doubt, namely, the placing of the whisky in the car, thereby unduly emphasizing this particular matter, though it was not a matter vital to the case.

Judgment below is affirmed.

GRAND TRUNK WESTERN RY. CO. V. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. April 2, 1918.)

No. 3088.

1. CARRIERS ⇨37—CARRIAGE OF LIVE STOCK—TWENTY-EIGHT HOUR LAW.

Under the Twenty-Eight Hour Law (Act June 29, 1906, c. 3594, 34 Stat. 607 [Comp. St. 1916, §§ 8651-8654]), forbidding the confinement of shipments of live stock for more than 28 consecutive hours, but allowing shippers to extend the time of confinement to 36 hours, it is the established rule that the time during which a shipment of live stock is confined by a connecting carrier shall be included in the statutory period.

2. CARRIERS ⇨37—TWENTY-EIGHT HOUR LAW—VIOLATIONS.

Under the Twenty-Eight Hour Law, forbidding the confinement without unloading of shipments of cattle or of live stock for more than 28 consecutive hours, but authorizing the shipper to extend the period for 36 hours, defendant railroad company, which received a shipment of cattle originating in Canada, which the owner had consented should be confined for 36 hours, is guilty of a violation of the act, where it confined animals after receipt in the United States for a period which, added to the time they had been confined in Canada, exceeded 36 hours; for the purpose of the act was to prevent cruelty to animals, as well as to prevent impairment of their food value by reason of their excessive confinement, and so it is applicable to shipments originating in Canada, where in the course of interstate commerce they are brought into the United States.

In Error to the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Action by the United States against the Grand Trunk Western Railway Company for a violation of the Twenty-Eight Hour Law. There was a judgment for the United States, and defendant brings error. Affirmed.

Harrison Geer, of Detroit, Mich. (W. K. Williams, of Detroit, Mich., of counsel), for plaintiff in error.

John E. Kinnane, U. S. Atty., of Detroit, Mich., Wm. M. Williams, Solicitor of Dept. of Agriculture, of Montgomery, Ala., J. Edward Bland, Asst. U. S. Atty., of Detroit, Mich., and J. L. Carr, of Washington, D. C., for the United States.

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

KNAPPEN, Circuit Judge. This action is brought by the United States under the Twenty-Eight Hour Law, so called (34 Stat. c. 3594, U. S. Comp. Stat. 1916, § 8651 and following). The defendant (plaintiff in error here) is a railroad corporation engaged in interstate com-

merce by railroad, its road extending from Port Huron, Mich., to Chicago, Ill. It is a part of the Grand Trunk Railway System, so called. The shipment in question, which consisted of three carloads of cattle, originated in West Toronto, Ont., with destination at Chicago, by way of the Grand Trunk Railway of Canada from West Toronto to Sarnia, Ont., from the latter place to Port Huron by way of the St. Clair Tunnel Company, and from Port Huron to Chicago by defendant's own line.

The time of confinement was, at the owner's request, extended to 36 hours. When the cars reached Port Huron the cattle already had been confined 26 hours and 15 minutes; they were detained at Port Huron 13 hours and 25 minutes more. The 36 hours had thus not elapsed when the cattle reached Michigan, but they were actually detained in that state for 3 hours and 40 minutes after the lapse of the permitted 36-hour period.

[1, 2] The trial court directed verdict for the government. The only controversy here arises over defendant's contention that the statute does not apply to a shipment from the Dominion of Canada into the United States unless there was a confinement within the United States alone beyond the time permitted by the statute. The argument is that the act, as shown, not only by its terms, but by its title, confines the prohibition of confinement to live stock, "shipped from one state or territory, or the District of Columbia, into or through another such state or territory or the District of Columbia for a longer period than 28 hours without unloading," etc.; that "no mention is made of confinement of shipments originating within the Dominion of Canada and moving into the United States"; that "a province of the Dominion of Canada is obviously neither a state, territory, nor the District of Columbia"; and that the act thus cannot be made to cover the confinement of live stock during transit within the Dominion of Canada when the shipment originated there.

We cannot agree with this contention. The statute (Comp. St. 1916, § 8651) omitting words inapplicable here, provides that:

"No railroad * * * whose road forms any part of a line of road over which cattle * * * or other animals * * * shall be conveyed from one state * * * into or through another state * * * shall confine the same in cars * * * for a period longer than 28 consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by" [conditions not existing here].

A provision for extension of time of confinement to 36 hours follows.

The statute plainly applies to the cattle in question, for defendants were engaged in interstate commerce, and the cattle were in course of interstate transportation, viz. from Michigan to Illinois. It is the established rule, generally, that the time during which cattle have been confined by a connecting carrier shall be included in the computation of the period of statutory confinement. 25 Op. Atty. Gen. 411 (Op. of Atty. Gen.—later Mr. Justice—Moody); *N. Y. C., etc., R. R. Co. v. United States* (C. C. A. 2) 203 Fed. 953, 122 C. C. A. 255.

The intention of the act, as indicated by its title, is to "prevent cruelty to animals in transit." *B. & O. S. W. R. R. Co. v. United States*, 220 U. S. 94, 106, 31 Sup. Ct. 368, 55 L. Ed. 384. It also has in view the protection of the public in preventing "injury to the public health from the sale of cattle for food made ill and feverish by hunger, thirst, and exhaustion." *United States v. Lehigh Valley R. R. Co.* (C. C.) 184 Fed. 971, 973; *United States v. Pere Marquette R. R. Co.* (C. C.) 171 Fed. 586, 588. As applied to this case, the substantive offense is not the carrying of the cattle in Canada, but their detention in the United States for such time as makes a total continuous confinement in excess of the statutory period. The act is thus violated in spite of the fact that a part of the confinement necessary to make up the statutory period had occurred in Canada. *United States v. Lehigh Valley R. R. Co.*, supra; s. c. 187 Fed. 1006, 109 C. C. A. 211; *Grand Trunk Railway of Canada v. United States* (C. C. A. 2) 191 Fed. 803, 112 C. C. A. 317; *Grand Trunk Ry. Co. v. United States* (C. C. A. 7) 229 Fed. 116, 143 C. C. A. 392, Ann. Cas. 1917B, 1094.

In *United States v. Lehigh Valley*, supra (where the judgment below was affirmed by the Circuit Court of Appeals of the Second Circuit on the opinion of the District Judge), the shipment originated in the United States, passed through Canada, and then again into the United States; part of the previous confinement being in the United States and part in Canada. The excess was again in the United States; an offense was held to have been committed, Judge Holt saying (184 Fed. 976):

"It is, of course, true that their confinement in New York would not have constituted an offense without their previous confinement, part of which was in Canada; but the previous confinement in Canada or elsewhere is not a part of the offense, although a fact necessary to its existence."

In the *Grand Trunk Railway Case*, passed upon by the Circuit Court of Appeals for the Seventh Circuit, the shipment (as in this case) originated in Canada, and part of the confinement occurred there. The excessive confinement was in the United States, and this confinement was held to be within the prohibition of the act. That case differs from the instant case only in the fact that there the destination was also in Canada. The underlying principle, however, is the same.

The *Grand Trunk Railway Case* passed upon by the Circuit Court of Appeals of the Second Circuit (above cited) is equally in point. There the shipment originated in Michigan; it was delivered by the initial carrier to the defendant at Port Huron, in that state, after a confinement of 16 hours. The cattle were then carried by defendant through Canada to Black Rock, N. Y., where they were delivered to another railroad company, 33 hours later. The confinement by the defendant in the United States was but one hour, and it is evident that there was no unlawful confinement, but for the period occupied in transporting the cattle through Canada. The defendant there, as here, contended that its action in the confinement of the cattle for a longer period than 28 hours in Canada should not be considered. This contention was rejected, Judge Coxe saying:

"When the defendant brought the animals into the United States they had been for 49 hours without food, water, or rest, in violation of the statute. When the car entered the United States, the acts forbidden by the law had been committed, and this situation was continued by the defendant for the period of an hour. In other words, the defendant violated the law *and continued the violation while in the United States.*" (Italics ours.)

The fact that in the instant case the shipment originated in Canada does not distinguish it in principle from the three cases last cited.

It is thus clear, on both principle and authority, that the District Court rightly held that defendant's confinement of the cattle in the United States for such period as, added to their confinement in Canada, made a total, continuous confinement in excess of the statutory period, constituted a violation of the act.

The judgment of the District Court is affirmed.

In re FEDERAL LIFE INS. CO.

(Circuit Court of Appeals, Seventh Circuit. March 11, 1918.)

No. 2567.

1. EXCEPTIONS, BILL OF \S 41(2)—PRESENTATION.

Where defendant's counsel, who prepared a bill of exceptions, took it to the court's chambers after plaintiff's counsel had made objection to the insertion of a typewritten copy of the insurance policy involved, and the court, in the presence of opposing counsel, observed the necessity of inserting a photographic copy, the bill, in view of the informality of such proceedings, must be deemed to have been presented at that time.

2. EXCEPTIONS, BILL OF \S 41(2)—DILIGENCE IN PRESENTATION.

Defendant's counsel, having presented a bill of exceptions during the term, *held*, under the circumstances, not to have been guilty of neglect, though the bill of exceptions, as changed, was not again presented during such term, because of the intervening summer recess and inability of defendant's counsel to serve same on counsel for plaintiff.

3. EXCEPTIONS, BILL OF \S 53(3)—SETTLEMENT—SIGNING—MANDAMUS.

Where the bill of exceptions was presented during the term, and no unjustifiable delay on the part of the moving party appeared, and the only objection to settlement was that the bill was not timely presented, the moving party is entitled to a writ of mandamus directing the signing of the bill.

Application to the District Court of the United States for the District of Indiana.

Application by the Federal Life Insurance Company for an alternative writ of mandamus to compel the settlement of a bill of exceptions. Writ directed to be issued.

The real controversy herein arises over the inability of counsel to agree upon what constitutes a presentation to the court of the bill of exceptions. The action was tried in the lower court in May, 1917, and resulted in judgment for defendant in error, herein called plaintiff. On June 29th defendant presented its proposed bill of exceptions to opposing counsel, and on June 30th called to get it, that the same might be presented to the judge, who was shortly thereafter to take his summer vacation. On this day plaintiff's

counsel objected to the bill as proposed, because a typewritten copy of the insurance policy appeared therein, whereas a photographic copy was desired. Defendant's counsel took the proposed bill to the court's chambers, to which place plaintiff's counsel was called and shortly thereafter appeared. There were present the judge and the opposing attorneys. The writ of error was allowed, the bond fixed and approved, and the bill of exceptions was discussed. These facts are not disputed. The difference between the parties as to just what took place centers around this discussion. Accepting the view most favorable to plaintiff, it appears that the court was advised as to plaintiff's demand that a photographic copy be inserted, and expressed the opinion that such a copy be inserted in place of the typewritten copy.

The bill of exceptions was then in the possession of defendant's counsel, but it is claimed such bill was not shown to the court, nor was the judge asked to sign it, nor were there any words spoken indicating that counsel was formally demanding of the judge that he sign the bill. In fact, the judge did not know that the proposed bill of exceptions was physically present and then in the possession of the defendant's counsel. In accordance with the court's direction, defendant secured a photographic copy of the insurance policy, inserted it, and delivered it to the clerk of the court, to assist that official in preparing the record. The clerk completed the transcript shortly before September 1st, and on that day defendant's counsel endeavored to serve it upon plaintiff's attorney. Several attempts were thus made to give the opposing counsel the transcript, but not until October 16th was the copy left in the office of plaintiff's attorney. On October 18th the matter was discussed by opposing counsel, and an additional objection was made to the appearance of exceptions to adverse rulings on admission of evidence. The controversy in reference to these exceptions arose through defendant's counsel's assumption that exceptions of this character, when proper objections had been made, followed as a matter of course, and it was further claimed that an understanding had been reached in this case at the opening of the trial, whereby the requirement of formal exceptions to the rulings on evidence was waived. The local attorney who had charge of the settlement of the bill of exceptions wrote the trial lawyer at St. Louis concerning this objection. Defendant's counsel at St. Louis was out of the city, and required to attend the United States Supreme Court, and was unable to take up the matter with the judge at once, but asked local counsel to ascertain if the court recalled the understanding as to noting exceptions. No such understanding was recalled by the judge, and he refused to allow such exceptions, unless formally made. Counsel at St. Louis was immediately notified, and he sought the possession of the bill of exceptions to correct it; but the clerk would not allow it to be taken from his office. On November 16th defendant's local attorney, as well as the counsel from St. Louis, appeared in Indianapolis to take up the matter with the trial judge and opposing counsel, but found the court busy and the opposing counsel about to leave the city.

The exceptions to rulings on evidence were stricken out, and on a later date, agreeable to parties, the bill was presented to the court. After several hearings, upon one of which oral testimony was taken, the judge refused to sign the bill of exceptions for the reason that the same had not been presented during the term of court at which the action was tried, and which term expired November 5, 1917. No objection to the bill as presented is made, excepting that it was not seasonably presented to the court for settlement and allowance. The bill was duly filed with the clerk October 18th.

Mr. Sullivan, for petitioner.

Frank Dailey, of Bluffton, Ind., for respondent.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge (after stating the facts as above). Was the bill of exceptions presented to the court on June 30th? If so, was the defendant guilty of neglect after that date in failing to get

its bill settled before November 5th? The answers to these two questions dispose of the petition before us.

[1] That there are authorities holding such transaction as occurred in the judge's chambers on June 30th was not a presentation of the bill of exceptions must be conceded. They are not, however, persuasive, and seem to emphasize form rather than substance. The settlement of a bill of exceptions ordinarily involves much informality. Wherever a dispute arises, the court and opposing attorneys generally indulge in informal discussion, in order that all may accurately recall the occurrences on the trial. Usually no stenographer attends such a hearing, and no record of the proceedings is preserved. None is required.

In this case it is inconceivable that plaintiff's counsel could have failed to understand the purpose for which he was called to the judge's chambers on June 30th. There was no dispute between the parties as to the allowance of the writ of error, nor of the amount of bond, nor the responsibility of the surety. Plaintiff's counsel called on the defendant's counsel on the 29th to submit the proposed bill of exceptions, and on June 30th to secure it, for the sole and only purpose of having it settled. No objection to the proposed bill as presented was made, other than the one indicated. The discussion between the attorneys and the observation of the court as to the necessity of supplying a photographic copy in place of the typewritten copy of the insurance policy is explainable upon no other theory than that the attorneys were discussing the settlement of the bill of exceptions. The observation of the court, though informal, was in substance a ruling upon the sufficiency of the bill of exceptions that contained the typewritten copy. Such a ruling, made in reference to the settlement of a bill under such circumstances, presupposes a presentation by the moving party. We do not think it at all necessary that the paper be formally and physically presented to the court, nor a formal written motion made asking the court to sign and settle the same.

Where counsel on both sides understand what the bill of exceptions contains, and there is a single objection made, no dispute between counsel as to the facts occurring, and the court is advised as to the claims of opposing counsel and rules that a photographic copy of an exhibit be supplied in place of a typewritten copy, we conclude that there has been a presentation. *Morehead v. Adams*, 18 Neb. 569, 26 N. W. 242.

[2] After June 30th we do not believe the defendant was guilty of any want of diligence. The summer recess occurred shortly after this presentation, and it appears that attorneys as well as the judge took a vacation. True, there was ample time after the judge returned, and before November 5th, in which the bill might have been again presented; but the record shows several attempts to present the proposed bill, with the photographic copy of the policy inserted, to plaintiff's attorneys. When the objection to the appearance of exceptions to rulings on evidence was made (October 18th), a new question arose, which required correspondence with the attorney at St. Louis. Such delay as occurred after October 18th was occasioned by this objection. We conclude defendant was not guilty of neglect.

[3] The bill having been presented during the term, and no subsequent unjustifiable delay on the part of the moving party appearing, and there being no objection to the settlement of the bill of exceptions, save that it was not timely presented, petitioner is entitled to the writ directing the signing of a bill of exceptions. *Chateaugay Iron Co., Petitioner*, 128 U. S. 544, 9 Sup. Ct. 150, 32 L. Ed. 508; *Hollon Parker, Petitioner*, 131 U. S. 221, 9 Sup. Ct. 708, 33 L. Ed. 123.

We do not anticipate that there will be any occasion for the actual issue of a writ of peremptory mandamus; but, should it become necessary to do so in order to secure the rights of the petitioner, his counsel may move for the writ at any time.

The present order will be: Petitioner entitled to writ of mandamus to the District Judge to sign the bill of exceptions tendered by petitioner, and as of the 30th day of June, A. D. 1917.

MAYER v. A. & H. G. MUTSCHLER et al.

(Circuit Court of Appeals, Second Circuit. February 14, 1918.)

No. 132.

1. PATENTS ⇨101—CLAIMS—CONSTRUCTION.

One claim, or set of claims, cannot be helped out by judicial incorporation therein of other claims, or parts thereof, in the patent application.

2. PATENTS ⇨42—INVENTION—WHAT CONSTITUTES.

Whether it is patentable novelty to change the old parts of a well-known machine depends on whether the result is new or merely an improvement.

3. EVIDENCE ⇨584(3)—WEIGHT AND SUFFICIENCY—REASONABLE DOUBT.

Certainty beyond a reasonable doubt is reached by quality of evidence, and testimony of one witness may suffice, if the surrounding circumstances are confirmatory.

4. PATENTS ⇨328—VALIDITY—PRIOR USE.

The Mayer patent, No. 1,043,021, for a machine for coating paper, mainly adapted for coating paper with carbon, etc., *held* invalid, for prior public use.

5. PATENTS ⇨76—VALIDITY—PRIOR USE.

An inventor's sale of even one experimental machine is a disclosure to the public of the invention which is a defense to an action for infringement of the patent.

6. PATENTS ⇨76—VALIDITY—PRIOR USE—SALES.

Though an inventor transferred by formal bill of sale an experimental machine, merely for the purpose of defeating his creditors, he cannot, where a patent subsequently issued was questioned on the ground of prior use, contend, for the purpose of defeating the rights of the public, that the bill of sale was in reality a mortgage.

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

Suit by Charles W. Mayer against A. & H. G. Mutschler and others. From a decree (237 Fed. 654) for complainant, defendants appeal. Reversed and remanded, with directions.

The action is on claims 1 to 4, 7, 8, 14, 15, and 47 to 49, of patent to plaintiff, No. 1,043,021, applied for November 24, 1911, and issued October 29, 1912, for a "coating machine." The specification covers, as do the very numerous

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

claims, all the parts of a cumbrous and extended, rather than complicated, mechanism for surfacing paper with materials applied in fluid condition, so as to produce what is called "carbon," or "waxed," or "photographic," papers. In a general, but wholly true, sense, this art, which was far from new in 1911, consists in unwinding paper from a roll, leading it over guides and under suitable tension to a roller, whose periphery is partly immersed in whatever is to be applied to the paper, and thence past and over other guides, scrapers, and rollers hot or cold, as desired, until the finished product is rewound on the last roll. What is applied to the paper is "dope," and scrapers are also called equalizers, as they not only remove superfluous "dope," but (in some forms at all events) produce a more equal or even distribution of the proper quantum thereof. Paper may be thus coated on one or both sides; the latter process requiring two "dope" or "coating" rollers and other duplications of process.

The machine of the patent and that of defendants are of the above general type, which is old and open to the public. After the paper is coated, there is an obviously natural tendency to crease or rumple; and smoothing rolls have long been used to counteract that inclination. The appearance and perhaps nature of the coating is affected by the application of heat or cold, or (perhaps) mere exposure to the air at workroom temperature. Thus, if the hot fluid that stuck to the paper as it passed through the "dope" is speedily chilled, it will not soak in as much as if kept warm, and will have a "gloss," instead of a "dead finish," and the quality or appearance of finish may be changed by differing forms of scrapers or equalizers; e. g., a striated circular revolving equalizer will remove superfluities, so will a knife edge, but the appearance of the coated papers will not be the same.

These and many other details of manufacture, and possibilities of variance in product, the specification deals with. For the purposes of this case, it suffices to say that plaintiff discloses a peculiar form of equalizer which defendants do not use, and then points out "that the special and precise positions of the dope roll, the equalizing bar and the releveling or smoothing roll is of special importance in a machine of the present type. The coated paper, while still hot from the coating roll, passes immediately and directly to the equalizing bar without coming in contact with any other object. * * * Then, before the paper with its coating has time to chill, it is brought into engagement with the smoothing roll, which acts on it to produce the desired surface"—i. e., it is hot or cold, as desired. But nowhere does the specification give any information as to how near or far apart rolls and equalizer should be, nor are the words "immediately" and "directly" translated into feet or inches, nor is the idea expressed in terms of the size of, or speed of travel of, the paper web.

Of the claims in suit, Nos. 1 to 4 cover, in language varying but little, the disclosure above outlined. The first is as follows:

"1. A machine for coating paper, comprising means for feeding paper under tension, means for coating the paper as it is fed, an equalizing device adjacent said coating means arranged to receive the paper therefrom before it touches another object, and a roll for releveling and smoothing the paper arranged to receive the paper web directly from the equalizing device, said roll being arranged adjacent said equalizing device."

Nos. 7, 8, 14, and 15 add to the idea of adjacency that of adjustability of the equalizer with reference to that which is adjacent. The fourteenth is perhaps the broadest, and is as follows:

"14. A paper coating machine, comprising a coating roller, means for feeding a paper web in contact therewith, an equalizing bar adjacent said roller in position to receive the paper directly therefrom before it contacts with another body, and means for adjusting said bar to vary its relation to the coating roller."

Nos. 47 to 49 make no reference to any new adjacency of parts, nor the adjustability of any part, and are an attempted summary of the whole apparatus, or its method of working. The forty-eighth is typical, and is as follows:

"48. A paper coating machine, comprising a frame, coating mechanism mounted therein, tension rollers for continuously feeding the paper, and a

separate winding roll receiving the paper from said tension rollers, said winding roll having a relatively light friction drive for the purpose stated."

The alleged infringement is a machine, with a similar coating roll (which any one can use), the scraper or knife of the prior art, and a smoothing roll which as matter of fact has been "run neutral"—i. e., without either heating or cooling, but is obviously so made that heat or cold might be applied by the use of long-known apparatus. The fact seems to be that plaintiff's disclosure describes what is wanted to make carbon paper for (e. g.) typewriters, while defendants' machine has been actually used in producing waxed paper wherein to wrap bread. If defendants wanted to make carbon, we see no reason why their smoothing roll could not be changed to suit by any competent mechanic.

The two rolls and scraper of defendants are quite close together, we assume as nearly juxtaposed as in machines made by plaintiff and said to embody his patent; but, as above pointed out, it is impossible to discover from the specification the measurements of such juxtaposition. In defendants' apparatus, however, the paper ribbon is touched on its way from dope roll to scraper by an idler roll, which plaintiff insists has no function but to create an appearance of noninfringement. We find, however, that it (being adjustable) regulates the touch of paper to dope roll, making it light or heavier as desired. Nevertheless it is true that the lead of the paper could easily be governed in other ways, and such interposition of an adjustable idler roll could be avoided by the exercise of quite simple mechanical skill, if and whenever the machine owner wanted to do away with it.

Overruling, not only the usual defenses of anticipation and lack of patentable invention, but several alleged prior uses as to which the testimony was largely taken by deposition, the trial court found infringement of all the claims in suit.

G. Willard Rich, of Rochester, N. Y., for appellants.

Eugene L. Dominick, of Buffalo, N. Y., for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] Claims 47-49 seem to us to have been recognized as valid by inadvertence, for as to them we agree with plaintiff's very distinguished expert, who frankly said that, since the relative positioning of rolls and equalizer was not made a positive element in these claims, "some of the references of the prior art read directly on" them, unless the court could "read into" them the relative positioning aforesaid as "producing a definite result." We know no method by which one claim or set of claims can be helped out, by judicial incorporation therein of other claims or any part thereof; nor in this instance is it doubtful that the subject-matter of 47-49 is quite different from that of the others in suit. Since they are proved as anticipated by plaintiff's own evidence, we need pursue the matter no further.

[2] As to the other claims, we cannot doubt, nor is it denied, that whatever inventive thought is in them lies in bringing nearer together the coating and smoothing rolls, and interposing a scraper into that minimized space. How much nearer these old tools of many prior art machines were brought by Mayer we cannot know from the specification; and this implied criticism on the sufficiency of the disclosure is sought to be avoided by saying (as do plaintiff's expert and counsel) that what the patentee did was to abolish the "cold zone"—i. e., the distance between edge of dope pan and axis of smoothing roll—by reducing said distance to about 11 inches, thereby ironing out

(so to speak) the coated paper before, either by atmospheric exposure or contact with other rollers, any substantial change could take place in the physical or chemical condition of what had been applied to the paper. "Cold zone" is one of those advertising phrases, unknown to the patent, and invented to aid it, of which we have spoken before. *Sundh, etc., Co. v. General Electric Co.*, 244 Fed. 169, 156 C. C. A. 591. What is patented here is not a condition or result, nor even a method or process, but a machine; i. e., the means of making something. And the question of invention is just this—was it of patentable novelty to reposition the old parts of a well-known machine, if the change produced either a new or an improved result? The answer to this query depends on whether the result is new or merely an improvement, whether the difference obtained is one of kind or of degree. *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Railroad, etc., Co. v. Elyria Iron, etc., Co.*, 244 U. S. 285, 37 Sup. Ct. 502, 61 L. Ed. 1136. This question of fact we shall not attempt to resolve, and have stated it only to emphasize the definition of whatever invention can be claimed.

There are two points on which we feel constrained to differ with the court below, each of them dispositive of this case:

[3, 4] 1. Mayer has long made coating machines; indeed, this is not his first patent. In 1907 he sold several machines to a company managed by one Archbald, who is still in business, and is himself a mechanic, if not an inventor. Archbald had and has machines of makes other than Mayer, and experimented in changing and adapting his stock of tools. He made and still has what in this record is called the "18-in. machine," because that is the size of paper for which it is designed, and we find that that apparatus was finished and used by August, 1908; has coating and smoothing rolls close together, with scraper (and nothing else) interposed, so that the paper is not touched by any other object in its journey from dope roll to scraper, and scraper to the next adjacent roll.

The rules, as to prior use are severe, and rightly so, and Archbald is a witness hostile to plaintiff; but the existence of the machine is not denied, its date of erection proved by other testimony than Archbald's, as also is its unchanged condition, and still another witness swears that it was in 1911 as it is now.

Certainty beyond reasonable doubt is reached by quality of evidence, and much depends on the nature of the thing sworn to. One witness may suffice (*Tompkins v. N. Y. Woven Wire, etc., Co.*, 159 Fed. 133, 86 C. C. A. 323) if the surrounding circumstances are confirmatory; here are more witnesses than one, and we regard the circumstances as highly corroborative. The machine in question was designed for small work (it is also called the "little" machine in the record), and it is to us a most natural thing, in such a device, to abolish for lighter work idlers and guides used in larger apparatus, and compress the whole mechanism. Nor is the matter complex or difficult of statement, nor easily confused in memory. The machine is simple, and its simplicity strongly assists belief in the statements that it has been what it is now since a date more than two years before Mayer's application.

[5, 6] 2. The patentee made in 1908 a machine for production of carbon paper, known in this record as the "Stull machine." The coating and smoothing rolls were apparently nearer together than in Mayer's earlier machines, and there were interposed two equalizers, and an adjustable guide roll, functioning exactly as does the idler of defendants' apparatus. The testimony is vague, but we may adopt as most favorable to plaintiff the statement of his expert that the distance from "double scraper" to smoothing roll was 10 to 15 inches.

It is too plain, to require more than statement, that, if this machine is prior art, there was no invention in abolishing one scraper and the guide roll, and making the remainder more compact by moving slightly closer coating and smoothing rolls. But, if greater importance be attributed to the suppression of guide roll, then it will not lie in plaintiff's mouth to allege infringement against defendants, who have that very thing.

We think the obviousness of the foregoing is the reason why the contest at trial was not over the similarities or differences of the Stull machine and that of the patent, but on the question as to whether that device was anything more than an experimental use within the rule of *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000.

That Mayer was experimenting and seeking to improve his product, whether of machines or paper, is not doubted, and it is admitted that the machine described in the patent is an improvement upon many earlier Mayer machines, including the so-called Stull apparatus. The patentee took, doubtless, one step at a time, and kept his machines secret as much as possible; but, of course, he could not sell even what he reminiscently calls an experimental machine without making whatever the thing sold contained known to the public. One sale is a public use of whatever is parted with (*Delemater v. Heath*, 58 Fed. 414, 7 C. C. A. 279; *Covert v. Covert* [C. C.] 106 Fed. 183, affirmed 115 Fed. 493, 53 C. C. A. 225; *Toch v. Zibell, etc., Co.*, 231 Fed. 716, 145 C. C. A. 597), even though what the purchaser got was imperfect, and subsequently greatly improved on (*Star, etc., Co. v. Crescent, etc., Co.*, 179 Fed. at 859, 103 C. C. A. 342). We assume that the embodiment of the patent in suit is a much better machine than what Mayer made in 1908; but since that earlier machine would, if later, have infringed as plainly as does defendants', and for the same reasons, in respect of the narrow range of claims here in suit, the sole question is whether what occurred amounted in law to a sale.

In 1908, Mayer was impecunious, and apparently harassed by "supplementary proceedings" under the New York practice, something which justifies the assumption that he was a judgment debtor. Stull was a member of the bar, who had loaned Mayer money and had an agreement with him by which Mayer was to make carbon for Stull, presumably on the "Stull machine," and perhaps others. Mayer had also obtained money from his wife, and in September, 1908, executed a chattel mortgage to her, which covered what is known herein as the Stull machine. In the following November Mayer gave Stull a formal written transfer or bill of sale of the same machine, subject to his wife's mortgage, and she contemporaneously released the machine from the lien thereof. Five months later Stull as owner and in writ-

ing leased said machine to Mrs. Mayer, and she undoubtedly permitted her husband to make coated paper upon it, which was sold.

Plaintiff now contends that this tangled web was no more than a device to secure Stull for loans; that in effect he was but a mortgagee. As between the parties this may be true, though we do not so find. The point is immaterial, because what decides is the legal effect of the contractual acts of the parties and the resulting rights of the public. Stull became in 1908 the owner of this machine, of which the test is this: Any creditor of Stull could have levied on it, and Mayer would have been helpless; therefore the transaction was in law a sale—i. e., a transfer of title and property. Though relating to a chattel, we need not inquire whether there was a change of possession, for the law of New York was complied with by the papers executed and delivered. Quite probably part of the reason for this apparatus of documents was to prevent Mayer's creditors from reaching the property; but, just as the parties could not have turned the transaction into a mortgage to defeat Stull's creditors, so they cannot now do it to defeat the rights accruing to the public by the formal sale to Stull.

Therefore there was, by the Stull sale, public use, as that term is interpreted, of a machine which would infringe the claims in suit, if later than the patent; the act occurred more than two years before application, and the claims are thereby invalidated.

Accordingly the decree is reversed, and case remanded, with directions to dismiss the bill, with costs in both courts.

PORTERVILLE CITRUS ASS'N v. STEBLER.

(Circuit Court of Appeals, Ninth Circuit. February 11, 1918. Rehearing Denied April 1, 1918.)

No. 2960.

PATENTS 328—INFRINGEMENT—DISTRIBUTING APPARATUS.

The Stebler patent, No. 943,799, for a distributing apparatus for distributing into different bins fruit as it comes from a grader, as limited by the prior art, and especially by the Strain patent, No. 775,015, held not infringed.

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

Suit in equity by Fred Stebler against the Porterville Citrus Association. Decree for complainant, and defendant appeals. Reversed.

Nicholas A. Acker, of San Francisco, Cal., for appellant.
Frederick S. Lyon, of Los Angeles, Cal., for appellee.

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

GILBERT, Circuit Judge. The appellee herein brought in the court below two suits, one against the Porterville Citrus Association,

a corporation, and one against the Mid-California Citrus Association, a corporation. By stipulation both cases were tried upon the record in the first case, and are now heard thereon in this court, the decree herein to dispose of both cases. In each case the plaintiff alleged that the defendant had infringed reissue letters patent No. 12,297, issued December 27, 1904, to Robert Strain, for a fruit grader, which patent had been assigned to the appellee, and letters patent No. 943,799, issued to Fred Stebler on December 21, 1909, for a distributing apparatus. The court below on the evidence found noninfringement of the first of these patents, but found infringement of claims 1, 2, 3, 5, 6, 7, 8, 11, 14, 15, and 19 of the Stebler patent. By inadvertence the decree was so framed as to adjudge infringement of the Robert Strain patent, and that the decree below should be corrected in that respect is not contested by the appellee.

The Stebler patent covers a combination for distributing fruit, such as oranges and lemons, after the same have been sized by a grading apparatus. The grading apparatus is not involved in the controversy. The object sought to be accomplished in the distributing apparatus is to utilize a short grader in conjunction with a long series of bins arranged along the side thereof, and to accomplish this result Stebler uses, in connection with a traveling belt, adjustable guides or partitions extended obliquely across the supporting means; each guide comprising telescoping members and means for adjusting the longitudinal position of the outer ends thereof.

We find it unnecessary to consider in detail any of the inventions of the prior art, except that of the Thomas Strain patent of November 15, 1904. Upon the combination described in that patent can be read all of the claims of the Stebler patent, except the features which distinguish the Stebler patent from the prior art, and these are the guides which extend from the outlets of the grading device and are adjustable at the outer ends, and extendable by means of telescoping ends, and the use in connection therewith of a series of bins which extend greatly beyond the length of the grading device. Therein is the novelty of the Stebler combination. The adjustability of the bins by the use of movable partitions called for by claims 11 and 19 was old in the art, and was used in various forms in prior combinations, and was not susceptible of monopoly by Stebler. The Thomas Strain combination exhibits the traveling belt and guides or deflectors, on each of which is adjustably mounted a lug clamped thereto by means of a set screw, "so that fruit will be shunted into the bin at any desired point." This deflector was intended to be used for the even distribution of the fruit in each bin, but the evidence is that fruit which normally would go to a bin could be carried on to an adjacent bin.

Now, what is done by the Strain combination is all that is accomplished by the appellant, and the appellant accomplishes it in the same manner and by substantially the same means. The appellant uses a grader with nine independently rotatable rollers, each having a given area for the escape of the sized fruit, and nine bins, one for each roller, to receive the fruit sized thereby, and, in connection with a longitudinally traveling belt, a number of barriers or small slats arranged parallel with the traveling belt so as to arrest the downward

gravity flow of the sized fruit and change its direction of travel to a direction parallel with the belt, for the purpose of deflecting it into the bins at any desired point. These barriers are used in the same way and for the same purpose as the barriers or brackets in the Strain combination. It is true that they may be so adjusted as to vary the delivery from one bin into an adjacent bin; but that, as we have seen, can be accomplished by the brackets of the Strain device. That, however, is not the purpose of their use, and to use them in that way would be to put out of operation the next succeeding grader unit, for the fruit from that unit could not be delivered into any bin. Therein is an essential difference between the guides of the Stebler patent, the barriers of the defendant, and the brackets of Strain. The guides of the Stebler patent belonging to one grading unit may be adjusted to turn the fruit to the adjacent bin, without deranging the action of the adjacent guides in carrying the fruit from the adjacent grade outlet to some other bin.

The proceedings in the Patent Office on the application for the Stebler patent afford light upon the nature of the Stebler invention. The examiner rejected all of the claims, except claim 5, as anticipated by the Rayburn patent of October 20, 1903, No. 741,928, the Stevens patent of June 23, 1903, No. 749,459, and the Strain patent of November 15, 1904. Claim No. 5, which was allowed, called for a combination, one element of which was a series of bins whose longitudinal extension is greater than the longitudinal extension of the grader, and another element of which was guiding means with adjustable outer ends. In the argument before the examiner counsel for the applicant stated that one of the primary objects and purposes to be accomplished by the applicant's device was to permit an extension of the bins longer than the extension of the grading element, so as to use a relatively short grader and sizer, and utilize a distributing conveyor and carry the sized fruit to bins of a desired width, extending "much beyond the length of the grader." Again, they said:

"One of the particular features of this apparatus, and one upon which its commercial value depends to a great extent, is the interrelation of the longitudinally adjusted fruit bins in connection with the adjustable guiding means on the conveyor."

The examiners in chief, on appeal from the examiner's ruling, said that claim 1 sufficiently represented the appealed claims. One element of that claim so referred to is:

"The longitudinal extension of the said distributing means being greater than the longitudinal extension of the grading element."

The examiners in chief distinguished the Rayburn patent by pointing to the fact that the distributing means thereof is not "traveling," and that it lacks the element of the Stebler invention:

"The longitudinal extension of the delivery portion of the said distributing means being greater than the longitudinal extension of said grading element."

They said that the distributing means of the Strain invention were clearly unadapted to the applicant's device, and in order to be used therewith would require such modification as to lose entirely their identity, that the Stevens device is more nearly in point, since he

shows the longitudinally traveling belt with the directing members across it; but they distinguished the Stevens device on the ground that "the delivery portion of the distributing means is not greater than the longitudinal extension of the grading element," and that the Stevens machine operates differently and was not adapted to sort oranges, in which it is important that the slightest abrasion of the skin be avoided.

The appellee insists that the appellants have availed themselves of that feature of the Stebler patent which calls for the extension of the bins beyond the length of the grading table. The manager of the Porterville Citrus Association testified that, in the machine installed in his packing house and used by his company, the bins for receiving the sized fruit did not extend beyond the sizing or grading member of the apparatus. On the other hand, Stebler found in the photographs taken of one of the appellant's apparatus evidence that the bins extended beyond the grading apparatus the width of one bin, or 45 inches, and in this he was corroborated by the testimony of an expert witness testifying also from the photographs. The photographs are in evidence, and they seem to show the extension of the bins to the extent indicated by Stebler. We do not regard an extension to that limited degree as an invasion of the appellee's claims. The idea of the appellee, as expressed in his specifications, was to provide for bins "extended much beyond the length of the grader," and in the proceedings before the Patent Office this feature of extending the bins "much beyond the length of the grader" was emphasized, and declared to be one of the primary objects and purposes of the device, and it is shown that the appellee's bins constructed under the patent do in fact extend from 12 to 15 feet beyond the grader. An extension of but 45 inches is not, we think, an extension within the meaning of the Stebler claims, and is not sufficient to amount to a substantial extension of the bins beyond the grading apparatus.

We think that the claims of the Stebler patent must be so construed as to limit his invention to the features which he added to the Thomas Strain combination, and that, when so construed, the appellant does not infringe.

The decree of the court below is reversed, and the cause is remanded, with instructions to dismiss the bill.

SIMPLEX WINDOW CO. v. HAUSER REVERSIBLE WINDOW CO. et al.

(Circuit Court of Appeals, Ninth Circuit. February 11, 1918. Rehearing Denied April 1, 1918.)

No. 3004.

1. PATENTS ⇨311—SUIT FOR INFRINGEMENT—ISSUES.

Where defendant in an infringement suit does not deny the validity of the patent, nor set up any prior use, invention, or patent, evidence of such prior invention or patent is receivable only to show the state of the art, and to aid in the construction of the patent.

2. PATENTS ⇨312(1)—SUIT FOR INFRINGEMENT—EVIDENCE.

That defendant's alleged infringing device is made under a later patent is not presumptive evidence of noninfringement.

3. PATENTS ⇨328—VALIDITY AND INFRINGEMENT—WINDOW.

The Soule patent, No. 1,072,669, for a window of the swinging sash type, covers an automatically operating device for holding the window in any desired position, and, while for a combination of old elements and by no means a pioneer patent, is valid, and marks a distinct advance in the art, and is entitled to a range of equivalents in proportion to such advance. As so construed, *held* infringed.

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

Suit in equity by the Simplex Window Company against the Hauser Reversible Window Company, Frederick Hauser, and Jessie Hauser. Decree for defendants, and complainant appeals. Reversed.

John H. Miller, of San Francisco, Cal., for appellant.

Scrivner & Hettman and Frank R. Sweasey, all of San Francisco, Cal., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. This suit was commenced in the court below by the present appellant against the appellees, for the alleged infringement of two certain letters patent, numbered, respectively, 1,072,669 and 1,159,604. After trial the court held that there was no infringement, and accordingly gave judgment for the defendants to the suit, resulting in the present appeal by the complainant.

[1] In this court the appellant has abandoned all claims under its patent numbered 1,159,604, and contends for a reversal of the judgment only by reason of its first patent. For the appellees it is contended, and has been elaborately argued, that that patent is invalid, the answer to which contention is that its validity was not denied in the court below, the defense there being made solely on the ground of noninfringement—the defendants denying that they have ever jointly or severally made or used or sold any device containing or embodying the inventions patented in and by the two letters patent under which the complainant claimed, and, on the contrary, alleging in effect that the only device they made, used, or sold was one of which the defendant Frederick Hauser was the original and first inventor, and which was duly patented to him October 20, 1914, by letters patent numbered 1,114,260. The defendants by their answer did not set up any prior use or prior invention or prior patent to those under which the complainant claimed, and such defenses were receivable in evidence only to show the state of the art, and to aid in the construction of the patent. *Morton v. Llewellyn*, 164 Fed. 693, 694, 90 C. C. A. 514, and cases there cited.

[2] Nor can the contention on the part of the appellees be sustained that the patent under which they claim is presumptive evidence that there was no infringement by them of the appellant's prior patent. The cases hold that it is presumptive evidence of a difference of that

patented device from the prior patent of the appellant, but not presumptive evidence of any infringement. *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 208, 14 Sup. Ct. 310, 38 L. Ed. 121; *Herman v. Youngstown Car Mfg. Co.*, 191 Fed. 579, 585, 586, 112 C. C. A. 185; *Murray v. Detroit Wire Spring Co.*, 206 Fed. 465, 124 C. C. A. 371; *Curry v. Union Electric Welding Co.*, 230 Fed. 422, 429, 144 C. C. A. 564; *General Electric Co. v. Electric Controller Co.*, 243 Fed. 188, — C. C. A. —; *Acme Harvester Co. v. Frobes (C. C.)* 69 Fed. 149.

The latter question—that is to say, that of infringement—is for the decision of the court, to determine which it is essential to ascertain, in the first place, what the invention was that is covered by the prior patent; next, the construction to which that patent is entitled, taking into view the prior state of the art; and, finally, whether or not there has been an infringement of the prior patent by the device of the appellees which they confessedly have made, used, and sold.

[3] Looking at the appellant's patent, the invention covered by which was made by one Soule, we find the inventor states in the specification of his application for letters patent, among other things, as follows:

"My invention relates to windows, and especially to windows of the swinging reversible sash type; and it has for its object to provide a new and improved window of the character specified, which, while remaining in a state of stable equilibrium in whatever position it may be placed, may readily be moved from any position to any other.

"With this object in view, my invention consists in a sash slidably pivoted in a window frame, adjuster arms having one end fixedly pivoted in and slightly above the middle points of the stiles and the other end slidably pivoted in the frame, and carrier arms having one end fixedly pivoted in the frame and the other end fixedly pivoted to the adjuster arms.

"It also consists in the combination, with a frame, sash, adjuster arm, and carrier arm, of a plate having means for automatically adjusting its position on the frame.

"It also consists in the novel parts, combinations, and arrangements set forth in the following description, particularly pointed out in the claims, and illustrated in the accompanying two sheets of drawings"

—some of which drawings, as well as some of the drawings illustrating the Hauser patent, will be subsequently inserted.

The three claims of the patent alleged to have been infringed are the first, fourth, and seventh, which claims are as follows:

"1. A window, comprising a frame, a sash slidably pivoted in said frame, adjuster arms, one end of which being fixedly pivoted at points slightly above the middle of the sash stiles and the other end slidably pivoted in the frame, and carrier arms, one end of which is fixedly pivoted in the frame and the other end fixedly pivoted to the corresponding adjuster arm."

"4. A window, comprising a frame, a sash in said frame, an adjuster arm pivotally secured at one end to said frame and at the other end to said sash, and a carrier arm pivotally secured at one end to said frame and at the other end to said adjuster arm."

"7. A reversible window, comprising a sash, an adjuster arm of suitable length, a carrier arm supporting said adjuster arm and window sash, a slidable pivoted connection between said frame and one end of said adjuster arm, and a pivoted connection between the other end of said adjuster arm and points near the middle of the sash stiles about which said sash is rotatable."

One thing is manifest from that portion of the specification above quoted, which is that the Soule invention was but an improved win-

dow of the character therein specified, namely, "windows of the swinging, reversible type"; for such is the inventor's express declaration. There is therefore no ground for the appellant's contention that reversible windows were new before the Soule invention.

Two specimens of the prior art introduced in evidence by the appellees are a patent issued to Oscar Frotscher, November 28, 1893, in which that inventor said in his specification, among other things, that his invention—

"relates to certain new and useful improvements in windows of that class in which provision is made for allowing the sliding sash to be swung out or reversed if desired, for cleaning or other purposes, and it has for its object, among others, to provide a window of this class which can be cheaply made, easily operated, and not liable to get out of order. It has for a further object to provide simple, yet efficient, means for holding the sash inclined for ventilation, and for a still further object the provision of means for firmly holding the sash in position for cleaning."

The second was the ordinary awning device, which the appellees contend disclosed every feature, mechanical and structural, of that of Soule, except in minor details of construction.

Regarding the Frotscher device, the model of which was introduced in evidence, the defendant Frederick Hauser himself testified:

"I never have made any windows like that. I didn't want to make them like that. They are useless. I found out they are useless, with windows made that way; so I got up my own idea, which is a useful device. The other one is not a practical or a useful device. I say it is not a useful device. No, you can not use it; but I would like to explain it a little better. You can use it, but it is, in other words, not practicable, not a practicable device. They do not use it at all any more. They used to use it, but they hardly don't use it any more, not even on stepladders."

And in respect to the awning device the witness Vale testified on behalf of the plaintiff in the suit as follows:

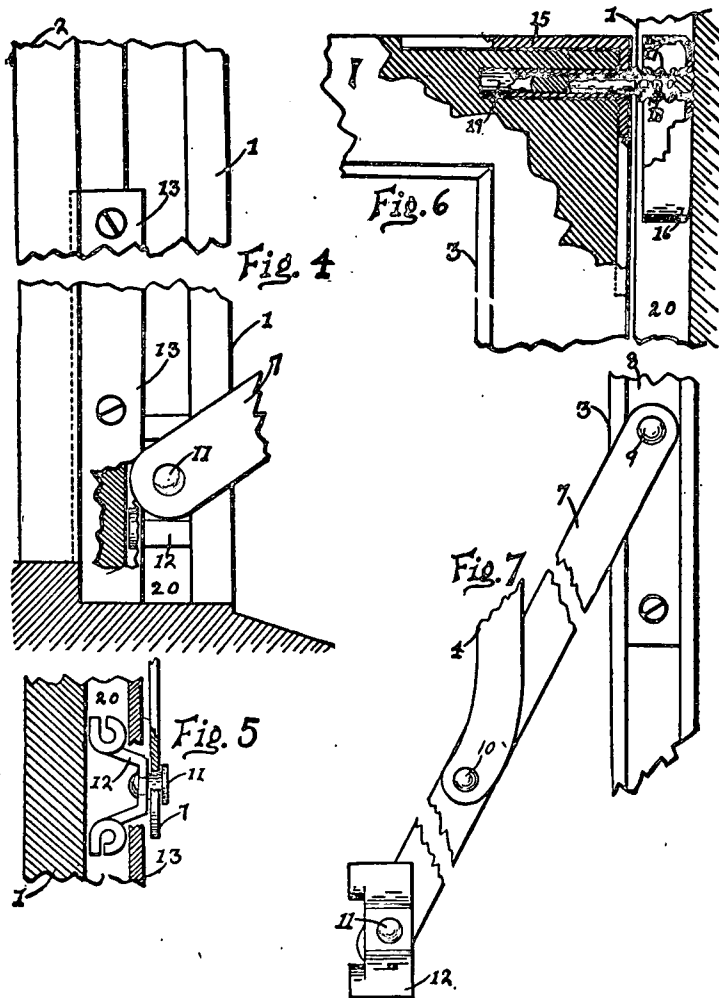
"In the first place, the function of the slide in the awning support is to get the support, which in this instance corresponds to the carrier arm, on a horizontal, so that it will not strike the heads of persons passing under the awning, and any one who has ever watched the operation of an awning will notice that practically the whole canvass forming the awning will be lowered to position before this carrier arm will suddenly flop out to a horizontal position, and it remains there until the awning is rewound practically to its whole extent, and then that arm will drop down again. It does not go through any synchronous movement in raising and lowering the awning."

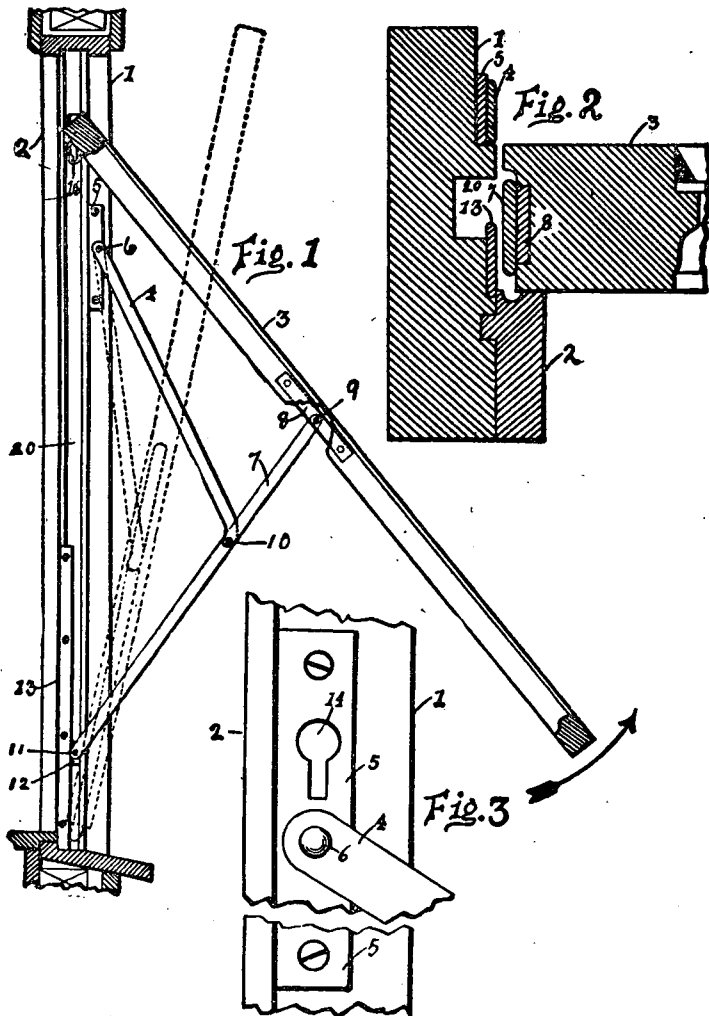
And the testimony of the appellees' witness Behnke as to that device is much the same in substance, which testimony we think is in accord with the ordinary understanding of the working of an awning. Neither of the devices thus referred to by the appellees can, in our opinion, be regarded as anticipatory of the patents of either the appellant or the appellees.

It is apparent that each of the claims of the appellant's patent alleged to have been infringed is a combination claim composed of old elements—claim 1 consisting of a frame, a sash slidably pivoted in the frame, adjuster arms having one end fixedly pivoted at points slightly above the middle of the sash and the other end slidably pivoted in the

frame, and carrier arms having one end fixedly pivoted to the frame and the other end fixedly pivoted to the adjuster arm. Claim 4 consists of a frame, a sash, an adjuster arm pivotally secured at one end to the frame and at the other end to the sash, and a carrier arm pivotally secured at one end to the frame and at the other end to the adjuster arm. Claim 7 consists of a sash, an adjuster arm, a carrier arm supporting the adjuster arm and the sash, a slidably pivoted connection between the frame and one end of the adjuster arm, and a pivoted connection between the other end of the adjuster arm at a point near the middle of the sash about which the sash is rotated.

The following illustrations are taken from the Soule patent :





As we understand the Soule device, it is an automatically operating one for holding the window in any desired position; and while his patent cannot, in our opinion, be properly regarded as a pioneer one in any sense, we think the improvement invented by the appellant's assignor marks such a distinct advance in the art over anything theretofore existing, so far as has been shown, as entitles the patent to the protection of the doctrine of equivalency in proportion to such advance. *American Can Co. v. Hickmott Asparagus Canning Co.*, 142 Fed. 141, 73 C. C. A. 359, and cases there cited; *Miller v. Eagle Mfg. Co.*, 151 U. S. supra, 186, 207, 14 Sup. Ct. 310, 38 L. Ed. 121.

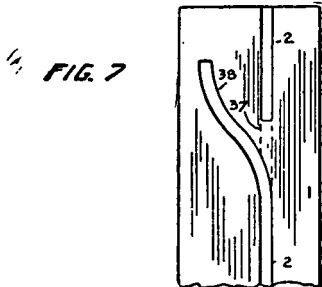
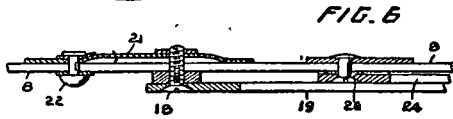
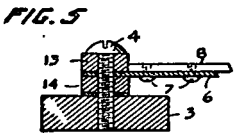
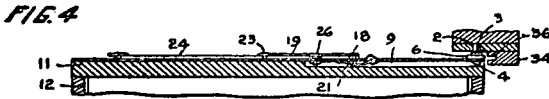
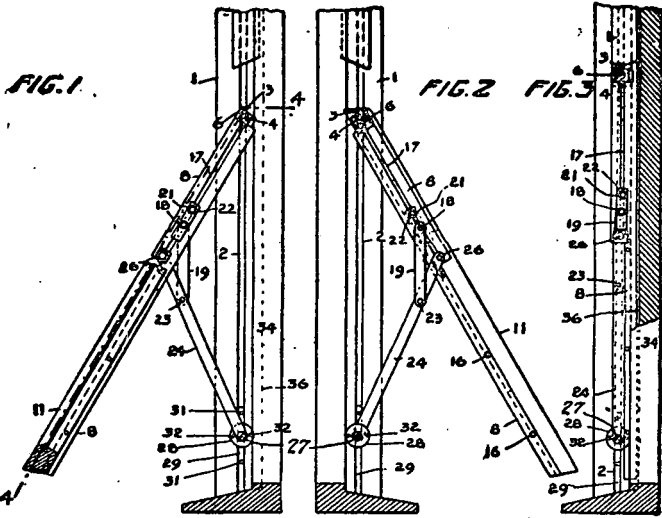
The patentee of the Hauser patent, which was issued October 20, 1914, set forth, among other things, in his specifications, the following:

"One object of the present invention is to provide means for so securing window sashes in window frames that they can be swung horizontally and reversed, to permit both sides of the sash to be readily cleaned from the inside of the room.

"A further object is to provide such fastening means, which will be simple and inexpensive, and which can be readily secured in place by a carpenter having no special skill or experience.

"A further object is to provide such fastening means, which can readily be adapted to the usual slidable window sashes, to convert them into swinging, reversible sashes."

The following figures are illustrative of his device:



It is apparent, from a comparison of the two devices, that they both produce the same result. The real question is: Do they do so by substantially the same means? It is needless to cite the numerous cases in support of the law clearly stated in section 348 of Walker on Patents, the substance of which is that changing the relative position of the parts of a machine does not avert infringement, where the parts transformed perform the same respective functions after the change as before, but that such change does do so where the changing of those positions so changes the functions of the parts that the machine acquires a substantially different mode of operation, even though the ultimate result remains the same.

Like the claims of the Soule patent, those of the patent to Hauser are also combination claims of old elements. In fact, the two devices are very much alike. In each the window is reversible and can be held in stable equilibrium at any desired point; each has an adjuster arm, a carrier arm, and a sliding mechanism in connection therewith by which the same result is attained—the chief difference being that in the Soule device the lower end of the adjuster arm is slidably pivoted in the window frame and its outer end rigidly pivoted therein, whereas in the Hauser device the lower end of the adjuster arm is rigidly pivoted in the window frame and its upper end slidably pivoted in the window sash by means of the link numbered 19. In other words, in the one the sliding mechanism is located in the window frame, and in the other in the window sash. We are of the opinion that this is a mere change of location, and that the means adopted by Hauser are the mechanical equivalent of those adopted by Soule, accomplishing the same result by substantially the same operation, and that accordingly the alleged infringement is sustained. We think this conclusion well supported by the decision of the Supreme Court in *Ives v. Hamilton*, 92 U. S. 426, 23 L. Ed. 494.

The judgment is reversed, and the case remanded for further proceedings in accordance with the views above expressed.

STEBLER v. PORTERVILLE CITRUS ASS'N.

(Circuit Court of Appeals, Ninth Circuit. February 11, 1918. Rehearing Denied April 1, 1918.)

No. 3052.

1. PATENTS ⇨328—INFRINGEMENT—FRUIT GRADER.

The Thomas Strain patent, No. 775,015, for a new and useful fruit grader, which evenly distributed fruit in bins, held not infringed by defendant's machine.

2. PATENTS ⇨241—INFRINGEMENT—IDENTITY OF RESULT.

That defendant's machine accomplished the same result as complainant's patented device does not show infringement, where there was a variation in the means used.

Appeal from the District Court of the United States for the Northern Division of the Southern District of California.

Suit by Fred Stebler against the Porterville Citrus Association, for an injunction restraining an infringement of complainant's patent and a decree for profits realized and damages sustained by reason of the infringement. From a decree for defendant, complainant appeals. Affirmed.

The complainant, Stebler (appellant), is the owner of United States letters patent numbered 775,015, for a new and useful fruit grader, granted to Thomas Strain on November 15, 1904. Complainant charges the defendant with making, using, and selling fruit graders embodying and containing the invention covered by said letters patent, and by his bill of complaint, filed February 11, 1916, he seeks to restrain the defendant from such infringing acts, and to recover damages sustained by complainant by reason thereof, and profits realized by defendant upon the sale of such invention.

Complainant's title to the patent is undisputed, but the defendant in its answer denies that any new or useful invention was contained in said patent, and sets up some 12 anticipatory patents, denies infringement of the same, and avers that the patent is wholly void and of no effect. The suit was combined for final hearing with another cause between the same parties, involving the use of the same machines by the defendant, but claimed to infringe other patents of the complainant. The court dismissed the bill of complaint in this case, and gave judgment to the defendant for its costs. From that judgment complainant appeals.

Frederick S. Lyon, of Los Angeles, Cal., for appellant.

Nicholas A. Acker, of San Francisco, Cal., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge. [1] It is contended that the fruit graders manufactured and sold by the defendant company contain such features of the complainant's invention, covered by letters patent No. 775,015, as to constitute infringement thereof. That an identity of results is produced by the two devices is granted; but it is claimed by defendant that there is not identity of means and operation.

The claims of complainant's patent said to be infringed comprise, briefly speaking, traveling means for conveying fruit along a definite

line of travel, consisting of grading and conveyor belts, inclined grading rods, a series of bins for receiving the fruit from the traveling belts, and a series of barriers or arresting members devised to guide and direct the sized fruit to any desired discharge point in the receiving bins; some of these barriers being fixed and some adjustable.

The principal object of the invention being the equal distribution of the sized fruit throughout the bins, particular attention must be paid to the devices which control this feature of the invention. The first is the slender, flexible, rotating grading rod, capable of being flexed at predetermined points to provide a series of discharge apertures; each constantly increasing in dimensions. This rod lies along the line of travel, above the conveyor belt, and in operation rotates in a direction away from the belt. The various sizes of fruit escape at the various apertures, and are carried by the conveyor belt to certain guards, against which the fruit rests until the belt has traveled a sufficient distance to bring it opposite a desired bin, at which point the deflector shunts the fruit into the bin. The guards and deflectors are so arranged that the fruit is distributed evenly to all parts of the bin.

The action of the grading rod is controlled in two ways, according to the specifications; the space between the rods and the conveyor belt being adjusted by raising or lowering the rods by means of the arms on which they rest, or by raising or lowering the hinged leaves which are a part of the supporting table over which the belt travels. Although the latter method is referred to as preferable in the specifications, the testimony discloses that it was not in fact used by the complainant in the operation of his machines. It is to be noticed that the position of the grading rod is not an absolutely fixed one, but is so arranged that it can be quickly adjusted and altered when desired.

In the defendant's machine the grading is accomplished by means of a series of nine rollers rotating in unison, but definitely fixed in position at varying spaces from the conveyor belts, thus forming apertures through which the different sizes of fruit escape into the nine bins provided to receive the sized fruit. The fruit then rolls by gravity into the bins opposite the respective discharge apertures, instead of being carried thereto by the conveyor belts, as in the complainant's device. Under normal conditions the distribution in the bins is accomplished without further devices, according to the testimony; but, when a greater number of one particular size of fruit is running than the packers can easily handle in one bin, a longitudinally adjustable barrier or small slat, arranged parallel with the conveyor belt, is placed by the packers in the groove of the supporting table arranged to receive it, which arrests the flow of the fruit, and changes its direction and deflects it to a point within the bin desired by the operator.

In support of the defendant's defense of anticipation the prior patents issued to Banker, Gunckel, Ayer, Jones, Hutchins, Ish, Hutchins, Rice, Richards, Stevens, Cerruti, and Nelson, respectively, are relied upon. From the proceedings in the Patent Office, as shown by the file wrapper and contents introduced on the trial of this case, it appears that all of these patents, with the exception of the Stevens and Cer-

ruti devices, were before the examiners and considered by them before the issuance of patent to the complainant's assignor, Thomas Strain. The Stevens patent was introduced as an exhibit in this case, and we find the machine there disclosed is not the same in means and operation—the conveyor belt being absent, and the fruit reaching the bins by gravity only; further, that it is not adapted to the sorting of oranges.

This court reviewed the state of the prior art in relation to fruit graders in the case of *Stebler v. Riverside Heights Orange Growers' Ass'n et al.*, 205 Fed. 735, 124 C. C. A. 29, and 240 Fed. 703, 153 C. C. A. 501. The complainant there was the complainant here. He was there suing to maintain his rights under the reissue patent, No. 12,297, issued December 27, 1904, to Robert Strain, and later assigned to the complainant, and the defendant there was using a device made under patent No. 997,468, issued July 11, 1911, to one George D. Parker. In the first case (205 Fed. 735, 124 C. C. A. 29) the validity of the Robert Strain reissue patent was upheld, and infringement thereof by the Parker patent was found. In the second case (240 Fed. 703, 153 C. C. A. 501) the patent complained of was a modified form of the Parker patent, designed to avoid the infringing elements found in the first instance. This court there held that in the modified form the device was not an infringement of the Robert Strain patent.

[2.] The defendant herein contends that its device is the same Parker modified device, "excepting, in lieu of adjusting the roller units toward and from the endless conveyor to vary the area of the discharge outlets of the fruit runway, the narrow endless conveyor belt is adjusted toward and from the roller units of the fruit runway," and that, if it is not an infringement of the Robert Strain reissue patent, No. 12,297, issued December 27, 1904, it cannot be held to infringe the Thomas Strain patent, No. 775,015, issued November 15, 1904.

An examination of the two patents does not disclose such similarity of means as to make such a conclusion imperative. The Thomas Strain device uses grading mechanism consisting of one long, slender, rotating, flexible rod, while the Robert Strain device uses a series of rotating rollers, capable of adjustment at different distances from the belt, to provide for the discharge apertures of varying dimensions. The same result is accomplished, but by a different mechanical arrangement; and as to the distributing features a still greater difference is observed. Indeed, the principal inventive idea of the Thomas Strain patent seems to be contained in the arrangement for the even distribution of the sized fruit in the bins, by the use of guards and deflectors above the conveyor belt, thereby controlling the ejection of the fruit from the grader into the bins, in place of allowing the unrestricted flow by gravitation, the common means used in the art for a long period of time.

We do not think the Thomas Strain patent and the Robert Strain patent are sufficiently identical, therefore, to make a device found to be an infringement of the Robert Strain patent, as this court did in *Stebler v. Riverside Heights Orange Growers' Ass'n*, 205 Fed. 735, 124 C.

C. A. 29, a consequent infringement of the Thomas Strain patent, as claimed by the complainant in this case.

Coming, now, to the defendant's device, it remains only to consider the distributing features thereof. No control over the ejection of the fruit from the grader is provided; the fruit merely rolling by gravity into the bins opposite the various discharge apertures. There are, it is true, longitudinally adjustable barriers, which may be placed in grooves of the supporting table, to arrest the flow of the fruit and change its direction to another point in the bin, and these are claimed to infringe the deflectors and stationary guards of complainant's patent. But we regard this feature as one which would naturally suggest itself to any one using a grading machine operating by gravity, and is, in fact, a mere dividing of the quantity of fruit which is being handled through a particular aperture, and not a new or inventive operation.

While the same result is accomplished in the defendant's machine as in the complainant's, there appears to be such a variation of means as to avoid infringement in the features complained of. *Cimiotti Unhairing Co. v. American Fur Ref. Co.*, 198 U. S. 399, 25 Sup. Ct. 697, 49 L. Ed. 1100.

The judgment of the District Court is affirmed.

TURNER v. LAUTER PIANO CO. et al.

(Circuit Court of Appeals, Third Circuit. January 17, 1918. Rehearing
Denied March 7, 1918.)

No. 2285.

1. PATENTS ⇨328—VALIDITY—REENFORCED CONCRETE CONSTRUCTION.

The Turner patents, No. 985,119, claims 4 and 8, and No. 1,003,384, claims 1, 5, 10, 11, 16, and 17, each for a steel skeleton concrete construction, *held* void for lack of invention, in view of the prior art.

2. PATENTS ⇨37—"INVENTION"—NEW COMBINATION OF OLD ELEMENTS.

The union of selected elements from various sources in a patented structure may be an improvement upon anything the art contains; but if, in combining them, no novel idea is developed, there is no patentable invention, however great the improvement may be.

[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 District of New Jersey; Charles P. Orr, Judge.

Suit in equity by Claude A. P. Turner against the Lauter Piano Company and the American Concrete Steel Company. Decree for defendants, and complainant appeals. Affirmed.

For opinion below, see 236 Fed. 252.

Frank A. Whiteley, of Minneapolis, Minn., and Willard Eddy, for appellant.

A. C. Paul, of Minneapolis, Minn., and Edward Rector, of Chicago, Ill., for appellees.

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

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This suit for infringement of Letters Patent No. 985,119, issued February 21, 1911, and Letters Patent No. 1,003,384, issued September 12, 1911, to C. A. P. Turner, is here on plaintiff's appeal from a decree of the District Court dismissing the bill on the ground of invalidity of the claims in issue. 236 Fed. 252; 239 Fed. 560.

The two patents sustain the relation of divisional and parent patent. The divisional patent (the earlier to issue), was granted upon an application filed October 19, 1910, as a division of the original application of June 11, 1907; the patent referred to as the parent patent was granted upon the original application. The two patents relate substantially to the same invention, the principal differences being in the scope of their claims. We shall, therefore, consider them together.

[1] The patents in suit are for steel skeleton concrete construction and relate particularly to reenforced concrete girderless floorings. The claims in suit are claims 4 and 8 of the divisional patent (No. 985,119), and claims 1, 5, 10, 11, 16 and 17 of the parent patent (No. 1,003,384), all of which are given in full in the opinion of the District Court. 236 Fed. 252, 254, 255. For the purpose of this discussion, claim 1 of the parent patent may be taken as a typical claim. It is as follows:

"An arrangement of reenforcement for a column-supported flat plate floor of concrete, comprising a plurality of circumferential cantilever members, respectively situated in the upper part of the slab at the columns and projecting therefrom, and reenforcing means extending from member to member in multiple directions through the space between said members, and filling, or substantially filling such space."

The object of the Turner invention is to provide a monolithic single panel floor made of concrete with metal reenforcement, which supports itself and its load on separate columns without beams, girders, or horizontal supports of any kind. The means disclosed by the patents is intended for use in building structures of one or more stories, with reenforced concrete columns and intervening reenforced concrete floors integral therewith. The column reenforcement is vertically continuous; the floor reenforcement originates in the columns, and passing upwardly, bends at the column heads and radiates laterally in the floor slab. Upon or above the head of each column is placed a circular spider of large steel rods raised to what becomes the upper plane of the slab when the concrete is poured in. This spider is anchored at its center in the column and overhangs the column an equal distance in all directions. Because of its position and function, it is termed a cantilever head; because of its shape, it is described as a circumferential cantilever reenforcement. Ordinary reenforcement metal rods of about three-eighths of an inch in diameter are laid from cantilever head to cantilever head in every direction. When the concrete hardens and the plate is formed, reenforcement rods extend from one cantilever head in the upper plane of the plate above a column; as they leave the cantilever, they sag into the lower plane of the plate

between columns; and as they approach the cantilever head of another column, they rise again to the upper plane and pass on as before. Multiple reinforcement is carried on in this way from column to column in all directions, producing between columns a sagging network of metal rods.

As we have said, the thing which the inventor sought to make, is a flat plate floor that will support itself without the aid of beams or girders. In such a floor, extending from and being supported only by four equidistant columns, for example, the effect of a load on the plate midway the supporting columns is to deflect it or press it downwardly and to give it the shape (though imperceptible) of a dish or saucer. Such a circular deflection produces many stresses. These are both radial in outward directions from the columns and circular along lines concentric with the columns. It also develops tensile strains in different planes of the plate: namely, in the upper plane above the columns and in the lower plane between the columns. Such being the natural stresses and strains upon a flat and girderless plate, the patentee claims invention in placing cantilever reinforcement above each column in the upper plane of the plate, and in placing metal rod reinforcement in the lower plane of the plate between columns, and in so shaping the cantilever reinforcement that it will take up the radial and circular strains as they are created. Therefore, the principle which we understand the patentee has endeavored to embody in his means, is the supplying of metal reinforcement at points where tensile strains are expected, and the distribution of reinforcement with an especial regard to the natural tendency of the slab to bend under a load in dish like shape.

The thing which the patentee claims to have achieved by his patented construction, is the making of a thin slab flooring, which will carry as heavy a load as the thick slab flooring of the prior art, at a lesser cost. The trade name which he has given his construction is the Turner Mushroom System.

Reinforced concrete of the modern kind came into use as a building material about fifty years ago. Its growth has been very rapid; it is now used upon an immense scale in a great variety of structures. During the progress of this art, much has been learned concerning the properties of concrete and great advances have been made in methods of using it. Yet, notwithstanding the knowledge acquired and the advances made, the fundamental problems of the art are the same today as they were in the beginning. They have to do with the peculiar characteristics of concrete and with means for meeting them. It is a matter of general knowledge that concrete is strong in resisting compression strains and weak in withstanding tensile strains. Places at which both strains may be expected, while susceptible of accurate mathematical ascertainment, are so well known that they are determined empirically by many engaged in the art. Therefore, as it is easy to ascertain, in one way or another, just where weak places in concrete construction are, the art has produced means with which to strengthen them. This consists in their reinforcement with materials possessing characteristics precisely the opposite of those of concrete. Thus,

metal which possesses tensile strength is placed at weak points in concrete where it is subjected to tensile strains. This is called reinforcement and the product is reinforced concrete.

There is today neither invention nor novelty in merely placing metal reinforcement in concrete at places at which strains come. The very principle of reinforcement, as the word denotes, is to give force to or strengthen the place that is weak by adding something that is strong. Invention in reinforcement is to be found only in discovering a new principle or in employing new means embodying the old principle. Therefore, one striving to find a new principle or to invent a new means of concrete reinforcement under the old principle, enters a well known and widely practiced art and must do something more than care for tensile strains at places where they are known to come. Turner's brief is a learned dissertation on the principles and practices of the art of reinforced concrete construction. It is clear, after reading it, that he appropriates to his invention (rather unconsciously, we believe), many of the principles and some of the practices that have long been in the art. Had he been first to discover and apply them, his claimed invention would have been a great invention. But, in appropriating and applying them in his patented construction, he does not achieve invention unless he causes the old principle to operate in a new way, or the old means to perform new and different functions, resulting in a useful advance of the art.

We make these observations concerning an art of which there is a broad general knowledge, simply to show that Turner was not early in entering it, and that he was not a pioneer in the solution of its problems. Nor was Turner the first to conceive the idea of a beamless or girderless floor. The record discloses girderless reinforced concrete floorings constructed several years before Turner applied for a patent. Most prominent among these is the reinforced girderless and beamless concrete floor of O. W. Norcross, for which Letters Patent No. 698,542 was granted April 29, 1902. As the Norcross patent has been in conflict with the Turner patents in another litigation, and as the validity of the Turner patents must be determined in view of the Norcross patent as a part of the prior art, we find it necessary to discuss this patent at some length.

Stating the purpose of his invention, Norcross says in his specification:

"This invention relates to a flooring for buildings which has been designed with a view of securing the advantages, first, of entirely dispensing with all girders or floor-beams, which have heretofore been regarded as absolutely essential for supporting the floors of buildings; second, to provide a form of flooring which will utilize to best advantage the immense crushing strength of concrete, and, third, to provide a strong inexpensive solid inflexible flooring which can be laid in place by unskilled labor."

To attain these results Norcross designed a flooring consisting of a single panel of reinforced concrete co-extensive with the entire floor space and extending in one unbroken slab or panel from wall to wall of a building, supported at intervals by uprights, posts, or columns. The essential features of the invention, he gives as follows:

"As herein illustrated, a flooring constructed according to my invention consists, essentially, of a panel concrete having *metallic network* encased therein so as to radiate from the posts on which the floor rests.

"The metallic network of my flooring is formed by strips of suitable wire-netting. In practice I have used a hog wire fencing, which is a fencing of the same class as ordinary poultry wire fencing, except that the same is made of considerably heavier wire.

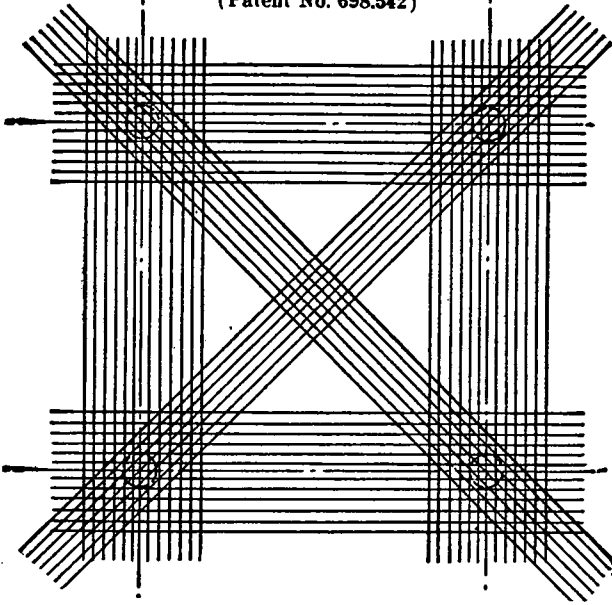
"In laying a floor constructed according to my present invention the posts are first erected, and a temporary staging is built up level with the tops of the posts. Strips of wire-netting are then laid closely in place on top of the staging. In practice I have laid this wire-netting *in straight lines from post to post and also crossing diagonally from post to post. A number of layers of this wire-netting are preferably employed, said layers being laid together at their crossing points in cob-house fashion, the number of such layers depending on the thickness of the floor, the weights to be supported, and the distance separating the posts.* The concrete is then spread upon or moulded in place on the staging to enclose the metallic network.

"In a completed flooring constructed according to my invention it will be seen that instead of resting or hanging a flooring in place upon beams or girders the flooring rests upon separated posts or other supports and consists of single concrete panel having a wire network enclosed therein in proper position to support the tensile strains, the concrete itself on account of its well known crushing strength having abundant strength for resisting all possible compressions—that is to say, if the forces acting upon a section of flooring supported between two posts be analyzed it will be found that the tendency of the floor section to sag between its supports will cause the lower layers of the flooring to be under tension while the upper layers of the flooring are under compression, these strains being of course greatest at the top and bottom layers, respectively, and diminishing to zero at the neutral axis near the center of the flooring. In addition to this the weight of a section of flooring causes a shearing strain at its line of contact with its supports.

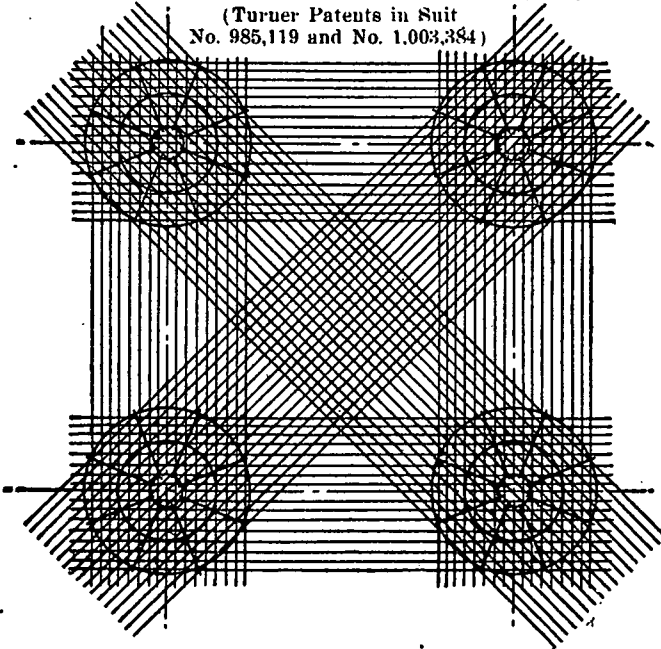
"The principle upon which I have worked in constructing my flooring is to permit concrete alone to resist compressions and to supply a maximum amount of metal at points where the flooring is to be subjected to greatest tensions and shearing strains. In carrying out this principle in some instances—for example, *where there are wide spans between adjacent posts—I have employed a greater number of layers of wire-netting near the center of the span than at the ends of the span, the distribution of the metal in any one span following substantially the same rules that would be followed in distributing metal in the construction of flat arches, in all cases the distribution of the metallic network in the flooring being carefully calculated and varied according to the columnation of the building, the thickness of the flooring, and the weights to be sustained.*"

The accompanying diagrams show the principle and mode of operation of the Norcross girderless flooring and the Turner mushroom flooring. To these diagrams must be added the explanation, that the metal reinforcement of Norcross comprises strips of heavy wire netting (not wire rods as the design seems to indicate), while the reinforcement of Turner is made up of strips or a multitude of steel rods (concededly interchangeable equivalents in reinforced concrete work of this character). The further explanation should be made, that the two diagrams were prepared by the defendant for comparison at the hearing, and, that, while the diagram of Turner is a faithful presentation of the patent disclosure, the diagram of Norcross, though it discloses accurately the Norcross principle, is rather closer to Turner in appearance and detail than is the diagram in the Norcross patent.

NORCROSS GIRDERLESS FLOORING
(Patent No. 698,542)



TURNER MUSHROOM SYSTEM
(Turner Patents in Suit
No. 985,119 and No. 1,003,384)



As the essential principle of Turner's invention, aside from its cantilever feature, is the arrangement of steel reinforcement criss-cross or crosswise the space between supporting columns, designed to take up strains coming in all directions, it is apparent that its original conception is found in Norcross. If Turner had limited his invention to metal rods or layers of metal rods laid directly and diagonally between the posts or columns in number and position "calculated and varied according to the columnation of the building, the thickness of the flooring, and the weights to be sustained," he clearly would have been anticipated by Norcross. But Turner, while not denying very successfully that he got from Norcross the idea of a crosswise or network reinforcement for the span between supporting columns as an element of his construction, claims that he departed from Norcross in the location of the reinforcement network in the different planes of the slab. He maintains that in Norcross the reinforced network is laid flat on a staging over the heads of the pillars as well as over the spans between them, so that, when the concrete hardens and the staging is removed, the reinforcement will be found everywhere in the lower plane of the slab. And indeed, such would seem to be the reading of the Norcross patent. Just here, Turner claims that he introduced an element not found in Norcross' teaching: This comprises the cantilever head already described, located over the head of the column and situated in what becomes the upper plane of the slab when the concrete is poured in. From this head, steel reinforcement bars radiate in every direction and sag as they extend to similar cantilever heads on other columns. While no such arrangement appears in the Norcross patent, it is in evidence that substantially the same arrangement was practiced before Turner, not only in the art generally, but particularly in concrete girderless floorings. Witnesses testified that in his early work, Norcross, who was a contractor of large experience and engaged in extensive building operations, raised the metal where the belts crossed one another over the tops of the columns so as to bring it above the center of the slab. One witness testified that he assisted Norcross as early as 1899 or 1900 to construct and test a single panel of concrete flooring, which contained strips of wire netting extending along the sides and ends of the rectangle formed by eight outer posts and extending diagonally from these to the ninth post which was located near the center. He said:

"The posts were set up and then there was a floor laid under the whole space the slab was going to occupy, strong enough to hold it. We then laid down from post to post, always, at right angles to each other, pieces—we called it them days 'hog wire', which was a wire fence used to enclose territory to keep hogs; there was no reinforcing material made in them days. Then we laid on top of the floor, diagonally from post to post, the same material *until the whole space was covered with this wire, raising the wire over the posts and letting it hang as low as possible in the center of the slab.* After that the whole space was filled to the depth of about eight inches, as I remember, with cinder concrete. Over the posts we were careful to make a little richer mixture of concrete where the greater strain was coming."

It is clear from this, that in girderless concrete floor construction, Turner was not the first to raise the reinforcement over the support-

ing columns. It was done before, because it was the obvious thing to do in view of the known fact that over the supporting column the tensile strain comes in the upper plane of the slab. What Turner did and what his predecessors did was to put the reinforcement at the known point of weakness in the concrete.

When we go to the general art of reinforced concrete construction, which embraces reinforced concrete girders and beams, we find in nearly every instance of a patented invention involving an upright or a column support, the reinforcement placed in the upper plane of the concrete above the column where the tensile strain is bound to come; and in instances where there are two supports with an intervening span, reinforcement is placed in the upper plane above both supports and is permitted to sag off to the lower plane of the intermediate construction. That this practice was almost universal before Turner, is shown by many patents of which the following may be named: Seely (No. 467,141); Hallberg (No. 659,965); Hallberg (No. 659,966); Hennebique (No. 611,907); Bossyns (No. 751,427); Perrot (No. 783,539); Ellinger (No. 702,093); Ellinger & Kopczynski (No. 729,299); Wight (No. 732,482). The upper plane reinforcement of the prior art, as shown by the few patents cited, contained the principle embodied by Turner in his construction, and named by him the cantilever principle.

From this very brief review of the art, it appears that Turner's construction comprises several elements. One is the criss-cross network arrangement of metal reinforcement; this is old in the art, and as employed by Turner, performs no new function. Another is the elevation of the metal over supporting columns by cantilever heads. Circumferential rings and struts or braces in the enlargement of column heads are old, and are found everywhere in the art. As they are employed by Turner, no new function is developed, unless it be, as he claims, in the circumferential characteristic of the cantilever head which permits reinforcement radially in every direction from which strains come. We are not impressed that this is a novel element involving invention, because, taking Turner's claim to invention even in its broadest scope, he did nothing more with his circumferential cantilever reinforcement than to do radially what the whole art had been doing lineally. While there is much testimony of a highly technical character concerning the particular strain carrying function of a cantilever, circumferential in shape, we do not believe that the circumferential shape creates a new function of the cantilever head involving invention, especially in view of the plaintiff's charge in this case, that the defendant's cantilever, which is rectangular in shape, is an equivalent of his circumferential cantilever and infringes it. The plaintiff's circumferential cantilever and the defendant's rectangular cantilever perform identically the same function in supporting and carrying metal reinforcement in multiple members and directions to the lower plane of intermediate plates, just as the cantilever in Hennebique and in many other constructions performed in single reinforcement of concrete structures. In other words, each

metal reenforcement rod in Turner, running above a column in the upper plane of the plate, then drifting to the lower plane in the intermediate plate, and then ascending to the supper plane as it approaches the next supporting column, performs separately and independently the same function that it performed in many inventions of the prior art. That there are many bars of metal reenforcement in Turner instead of a single bar or a few bars, and that they are plated crosswise instead of straightways, does not change the function which the bar reenforcement performs. Hence the idea of an aggregation of elements, each performing the same function when together that it performs when alone, has arisen and has been a constant difficulty with which Turner has had to contend whenever he has been called upon to sustain his patents.

In *Turner v. Moore* (D. C.) 198 Fed. 134, and 211 Fed. 466, 128 C. C. A. 138 (C. C. A. 8th), claims 1, 4 and 6 of the Turner divisional patent (No. 985,119) were held invalid as disclosing an aggregation. Claim 8 of that patent, which, with claim 4 is involved in this litigation, is not so different from claim 4 as to call for a different ruling. Both the divisional and parent patents were in litigation in *Drum v. Turner* (D. C.) 209 Fed. 854, and 219 Fed. 188, 135 C. C. A. 74 (C. C. A. 8th); in which the appellate court held that a construction substantially after the manner pointed out in the specifications of the two patents, was an infringement of claims 1, 3 and 4 of the Norcross patent (No. 698,542). In *Turner v. Deere-Webber Bldg. Company* (D. C.) 238 Fed. 377, claims 1, 2, 4, 6 and 8 of the divisional patent (No. 985,119) were held void for lack of invention in view of the prior art, and, if valid, not infringed.

[2] The trend of these decisions is that the patents disclose an aggregation, not invention. The plaintiff urges, correctly enough, that these decisions, while persuasive, are not binding on this court, and asks that this court find invention and hold the patents valid. In addition to the purely technical and scientific grounds which we have discussed, he points to the substantial success of the patented construction as evidence of patentable invention, and argues that it should turn the scale of doubt in his favor. But, after a very careful study of the immense record in this case, we find ourselves without serious doubt, certainly without such doubt as may be influenced by the consideration of commercial success of the subject matter of the patents. There doubtless is merit in Turner's system of concrete construction; it may be superior to other systems; but merit, and superiority even, may spring from a conception which does not involve invention. These qualities may come, as we think they do in these patents, from a careful assemblage of different elements from various sources and the clever combining of them. The union of the selected elements may be an improvement upon anything the art contains, but, if, in combining them, no novel idea is developed, there is no patentable invention, however great the improvement may be. *American Laundry Machinery Mfg. Co. v. Troy Laundry Machinery Co.* (C. C.) 171 Fed. 870; *Id.*, 177 Fed. 1001, 100 C. C. A. 513; *Dodge Coal Storage Co. v. N. Y.*

C. & H. R. R. Co., 150 Fed. 738, 86 C. C. A. 404; Atlantic Works v. Brady, 107 U. S. 192, 2 Sup. Ct. 225, 27 L. Ed. 438; Hailes v. Van Wormer, 20 Wall. 353, 22 L. Ed. 241; Turner v. Moore, 211 Fed. 466, 469, 128 C. C. A. 138.

While the decisions adverse to Turner's patents are directed more against the divisional than against the parent patent, yet, as the same principles are involved in both, the reasoning of the decisions is applicable to both. We find ourselves in accord with this reasoning, and hold that the claims of both patents here in issue are invalid for lack of invention in view of the prior art.

This decision makes unnecessary a consideration of the motion to dismiss. The decree below is

Affirmed.

VANMANEN v. LEONARD et al.

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

No. 3018.

1. PATENTS ⇨328—INFRINGEMENT—WAREHOUSE TRUCK.

The Vanmanen patent, No. 988,677, for a warehouse truck, claim 4, held not infringed by a modified structure built by defendants after a decree finding their original trucks infringed.

2. PATENTS ⇨168(2)—CONSTRUCTION—LIMITATION BY PROCEEDINGS IN PATENT OFFICE.

An inventor's acquiescence in the rejection of a broad claim, and his acceptance in its place of one distinctly limited, estops him from thereafter seeking the benefit so surrendered; and this regardless of whether the Patent Office was right or wrong in rejecting the original claim.

Appeal from the District Court of the United States for the Western District of Michigan; Clarence W. Sessions, Judge.

Suit in equity by William Vanmanen against George Leonard and Nicholas Bouma. From the final decree, complainant appeals. Affirmed.

L. V. Moulton, of Grand Rapids, Mich., for appellant.

Geo. Leonard and Nicholas Bouma, both of Freeport, Mich., pro se.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This is a suit for infringement of patent No. 988,677, issued to appellant William Vanmanen April 4, 1911, and relating to improvements in warehouse trucks. Upon the usual issues in such cases the patent was held valid, and claim 4 infringed, though claims 1, 2, and 3 were held not infringed, and an interlocutory decree for injunction and accounting was entered accordingly. The master reported separately profits and damages on two

sets of trucks, the first set comprising 322 and the second 50, but held that both sets infringed claim 4; the court affirmed the ruling touching the first set, but reversed it as to the second. The appeal concerns only the latter set of trucks; they are called "modified" structures.

[1] It is to be inferred, from testimony introduced before the master and from the master's report, that after the order of injunction was entered the defendants made a distinct change in the construction of their trucks, and that at the time of the accounting they had sold as many as fifty trucks of the modified form. This presents the question whether the modified structure infringes claim 4:

"In warehouse trucks, a metal top, sides integral with and bent down at right angles with the top, with the lower edges channeled to provide rigidity, end rails secured to the top and sides, and a supporting beam extending the length of the truck and secured to the end rails, in combination with necessary caster supports and stake sockets secured to the sides and end rails."

The change involved in the modified structure concerns the "supporting beam" called for in this claim. In the opinion allowing the injunction and accounting the trial judge described the device shown by the evidence and claimed in the patent as consisting of—

"* * * the elements of a sheet of metal bent to form the top and sides, end plates secured to the same and bent at the middle to form caster sockets, a center beam and means for securing the beam to the end plates."

The infringing device which was then under consideration seems to have contained all these elements. The modified structure, however, omits the "center beam"; and the present importance of this omission may be further seen in the specification, where, in speaking of the liability of a truck to warp, the patentee says:

"To avert this danger I place a heavy wooden beam or brace, as *F*, or a pair of cross-braces, as *F'*, in position to engage both ends of the truck. I prefer the use of a single beam, as shown in Fig. 1, as it is much less expensive, more readily applied and equally as reliable as the cross-beams shown in Fig. 2."

And the preference thus given to the single beam finds expression in claims 1, 2, and 3, as well as 4, of the patent. In place of the single beam, as also of the cross-braces, the defendants in their modified structure employ three beams located in the central portion of the truck frame, two disposed transversely to the truck with their ends fastened to the sides of the truck frame, and the other longitudinally thereto, with its ends fastened in turn to the transverse beams midway of their length, and also two iron rods, disposed one on each side of, and fastened in the same manner as, the longitudinal beam, but each equidistant between it and the corresponding side of the truck. Thus in the modified structure beams are fastened only to the *sides*, while in the patent the beam is connected only with the *ends*, of the truck frame, to strengthen the truck.

[2] It is insisted that such a difference does not avoid the patent. It must be conceded that this would ordinarily be true; but in this

instance the patentee materially limited the scope of his invention in the Patent Office. The application in its original form contained five claims. The last two claims were as follows:

"4. A warehouse truck made of sheet metal and having beams connected therewith in such a manner as to avert the danger of the truck warping out of shape under load.

"5. A warehouse truck made of sheet metal, stake sockets and caster sockets formed at the ends of the truck, and beams secured to and extending from end to end of the truck in position to render the truck rigid and not liable to warp under load."

The claims were all rejected on the ground that in the opinion of the examiner they were "substantially anticipated in the patent to Dietz, 564,740, July 28, 1896, trucks." The applicant urged in answer that he avoided the Dietz patent by the fact, among others, that the applicant did not "carry the beams near the sides of the truck." However he directed the examiner to cancel original claims 4 and 5 and substitute the present claim 4. Comparison of the original with the present claim 4 shows that the patentee is now claiming the benefit of the very feature he surrendered in the Patent Office. He there sought to avoid the Dietz patent, as we have seen, on the ground that he did not carry his beams "near the sides of the truck," while he now insists that defendants' modified structure infringes the present claim 4, despite the fact that its beams do not connect with the ends, but only with the sides. The case thus falls within the well-settled rule that an inventor's acquiescence in the rejection of a broad claim, and his acceptance in its place of one distinctly limited, estop him from thereafter seeking the benefit so surrendered; and this, too, regardless of whether the Patent Office was right or wrong in rejecting the original claim. *Morgan Envelope Co. v. Albany Paper Co.*, 152 U. S. 425, 429, 14 Sup. Ct. 627, 38 L. Ed. 500; *Garland v. Quinn*, 242 Fed. 267, 270, — C. C. A. — (C. C. A. 6); *Ventilated Cushion & Spring Co. v. D'Arcy*, 232 Fed. 468, 470, 146 C. C. A. 462 (C. C. A. 6); *Ventilated Cushion & Spring Co. v. D'Arcy*, 229 Fed. 398, 406, 143 C. C. A. 518 (C. C. A. 6), and citations; *Winchester Repeating Arms Co. v. Peters Cartridge Co.*, 184 Fed. 333, 335, 106 C. C. A. 363 (C. C. A. 2); *Marshall & Stearns Co. v. Murphy Mfg. Co.*, 199 Fed. 772, 776, 118 C. C. A. 362 (C. C. A. 9). In *Arnold-Creager Co. v. Barkwill Brick Co.*, 246 Fed. 441, 444, — C. C. A. —, we have recently held that an express claim limitation to the "end" of a structure could not be escaped upon the theory that the "side" is generally the equivalent of the end. It is true that was a case of voluntary, not compulsory, limitation; but, after it appears that the patentee intended a specific interpretation, the ultimate principle is the same. Nevertheless it is earnestly contended that to limit claim 4 closely to the full equivalent of the specific structure which it, in connection with the specification and drawings, describes, is to render the patent worthless. The logic of the argument would reject interpretation of the patent, and lead to a judicial grant; the argument, moreover, totally ignores the responsibility of the patentee for the limitation placed upon the scope of his patent.

We therefore agree with Judge Sessions in holding that claim 4 was not infringed by defendants' modified structure, and so we affirm his decree. His opinion on this subject follows:

"Plaintiff's patent is very narrow and limited in scope and must be confined substantially to the structure therein described. One of the essential elements of claim 4 of the patent is 'a supporting beam extending the length of the truck and secured to the end rails.' Defendants' so-called 'modified structure' lacks this essential element, and therefore does not infringe. The profits and damages based upon the manufacture and sale of the 50 machines of this 'modified structure' have been improperly allowed by the master. Defendants' exception in this regard is sustained, and \$54.65 will be deducted from the profits and \$69 from the damages found and awarded by the master. Otherwise the findings of the master are approved and affirmed, and the exceptions thereto overruled.

"The facts of this case justify increased damages; but by the allowance of both profits and damages upon the manufacture and sale of the same machines the actual damages have been sufficiently increased.

"A decree will be entered in favor of plaintiff and against the defendants for the sum of \$769.27, with costs."

THE THOR.

(District Court, N. D. California, First Division. February 7, 1918.)

No. 16232.

SEAMEN \Leftrightarrow 24—WAGES—PART PAYMENT AT INTERMEDIATE PORTS—CONSTRUCTION OF STATUTE—"ONE-HALF PART OF WAGES THEN EARNED."

Under Seamen's Act March 4, 1915, c. 153, § 4, 38 Stat. 1165 (Comp. St. 1916, § 8322), which provides that at every port where a vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, a seaman shall be entitled to payment of "one-half part of the wages which he shall have then earned," against the one-half part which he can then demand there must be charged all prior payments he has received.

In Admiralty. Suit by Olaf Olsen against the steamship Thor; Ole Hansen, claimant. Decree for respondent.

F. R. Wall, of San Francisco, Cal., for libelant.

Nathan H. Frank and Irving H. Frank, both of San Francisco, Cal., for respondents.

DOOLING, District Judge. Libelant, a subject of Norway, shipped upon a Norwegian vessel for a period of 24 months. He served for about 17 months, and then, the vessel being in the port of New York, demanded of the master one-half of the wages which he had then earned, under the provisions of the Seamen's Act, and, the master declining to pay him anything, he left the ship. This action is for the full amount of the wages earned by him up to the time of his leaving the ship. The answer avers that he forfeited everything coming to him, because he deserted.

The provisions of section 4 of the Seamen's Act are made applicable to foreign vessels by the section itself, and the United States courts

are open to seamen for their enforcement. This section provides as follows:

"Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended and all stipulations in the contract to the contrary shall be void: Provided, such a demand shall not be made before the expiration of, nor oftener than once in five days. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. And when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall then be due him, as provided in section forty-five hundred and twenty-nine of the Revised Statutes: Provided further, that notwithstanding any release signed by any seaman under section forty-five hundred and fifty-two of the Revised Statutes any court having jurisdiction may upon good cause shown set aside such release and take such action as justice shall require: And provided further, that this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement."

The seaman is therefore entitled to demand, not oftener than every five days at any port where the vessel shall load or deliver cargo, one-half part of the wages which he shall have then earned. At the time libelant made the demands in New York, he had then earned, as appears from the libel, the sum of \$521.32, and had been paid \$357, leaving then unpaid \$164.32. If he had already been paid more than he could claim under the Seamen's Act, the master was entitled to refuse to pay him anything more, and in leaving the ship because of such refusal he was a deserter, and his present libel must fail. If, however, he were at that time entitled to one-half of the wages that were still unpaid, he was within his rights in leaving the ship, upon the master's refusal to pay him, and the present libel may be maintained.

The failure or maintenance of his action, therefore, depends upon the meaning of the words "one-half part of the wages which he shall have then earned," and the method of computation by which such half part shall be ascertained. Libelant contends that the correct method contemplated by the statute is to deduct from the total amount earned the amount already received by the seaman and divide the remainder by 2. This method applied to the case at bar would entitle the libelant to demand \$82.16, that being one-half of the wages earned and still unpaid. Respondent contends that the correct method of ascertaining "the one-half part of the wages then earned," and which the seaman is entitled to demand, is to divide the total amount earned by 2, and deduct from the quotient the amount already paid. If this method be applied to the instant case, the result would show that the seaman was not entitled to anything under the act at the time he made the demand, but had already been paid \$91.34 more than he could rightfully claim.

Some courts have adopted the former method of computation, and others the latter. The Circuit Court of Appeals for the Third Circuit, in the case of *The London*, 241 Fed. 863, 154 C. C. A. 565, construing this statute, states the rule to be:

"That when a vessel arrives at any port of loading or discharge the seaman is entitled to be paid one-half of the wages he has up to that time earned, and that against such one-half which he can demand there must be charged all prior payments he has received."

This I think is the proper construction of the act. If in the present case libelant had been paid one-half the amount still unpaid at the time he made his demand, he would have received in all \$439.16 out of \$531.32, or more than five-sixths, instead of one-half, of the wages then earned.

As the libelant was not entitled to demand anything, his leaving the ship was desertion, and the libel will therefore be dismissed.

FOSTER v. CALLAGHAN & CO.

(District Court, S. D. New York. January 25, 1918.)

No. 197.

1. EQUITY ⇨133—PLEADING—LACHES.

Facts which excuse plaintiff from laches are properly pleaded in a bill asking equitable relief, and may be proven upon the trial.

2. COURTS ⇨347—FEDERAL COURTS—PLEADING—BREVITY.

Under equity rule 25 (198 Fed. xxv, 115 C. C. A. xxv), providing that the bill shall contain a short and simple statement of the ultimate facts upon which plaintiff seeks relief, allegations in the bill of due diligence on the part of plaintiff, rebutting laches, which set out various letters showing diligence, being properly pleaded, are not subject to motion to strike on the ground of the violation of the rules of brevity.

3. JOINT ADVENTURES ⇨2—JOINT ADVENTURERS—WHO ARE.

Where a contract between the author of a book and the publisher provided that the copyright should be taken in the name of the author and for a profit-sharing arrangement, the publisher and author were joint adventurers.

4. ASSIGNMENTS ⇨19—PERSONAL CONTRACTS.

A contract between an author and publisher, which made the parties joint adventurers, is a personal one, which the publisher cannot assign without the author's consent.

5. JOINT ADVENTURES ⇨4(1)—DUTY OF ADVENTURERS—GOOD FAITH.

Where a contract between an author and a publisher, under which the author retained copyright, made the parties joint adventurers, each owed the other the duty of utmost good faith and scrupulous honesty; and the publisher, who agreed to advertise and supply the trade with the book for 10 years, will be enjoined from falsely advertising a competing work in such a manner as to depreciate the value of the first author's book.

In Equity. Bill by Roger Foster against Callaghan & Co. On motions to dismiss bill and to strike out paragraphs thereof. Denied.

Jacob J. Aronson, of New York City, for plaintiff.

Harry D. Nims, of New York City, and Frank F. Reed and Edward S. Rogers, both of Chicago, Ill., for defendant.

MANTON, District Judge. The plaintiff sues in equity as the owner of the copyright and author of a treatise entitled "A Treatise

upon Practice in the Courts of the United States." It was first published in 1890, and five editions thereof have been published, with great profit to the plaintiff. The defendant is a publisher, and has published the third, fourth, and fifth editions under a contract the material terms of which are:

I. Said Foster grants Callaghan & Co. the exclusive right to publish his work on 'Federal Practice' for the period of ten (10) years from date, upon the condition that Callaghan & Co. perform each and all of the covenants herein contained.

II. A copyright in the name of said Foster is to be secured and official certificates thereof furnished said Foster.

III. Callaghan & Co. are to publish said book, and use its judgment in the distribution of presentation copies for purpose of obtaining reviews or notices, or otherwise promote the sale of the book, and to keep the trade supplied with copies, and to advertise the said book throughout the said ten (10) years.

* * * * *
VI. Callaghan & Co. are to furnish said Foster with two copies of the proof sheets of said book, and for his personal use five (5) sets of said book when published.

VII. Said Foster hereby agrees that he will not prepare, edit, or cause to be published in his name or otherwise, anything which may interfere with the sale of the aforesaid work; but he shall have the right to publish an abridgment of said book for the use of law schools, which shall not exceed one volume in length. Said Callaghan & Co. shall have the option to publish said abridgment, if prepared by said Foster, upon the same terms as the complete work.

VIII. Said Foster agrees to act as the attorney of said Callaghan & Co. without cost to them, in case of any suit for infringement of copyright and to protect them against any judgment for infringement and to indemnify them for all costs of every kind arising from or due to such judgment.

IX. It is further agreed that Callaghan & Co. shall be the sole owner of all plates or mats made from said manuscript.

The fifth edition of this book contains 53 sections, or about 125 pages, devoted to treating the subject of criminal practice in the federal courts. The complaint alleges:

"That the same sets forth the effect of all the statutes and all the decisions upon the subject which had been published prior to the publication of said fifth edition, and that said book cites and refers to all of such statutes and all of such decisions as are of any importance and as can be of any practical use to a person seeking information concerning practice in the courts of the United States."

It also contains 35 forms for use in criminal procedure and chapter XXXII deals with the removal of causes and chapter XXX on the practice at common law in civil actions, including the sections therein which discuss writs of habeas corpus, writs of prohibition, and writs of certiorari, and chapter XXXVI, on writs of error and appeals, some of which include the topic of practice in criminal cases.

The fifth edition is comprised of three volumes, containing 3,102 pages. The complaint further alleges that the defendant, in violation of the agreement above referred to, published a work described as a treatise on Federal Criminal Procedure by John Elliott Byrne; the preface of said book containing the following statement:

"For a number of years the writer has realized the necessity for a work including in comprehensive, yet concise, manner the law of criminal procedure in the federal courts. Heretofore this law has been ascertainable only by

means of a search through the hundreds of United States statutes and thousands of cases."

It is claimed by the plaintiff that this statement is untrue, and that the plaintiff's book gives a full discussion of the federal criminal procedure, and that Byrne's book omits a number of topics which are found in the plaintiff's work. The complaint alleges that the defendant has widely advertised Byrne's Criminal Procedure, by circulars and advertisements in legal periodicals, and that the defendant, while so advertising and publishing Byrne's Federal Criminal Practice, has neglected to advertise the plaintiff's work as it had theretofore, and in its advertisements failed to state that the plaintiff's book contained a description of criminal practice in the courts of the United States; that the plaintiff wrote letters to the defendant, demanding advertisement of the plaintiff's book; and that it was only after such letters and demands that the defendant again advertised his work. The plaintiff alleges he did not learn of the intended publication of Byrne's book until April, 1916. He thereupon wrote and sent by mail to the defendant a letter, stating he considered the publication of Byrne's book a breach of defendant's contract with plaintiff, and further stated that he would hold defendant responsible, and further:

"My Federal Practice contains a chapter on criminal practice in the courts of the United States, which I have always requested you to emphasize in your advertisements, although you have not done so."

He again wrote on May 2, 1916. Plaintiff alleges that he did not receive Byrne's book until May 31, 1916, and then wrote again, protesting and demanding that the alleged false statement in advertisement of Byrne's book, above quoted, be eliminated from the preface and from the advertisement of Byrne's book.

[1, 2] Plaintiff thereafter pleads that he instituted an action in the City Court of the City of New York against Baker, Voorhes & Co., a New York corporation, which was selling Byrne's Federal Criminal Procedure, and further that, because of the institution of this action, the defendant, whose principal office is in Chicago, submitted to the jurisdiction of this court. He also pleads correspondence had with the attorney for the defendant here. This, it is claimed, is pleaded to avoid the claim of laches. The defendant moves to strike out paragraphs 10 and 11 of the bill, claiming that under equity rule 25 (198 Fed. xxv, 115 C. C. A. xxv), which provides that the bill should contain a short and simple statement of the ultimate facts upon which the plaintiff seeks relief, there should be omitted mere allegations of evidence.

While I think that allegations of due diligence might have been stated in more concrete form, still it is not fatal to the pleadings to plead in detail the due diligence on the plaintiff's part, to set forth the letters and make them part of the pleadings. It furnishes the defendant with particulars of the claim of due diligence, and ought not be stricken out on the claim of necessity for brevity in the pleadings. Facts which excuse the plaintiff from laches are properly pleaded in a bill asking equitable relief, and may be proven upon the trial. *Wollensak v. Reiher*, 116 U. S. 96, 5 Sup. Ct. 1137, 29 L. Ed. 350; *Lockhart v.*

Leeds, 195 U. S. 427, 25 Sup. Ct. 76, 49 L. Ed. 263; Edison Electric Co. v. Equitable Life Assur. Soc. of United States (C. C.) 55 Fed. 478.

[3-5] For the purpose of this motion, we must assume the charge in the bill (the statements as to Byrne's book) is true and that the plaintiff's treatise fully covers the subject of criminal procedure, and contains all the authorities and federal statutes bearing upon this subject-matter. This may appear differently upon the trial. The plaintiff holds the copyright to his book, and has a profit-sharing interest with the defendant in the publication of his treatise. Therefore the relationship is that of joint adventurers. The defendant has agreed, in paragraph third of the contract, to publish the book and use its judgment in the distribution of presentation copies, for the purpose of obtaining review, and to keep the trade well supplied with copies of it and advertise the book throughout the ten-year period. The charge is made that it was not advertised as it should and could be advertised, and that its advertisement is neglected, and the defendant is advertising another work, the plaintiff says, claiming it is a superior work to the plaintiff's, and which claim, plaintiff says, is false. This contract is personal and could not be assigned without the plaintiff's consent. *Matter of D. H. McBride & Co.* (D. C.) 132 Fed. 285; *Selwyn v. Waller*, 212 N. Y. 507, 106 N. E. 321, L. R. A. 1915B, 160.

Where the parties have entered into a joint adventure, the relation owed to each other is that of the utmost good faith and the most scrupulous honesty. *Getty v. Devlin*, 54 N. Y. 405; *Mitchell v. Reed*, 61 N. Y. 123, 19 Am. Rep. 252; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764. Even though they may not be copartners, if they be joint adventurers, there must be fair dealing between them, with the relations of mutual trust and confidence, which rigidly requires the utmost good faith on the part of each toward the other.

Whatever may be the rights of the defendant to compete with the plaintiff's book in the publication of some other, there can be no competition which of itself affects the publication and sale of the plaintiff's book. There can be no publication of reviews of some other book, or statements as to the qualities of some other book, which are false, or which by fair intendment deprecates or depreciates the value of plaintiff's book; nor can there be a failure to advertise plaintiff's book and in this way breach the contract. In other words, this defendant under its contract cannot so act, in competition or otherwise, as to injure the rights of the plaintiff, which the plaintiff has confided in it. There is an implied condition that such conduct will not be followed. Therefore for the defendant to perform its part of the contract with the plaintiff requires it not to interfere with the sale of the plaintiff's book by another publication.

When the plaintiff delivered his treatise to the defendant, he performed all the work that was required of him under the contract; but he would not be authorized to contract with a rival publisher. The defendant is required to use its judgment to sell the treatise intrusted to it for publication and to advertise it for ten years. The exercise

of its judgment does not permit it to fail to advertise it, or to so advertise some other book, publishing false statements as to that other book, which interfere with the sale of the plaintiff's book, for such conduct would be a failure "otherwise to promote the sale of the book. This implies an obligation of good faith, and to do anything which would make it impossible or unlikely that the trade would be well supplied with the books, so that the sale of the books would be promoted, would be a violation of the contract. It would also nullify the effect of the provision requiring advertisement of the book.

In *Colgate v. Jas. T. White & Co.* (C. C.) 180 Fed. 882, Judge Learned Hand held that a promise to publish the facts in a government biography carried with it by implication a promise not to publish them in another work, and granted an injunction. In *Harper v. Klaw* (D. C.) 232 Fed. 607, there was implied a negative covenant on the part of the plaintiffs not to use the ungranted portion of the copyright estate to the detriment, if not destruction, of the licensee's estate. There Judge Hough said:

"This being the fact, the law is analogous to that which implies, from a covenant to make a certain use of property, a covenant negative against doing anything else with it."

While the defendant here might serve both the plaintiff and Byrne in publishing the books of each, it cannot do so with a breach of faith to the plaintiff, and it cannot do so where their interests are diverse, and where what it does for Byrne necessarily detracts from its efforts for the plaintiff. In *State of Nebraska v. State Journal Co.*, 75 Neb. 275, 106 N. W. 434, 9 L. R. A. (N. S.) 174, 13 Ann. Cas. 254, cited by the defendant, defendants were printers, who agreed to manufacture stereotype plates of reports and opinions which were not copyrighted, and to deliver the same to the state authorities. There was no contract to sell the reports when printed, nor were the reports copyrighted. They, therefore, had the right to sell the plates. After the plates had been delivered to the state, the action was commenced, and the court held that the trust relation was terminated, and injunctive relief was denied.

Judge Lowell said in *Singer Co. v. Union, etc., Co.*, Fed. Cas. No. 12,904:

"I think the fair result of the latter cases may be thus expressed: If the case is one in which the negative remedy of injunction will do substantial justice between the parties, by obliging the defendant either to carry out his contract or lose all benefit of the breach, and the remedy at law is inadequate, and there is no reason of policy against it, the court will interfere to restrain conduct which is contrary to the contract, although it may be unable to enforce a specific performance of it."

See, also; *Stephens v. Ohio State Telephone Co.* (D. C.) 240 Fed. 759, and *Montgomery Traction Co. v. Montgomery Light & Power Co.*, 229 Fed. 672, 144 C. C. A. 82.

Taking the allegations of the complaint at their face value for truthfulness, as I am obliged to do on this motion, I think the plaintiff is entitled to equitable relief, and I must deny the motion to dismiss the complaint; also the motion to strike out paragraphs 10 and 11 thereof.

LONDON-SAVANNAH NAVAL STORES CO. v. SOUTH ATLANTIC S. S. LINE.

(District Court, S. D. Georgia, E. D. March 21, 1918.)

1. SHIPPING ⚡104—CONTRACTS—CONSTRUCTION.

Words used in a mercantile contract for affreightment by water of a designated cargo should be given a meaning as used in the mercantile sense.

2. SHIPPING ⚡108—CONTRACTS—BREACH—"LIBERTY TO CALL"

Where a contract for affreightment of a designated cargo from Florida to England, by reference to the ocean bill of lading of the vessel, gave the vessel the liberty to call at any port or ports in or out of the customary route, the carrier's refusal to accept the cargo, except with the understanding that it reserved the option of forwarding the same via a continental port, should it prove necessary, was a breach, for the "liberty to call" is restricted to ports lying in or near the usual and direct course of the voyage, and there was an attempt on the part of the carrier to ingraft on the contract an additional term.

3. SHIPPING ⚡104—CONTRACTS—MODIFICATION.

The terms of a contract for affreightment by water cannot be changed, save by evidence of a general custom or usage, which by implication must be deemed to have entered into the contract.

4. SHIPPING ⚡104—CONTRACTS—BREACH.

Where a carrier by water breached its contract of affreightment, libellant is entitled to recover the increased cost of freight, the expense of storage, and the cost of fire protection until a bottom could be procured.

In Admiralty. Libel in personam by the London-Savannah Naval Stores Company against the South Atlantic Steamship Line. Decree for libellant.

Garrard & Gazan, of Savannah, Ga., for plaintiff.
Adams & Adams, of Savannah, Ga., for defendant.

BEVERLY D. EVANS, District Judge. The action is to recover damages for a breach of contract. On the trial it appeared that the libellant entered into three contracts, of the same tenor and effect, with the respondent, by which respondent agreed to furnish freight room for designated cargo at a stipulated charge for August, 1914, shipment; cargo to be delivered to respondent at Pensacola, Fla., and to be carried to Bristol, England, subject to conditions printed on the back of the contract. One of the conditions was that the contract was subject to the clauses and conditions in the ocean bill of lading used by the vessel. The bill of lading provided that the ship shall have the liberty "to call at any port or ports in or out of the customary route, in any order, to receive or discharge coal, cargo, passengers, or for any other purpose." On August 8, 1914, libellant at the request of respondent sent a cable message to its buyer at Bristol as follows: "Will you permit shipment Pensacola Bristol via Antwerp steamer Twilight"—who replied: "Via Antwerp impossible. Suggest defer shipment September-October." Similar request by cable was made of the buyer of the cargo destined to London, who replied: "Can only insure war risks steamers not sailed. Cannot permit shipments United Kingdom via Antwerp." This

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

cable correspondence was communicated to the respondent. On August 10, 1914, respondent transmitted to libelant two letters reading, respectively:

"Pensacola-Bristol: We herewith beg to tender you the S/S Twilight, now at Pensacola ready to load, under the above engagement, with the understanding that we reserve the option of forwarding this cargo via a continental port should it prove necessary. Kindly give your Pensacola office instructions to order this cargo out promptly and oblige."

"Pensacola-London: We herewith beg to tender you the S/S Uganda, now at Sand Key awaiting orders, under the above engagement, with the understanding that we reserve the option of forwarding this cargo via continental port should it prove necessary. Kindly give your Pensacola office instructions to order this cargo out promptly and oblige."

Reply was made to these letters by libelant on same day, as follows:

"We have your letters of this date tendering us the steamers Uganda for London and Twilight for Bristol, but beg to say that we cannot accept same with your reserving the option of forwarding these cargoes via a continental port. Such reservation is contrary to usance, besides which it is not provided for in your freight contracts with us, and we must therefore insist upon your providing us an unrestricted U. K. voyage. Furthermore we would remind you that you agreed with our Mr. Jensen to give one week's notice of steamers' readiness to sail."

On the next day respondent wrote libelant:

"Engagement 3000 B/Rosin and 3000 B/Turps. August shipment Pensacola/Bristol. We are in due receipt of your yesterday's favor notifying us that you decline to make delivery to the S. S. Twilight under our contract with you, which gives us the option of forwarding direct or via a continental port. Under these circumstances we are compelled to look upon the contract as canceled, and are taking action accordingly, which please note."

Subsequently and with due dispatch libelant procured in open market on the best terms possible space in another vessel at an advanced rate, and the cargo was shipped to Bristol.

[1, 2] The fundamental difference between the parties arises out of the construction to be given to the "liberty to call" provision of the contract. This is a mercantile contract, and the words employed therein are to be given a meaning as used in the mercantile sense. The parties were contracting for the voyage of a cargo, and it is fair to both of them to view their expressions in the contract as being in furtherance of the voyage and the delivery of the cargo, rather than give such expressions an unreasonable signification, or a meaning out of harmony with the true intent of the parties as revealed in the contract. In the early maritime cases a general liberty to call at any port was restricted to ports lying in or near the usual and direct course of the agreed voyage. Carver on Carriage by Sea, § 286. In an English case decided in 1888 (*Leduc v. Ward*, 20 Q. B. D. 475, 6 N. S. Aspinall's Rep. of Maritime Cases, —) the bill of lading reserved "liberty to call at any ports in any order and to deviate for the purpose of saving life or property." Instead of proceeding direct to Dunkirk, the ship went first to Glasgow, out of her course, and was lost; and it was held that the shipowners were not protected by the clause giving liberty to call. The principles enunciated in *Leduc v. Ward* were reaffirmed and followed in *Margetson et al. v. Glynn et al.*, 7 N. S. Aspinall's Report of

Maritime Cases, 148. In that case oranges were shipped by the plaintiffs on a steamer of the defendants at Malaga for conveyance to Liverpool under a bill of lading with the provision:

"Shipped * * * upon the Zena, now lying in the port of Malaga and bound for Liverpool, with liberty to proceed to and stay at any port or ports in any rotation in the Mediterranean, Levant, Black Sea, or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain, and Ireland, for the purpose of delivering coals, cargo or passengers, or for any other purpose whatsoever."

On leaving Malaga the steamer, instead of sailing directly to Liverpool, proceeded to a port in Spain about two days' voyage from Malaga, in the contrary direction of Liverpool. Owing to the delay, the oranges were damaged when they arrived at Liverpool. It was held that the general words in the deviation clause must be construed with reference to, and limited by, the voyage agreed upon, and would only justify a deviation to any port fairly on the course of the agreed voyage.

In *Swift v. Furness et al.* (D. C.) 87 Fed. 345, the bill of lading contained a clause, "with liberty to sail with or without pilots, to make deviation, and to call at any intermediate port or ports for any purpose," and this was construed to permit only such departures from the voyage as might be reasonable and necessary.

The rationale of the principle recognized in the cited cases, as well as others examined by me, is that where general words are used in a contract of affreightment, and are intended to be made applicable to the circumstances of the particular contract, the main object and intent of the particular contract are to be looked at, and the general words are to be limited to that view. Applying this principle to the construction of the contract sub judice, it is manifest that the parties contemplated a carriage of the cargo on a voyage from Pensacola, Fla., to Bristol, England, and that the general words of the clause giving liberty to call "at any port or ports, in or out of the customary route, in any order," must be considered as limited by the contemplated voyage from Pensacola to Bristol, and only justifying a deviation to any port fairly on the course of the agreed voyage.

We come, now, to a consideration of the correspondence between the parties, to determine whether there was a demand on the part of the respondent to ingraft an additional term in the contract by its letter of August 10th, wherein it offered to accept the cargo "with the understanding that we reserve the option of forwarding this cargo via a continental port, should it prove necessary." The respondent's insistence is that this language of its letter was not intended, nor could it be understood as so intending, as making any change in the deviation clause of the contract. It contends that the letter was prompted by conditions produced by the European war, which had just begun, many shippers being uncertain as to the effect of the war on contracts of this kind; that libelant had put it on notice that it considered all continental contracts were canceled, and under these circumstances respondent was apprehensive there might be some objection if a vessel touched a continental port. Respondent had continental contracts, and,

in making the tender, wished to make it clear that it insisted on its contract, which under its interpretation reserved to it the option of forwarding the cargo via a continental port, should it prove necessary. On the other hand, the libelant takes the position that the contract did not permit a deviation to continental ports, but that the contract called for a voyage from Pensacola to Bristol, and that no deviation was permissible to a continental port, if such was not fairly on the course of the agreed voyage.

According to my construction of the contract, the liberty of call clause did not permit an absolute deviation to all or any particular continental ports. The only ports at which the vessel was at liberty to call were such as were fairly on the course of the agreed voyage from Pensacola to Bristol. Hence the tender, made with the understanding that respondent reserved an option of forwarding the cargo by a continental port imported a new term, viz. the option to call at a continental port deemed to be necessary, without regard to its location with respect to the course of the agreed voyage. The libelant had the legal right to reject such tender. The statement in the letter declining to accept tender, with the condition named, on the ground that the reservation was contrary to "usage," and not provided for in the contract, and therefore it must insist on an unrestricted U. K. voyage, will not excuse the tender required by the contract. The respondent attached no importance to that sentence in the letter, because in its letter of the 11th it expressly states that it canceled the contract because libelant declined to make delivery to the vessel under the contract which gave them an option to forward by a continental port. The subsequent letter of libelant throws no additional light on the subject. I am therefore of the opinion that respondent did not make a tender of its vessel in terms of the contract, and, having voluntarily declared the contract to be canceled, the libelant could proceed as for breach of contract.

[3] The respondent further insists that the evidence discloses that it was not unusual to make the voyage from Pensacola to Bristol, touching at a continental port en route the voyage. But the evidence falls short of showing a general custom or usage of trade sufficient to authorize a conclusion that any such custom or usage by implication entered into the contract. The contract as made by the parties must control.

[4] As to the amount of damages recoverable: I think that libelant is entitled to recover the increased cost of freight, the expense of storage, and the cost of fire insurance protection until a bottom could be procured. These items total \$2,397.94, and I award this amount as damages resulting from a breach of the contract.

Leave is granted to the proctor of libelant to enter up judgment for this amount, with costs, according to the practice and law in such cases.

W. R. GRACE & CO. v. LUCKENBACH S. S. CO., Inc., et al.

(District Court, E. D. Virginia. March 12, 1918.)

1. SHIPPING Ⓒ51—CHARTERS—RIGHT OF OWNER TO CANCEL—EFFECT OF WAR.

The existence of a state of war between United States and Germany did not operate to relieve a shipowner from its obligation to fulfill a prior charter, by which it undertook to carry a stated quantity of nitrates from Chile to ports of the United States, under the "restraint of princes" clause of the charter party, even conceding that nitrates are contraband of war, in the absence of any actual arrest of any of the vessels engaged in carrying out the contract, or imminent danger of their capture.

2. SHIPPING Ⓒ51—CORPORATE ENTITY—LIABILITY FOR CONTRACTS OF AUXILIARY CORPORATION.

A corporation which leased a number of ships, of which it was owner, for a term of years, for operating purposes to another corporation, which was practically the same, having the same stockholders, president, and directors, held liable for a breach of charter by its lessee.

In Admiralty. Suit by W. R. Grace & Co. against the Luckenbach Steamship Company, Incorporated, and another. On exceptions to answer. Exceptions sustained.

Kirlin, Woolsey & Hickox, of New York City, and Edward R. Baird, Jr., of Norfolk, Va. (John M. Woolsey, of New York City, of counsel), for libelant.

Carter & Carter, of New York City, and Harry E. McCoy, of Norfolk, Va., for respondents.

WADDILL, District Judge. This is a libel in personam, with foreign attachment, against the respondents, to recover damages for the alleged breach of a contract of charter party, entered into between the libelant and the respondent, the Luckenbach Steamship Company, Incorporated, for freight room for the transportation of 75,000 tons (10 per cent. more or less), at the option of the libelant, of nitrate and/or ores, between the 1st of December, 1916, and the 31st of July, 1917, the same to be loaded at one or two ports and/or their adjacent caletas, between Valparaiso and Pisagua, Chile, both included, to one port between Savannah and Boston in the United States, at the rate of \$15.-59 gold per ton of 2,240 pounds delivered. The usual form of nitrate charter party used by the libelant, in arranging for the transportation of nitrate, was annexed to and made a part of the agreement.

The libel averred that the Luckenbach Company was the owner of certain steamships, contemplated to be used in the performance of said charter, and that certain of its steamships had been regularly leased by the respondent, the Luckenbach Company, Incorporated, to the Luckenbach Steamship Company, Incorporated, under a term charter covering from May 15 to December 1, 1920, and certain other ships for the period from October 1, 1915, to October 1, 1926, for a monthly rental payable on the 1st day of each month, and for other payments provided for in said lease. The libel further averred that the Luckenbach Steamship Company, the lessee of said steamships, and the Luckenbach Company, Incorporated, the owner of said steamships, were in fact maintained and managed as one corporation,

under the domination and control of Edgar F. Luckenbach, who was the president and principal stockholder in both corporations, for the purpose of financing and operating the steamships mentioned, and many other steamships and vessels, owned by said companies, or by the said Edgar F. Luckenbach.

The Luckenbach Steamship Company, Incorporated, the lessee, was capitalized at only \$10,000, and the Luckenbach Company, Incorporated, the lessor, at \$800,000, and both were chartered under the laws of the state of Delaware. The Luckenbach Company, Incorporated, denies knowledge of the acts and doings of the Luckenbach Steamship Company and responsibility therefor to the libelant.

Under this contract of affreightment, only one ship, the J. L. Luckenbach, was furnished, and one cargo of 5,998 tons of nitrate delivered. The libelant seeks to recover for the failure to transport the remaining 69,002 tons of nitrate or ores, 10 per cent. more or less, as provided in the contract. On the 21st of April, 1917, the libelant demanded of the respondent steamship company that it continue the shipments contemplated under the charter, and on the 23d of April, 1917, the Luckenbach Steamship Company, Incorporated, acting by and through its president, Edgar F. Luckenbach, declined to complete the contract, for the reason, as stated, that a state of war existed between this government (referring to the government of the United States) and the government of Germany, and claimed that they were released under article 13 of the nitrate charter party from so doing, which reads as follows:

"The * * * enemies, pirates, * * * arrest and restraint of princes, rulers, and people, political disturbance or impediment, * * * always mutually excepted."

Libelant further avers that the respondents failed to carry out the contract, either with the ships contemplated, or any other ships; that their failure was wholly unjustified, and constituted a willful and wrongful breach of the contract between them, and a violation of libelant's rights thereunder; that said respondents, in total disregard of libelant's rights, wrongfully chartered their ships in the same trade, for the carriage of nitrate from South America to the United States, under the same form of charter party, but at greatly increased prices; and that libelant was damaged to the extent of \$1,500,000, which was duly demanded of the respondent, and payment thereof refused.

The defense set up in the answer is that of exemption under the "restraint of princes" clause referred to above, to the sufficiency of which the libelant excepts.

[1] The conclusion reached by the court is that the exception is well taken. The defense interposed under the facts and circumstances of this case constitutes no valid ground for the breach of contract on the part of the respondents. No suggestion is made of the arrest of any vessel of the respondent in carrying out the contract, and in the absence thereof there must exist some actual restraint preventing performance, or the danger of capture, by reason of the prevalence of the war, that was imminent, apparently remediless and certain, and which would have operated to prevent the contract from being performed.

The mere fact that the completion of the contract had, or might have, become more difficult, because of conditions other than those present at the time it was entered into, will not suffice. *King v. Delaware Ins. Co.*, 6 Cranch, 71, 3 L. Ed. 155; *Oliver v. Maryland Ins. Co.*, 7 Cranch, 487, 3 L. Ed. 414; *Northern P. R. Co. v. American Trading Co.*, 195 U. S. 439, 25 Sup. Ct. 84, 49 L. Ed. 269; *Furness-Withy Co., Ltd., v. Muller* (D. C.) 232 Fed. 186; *Furness-Withy Co., Ltd., v. Fahey* (D. C.) 232 Fed. 189; *Associated Portland Cement Mfrs. v. William Corey & Son*, 31 L. T. R. 442; *Miller & Co., Ltd., v. Taylor & Co.*, 32 L. T. R. 161; *Lubbock v. Rowcroft*, 5 Esp. N. P. 50; *Atkinson v. Ritchie*, 10 East, 530. Many of the cases cited arose under policies of insurance; but excepted perils in such policies have the same meaning as they have in bills of lading. *The G. R. Booth*, 171 U. S. 450, 459, 460, 19 Sup. Ct. 9, 43 L. Ed. 234, and cases cited; *Hamilton v. Pandorf* (1887) L. R. 2 App. Cas. 518.

The war between this country and Germany did not prevent, nor materially affect, the transportation of nitrates. There was no unusual or special danger to shipments between Chile and the United States, the line of travel not being in the danger zone. Doubtless freight rates were greatly advanced, as a result of the increased demand for ships; but neither that, nor mere increased difficulties, would warrant the breach of the contract; respondent's position as to supposed dangers at most being that because of rumors regarding the same, they reasonably feared that vessels carrying Chilean nitrate, would be subject to capture and destruction by German war vessels. They made no pretense of knowledge of any facts that would warrant any well-grounded fear either that the ships would be seized or detained or the libellant's cargo confiscated.

Nor would the respondent be relieved from liability in performing its contract, even assuming nitrate to be contraband. The contract on this account would not have been illegal, although the ship and cargo might have been subject to capture and forfeiture. *Northern Pac. R. Co. v. American Trading Co.*, supra, 195 U. S. 439, 440, 465, 25 Sup. Ct. 84, 49 L. Ed. 269.

[2] The respondents admit the use of their ships for transportation of nitrates, during the period, and between the points covered by this contract, at greatly increased rates, and they cannot, and should not, escape responsibility for their breach of contract with the libellant. The defense interposed by them, seeking so to do, will not be entertained; nor will the Luckenbach Company, Incorporated, be allowed to escape liability, it sufficiently appearing from the pleadings, and the admissions made in reply to interrogatories filed, that the two corporations are substantially one, having the same ownership, the same directors, and the same officers, in their combined capacities carrying on the business out of which the breach of the contract in this case arose; and they appeared generally herein, and executed a joint and several stipulation for the release of the attached property, and the payment and performance of any judgment or decree which might be entered in this case by this or any appellate court. Moreover, they are liable under the doctrine of principal and agent. In *re Muncie Pulp*

Co., 139 Fed. 546, 71 C. C. A. 530; In re Rieger, Kapner & Altmark (D. C.) 157 Fed. 609, 613, 614; New York Trust Co. v. Bermuda-Atlantic S. S. Co. (D. C.) 211 Fed. 989, 998, 999; Joseph R. Foard Co. v. State of Maryland, 219 Fed. 827, 829, 135 C. C. A. 497 (Circuit Court of Appeals, this circuit), and cases cited.

The defenses interposed by the answer being insufficient, the exceptions thereto will be sustained, and respondents given 15 days from the entry of the decree herein in which to answer over, if they so desire, and make such valid defense, if any they have, as they may be advised, and in default of their so doing an interlocutory decree will be entered, and the cause referred to a master for the ascertainment of damages.

Both libelant and the respondents having filed interrogatories with the libel and answer respectively, and each excepted to the same, the exceptions by the respondents to the interrogatories of the libelant will be overruled, save as respects the production of the charter parties called for in interrogatories Nos. 2, 3, 4, 5, 8, and 9, which should be sustained for the time being, as it does not seem necessary for the present to produce these papers, and the exceptions by the libelant to the interrogatories filed by the respondents will be sustained, since the interrogatories refer mainly to questions properly arising upon the assessment of damages.

THE FRED E. RICHARDS. THE MARY L. CROSBY.
THE HENRY R. TILTON.

(District Court, S. D. New York. February 23, 1918.)

No. 217.

1. ADMIRALTY ⚓90—CONSTITUTIONAL LAW ⚓315—DECREE PRO CONFESSO—DUE PROCESS OF LAW.

Where respondents filed an answer, but failed to answer interrogatories addressed by libelant to them, their default does not warrant the entry of a decree pro confesso against respondents, for that deprives them of due process guaranteed by Const. U. S. Amend. 5.

2. ADMIRALTY ⚓72—EQUITY RULES—APPLICABILITY.

Admiralty rule 32 (29 Sup. Ct. xlii), declaring that the defendant shall have the right to require the personal answer of the libelant under oath to any interrogatories which he may propound, and that in default of answer the court may adjudge the libelant to be in default, and dismiss the libel or compel his answer by attachment, or take the subject-matter of the interrogatories pro confesso, is not extended to defendants by virtue of equity rule 58 (198 Fed. xxxv, 115 C. C. A. xxxv), declaring that the court or judge, upon motion and reasonable notice, may make all such orders as may be proper to enforce answers to interrogatories, and that any party failing or refusing to comply with such an order shall, if a defendant, be liable to have his answer stricken and be placed in the same situation as if he had not answered, for the equity rule is obviously inapplicable to an admiralty case, notwithstanding there is a similarity in practice between equity and admiralty.

3. ADMIRALTY ⚓75—INTERROGATORIES.

Under admiralty rule 38 of the Southern district of New York, declaring that, after joinder of issue and before trial, any party, by leave

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

of court granted on motion, may examine the opposite party, his agents or representatives, or deliver interrogatories in writing for the examination of such party, and in case the order shall provide for an examination by interrogatories, the answers thereto shall be made under oath, a libellant, who did not obtain leave of court before filing interrogatories for answer by respondent, is not entitled to aid of the court on account of respondent's failure to answer, notwithstanding it was the ordinary practice in the district to file interrogatories without leave.

In Admiralty. Libel by the Rockland & Rockport Lime Company, owner of the steamship Fred E. Richards, against the owners of the schooners Mary L. Crosby and Henry R. Tilton, with citation against Fields S. Pendleton. On motion by F. S. and E. S. Pendleton, claimants, to set aside and vacate a decree entered pro confesso. Motion granted.

Carpenter & Park, of New York City, for libellant.

Roscoe H. Hupper, of New York City, for respondents Pendleton.

MANTON, District Judge. This is a motion to set aside and vacate a decree entered pro confesso herein.

[1] On July 17, 1917, the libellant filed its libel as owner of the steamship Fred E. Richards against the owners of the schooners Mary L. Crosby and Henry R. Tilton, to recover, \$2,375, the fair and reasonable value of the services of the steam tug while, at the request of the respondents, she was engaged along the New England coast. The citation was against Fields S. Pendleton, and was returned September 15, 1913; it was adjourned until September 22, 1913, no appearance being entered on behalf of Pendleton; default was taken and an interlocutory decree and order of reference was signed. The damages were proven before a commissioner and a final decree entered. Thereafter Pendleton, through his attorney, moved to vacate the final decree, which was granted on November 7, 1913, on the payment of costs. An answer was filed on behalf of the two Pendleton claimants, and citations served upon the three other respondents, Lewis, Kenyon, and Nugent. Upon their default, an interlocutory decree and final decree were entered against each. This default was afterward opened, an answer was filed, and interrogatories addressed to the libellant, answers to which were filed by the libellant; and it filed and served on the respondents' attorneys interrogatories addressed to them. There was a default in answering these interrogatories. Upon notice to the respondents' attorneys, a decree pro confesso was entered on August 26, 1915, and a final decree on September 20, 1915. Heretofore an application was made to vacate the decree pro confesso, that application being addressed to the discretion of the court, and it was denied.

The respondents Pendleton now move to vacate the decree pro confesso upon the ground that the same could not be granted, and, further, that the interlocutory and final decrees and judgment entered were beyond the power of the court and in violation of the due process of law guaranteed by the Fifth Amendment of the Constitution. The respondents rely upon *Hoyey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215, in maintaining that an interlocutory and final

decree in this case are wholly void. After the respondents failed to answer the interrogatories, Judge Lacombe granted an order on August 26, 1915, "taking the libel herein pro confesso, or adjudging the respondents Fields S. Pendleton and Edwin S. Pendleton in contempt of court for failure to answer the libelant's interrogatories."

The affidavit in opposition to this motion states that the respondents' counsel appeared after notice and stated that he would not oppose the motion, but requested the withholding of the entry of the order until the following Monday. Notice of reference was then served upon the attorney for the respondents, and the commissioner took testimony resulting in this decree. In *Hovey v. Elliott*, supra, the respondent's answer was stricken out and a decree pro confesso entered, where the defendants had failed to pay money into court pursuant to an order made after the answer was filed. The defendants were adjudged guilty of contempt and the decree so provided, and, further, that if they failed to comply with the decree for the payment of the money into court the answer filed by them in the cause be stricken out, and that the cause then proceed as if no answer had been interposed. The Supreme Court, speaking through Mr. Justice White, held that granting a decree pro confesso and striking out the answer was a violation of the defendant's rights under the due process of law provision of the Constitution, and this case was cited and followed in this circuit in *The Fred M. Lawrence*, 94 Fed. 1017, 36 C. C. A. 631. Judge Learned Hand later refused to strike out an answer for failure to answer certain interrogatories in *Barnes v. Trees* (D. C.) 194 Fed. 230.

A decree, therefore, which is granted in violation of these authorities, and of the Constitution, is void, and the respondents are entitled to have it vacated as a matter of right.

[2, 3] Rule 32 of the admiralty rules of the Supreme Court (29 Sup. Ct. xlii) provides as follows:

"The defendant shall have a right to require the personal answer of the libelant under oath or solemn affirmation to any interrogatories which he may, at the close of his answer, propound to the libelant, touching any matters charged in the libel or touching any matters and defenses set up in the answer subject to the like exception as to matters which shall expose the libelant to any prosecution or punishment, or forfeiture, as is provided in the thirty-first rule. In default of due answer by the libelant to such interrogatories, the court may adjudge the libelant to be in default and dismiss the libel, or may compel his answer in the premises by attachment, or take the subject matter of the interrogatories pro confesso in favor of the defendant, as the court, in its discretion, shall deem most fit to promote public justice."

But this rule does not apply to the respondent, but applies to the libelant. Rule 58 of the Rules of Practice of the Courts of Equity of the United States (198 Fed. xxxv, 115 C. C. A. xxxv) provides:

"The court or judge upon motion and reasonable notice may make all such orders as may be proper to enforce answers to interrogatories or to effect the inspection or production of documents in the possession of either party and containing evidence material to the cause of action or defense of his adversary. Any party failing or refusing to comply with such an order, shall be liable to attachment and shall also be liable if a plaintiff, to have his bill dismissed, and, if a defendant, to have his answer stricken out and be placed in the same situation as if he had failed to answer."

The libelant argues that courts of admiralty, within the limits of their jurisdiction, resemble courts of equity in their practice and modes of procedure, that the foregoing rule of equity practice should be made applicable here, and that rule 58 was established after the decision in *Hovey v. Elliott*, supra, and therefore must be held to reverse that decision. I think this view erroneous. The admiralty court has laid down its rules of practice, which must be deemed full and sufficient and must be followed, and the equity rules cannot be borrowed for the purpose of determining the procedure in an admiralty cause. There is no converse rule to rule 32 of the Supreme Court above referred to. Admiralty rule 38 of this district provides for an examination and discovery before trial, as follows:

"After joinder of issue and before trial, any party by leave of the court granted on motion may examine the opposite party, his agents or representatives, or deliver interrogatories in writing for the examination of such party, his agents or representatives, with regard to any fact material to the issues. In case the order shall provide for an examination by interrogatories, the answers to the interrogatories shall be made under oath and filed within ten days after the delivery thereof, or within such further time as may be allowed by the court."

This appears to be the admiralty court's own rule, applicable in a situation as here presented. The inquiry, therefore, must be: What is the relief which should be granted for failure to answer interrogatories propounded under this rule? In the instant case, leave of the court was not granted on motion for propounding the interrogatories; but counsel says the interrogatories were propounded in accordance with the common practice prevailing in the district. While such may be the practice (since the admiralty practice is free from technicalities), still a failure to follow this common practice, which is not provided for by any rule of law or of the court, should not condemn the litigant failing to answer interrogatories to the extreme penalty of depriving the litigant of his day in court.

Rule 32 provides that the libel may be dismissed if the libelant fails to answer interrogatories; but the dismissal is not upon the merits, and the libelant may sue again. But here is a judgment on the merits against the respondents and forecloses forever the respondents' opportunity to be heard. The failure to answer the interrogatories, if propounded under an order of the court, may be penalized by excluding testimony upon the subject-matters of the inquiries or by punishing for contempt; but, where an answer stands to the libel, there can only be a decree after the case is reached in its regular order upon the calendar and libelant's right to succeed shown by evidence before a judge of the court.

I think the respondents are right in their contention, and, even though there have been flagrant defaults by them, I am obliged to vacate this decree, for the reason that it is entered in violation of the respondents' constitutional rights.

GREGG et al. v. MEGARGEL

(District Court, S. D. New York. January 24, 1918.)

No. 194.

1. JOINT ADVENTURES ⇨4(1), 5(2) — SYNDICATE MANAGERS — RELATION TO MEMBERS.

A circular letter was sent by defendants to each complainant, stating that defendants were negotiating for the purchase of stock of a certain corporation and were organizing a syndicate to purchase from them a portion of such stock, not exceeding 100,000 shares, "when and if acquired by us at a price of \$7 per share." Defendants were to be managers of the syndicate, with full powers and no liability, except for the exercise of good faith, and with the right to charge all expenses of the acquisition of the stock to the syndicate. They might also become members. Complainants were invited to become members of the syndicate by signing an acceptance on the letter, which they did. *Held* that, under the contracts so made, defendants became vendors, managers, and members of the syndicate, that as managers or agents of the syndicate they assumed a fiduciary relation to the other members, and that a bill by complainants alleging fraud and deceit, in that, after the syndicate was formed, defendants purchased the stock at \$3.50 per share and charged complainants \$7, without disclosing the price paid, stated a cause of action which entitled complainants to a preliminary injunction restraining defendants from disposing of the stock in their hands until the case could be heard on the merits.

2. JOINT ADVENTURES ⇨4(1)—CONSTRUCTIVE TRUSTS—MANAGERS OF SYNDICATE—RELATION TO MEMBERS.

Syndicate managers are held to the use of unambiguous language in circulars and letters to syndicate members, and words of doubtful meaning or application must be strictly construed against them.

3. PRINCIPAL AND AGENT ⇨75—TRUSTS ⇨237—VIOLATION OF DUTY BY TRUSTEE—REMEDIES OF BENEFICIARY.

A principal, if he finds that his agent or trustee has made secret profits, may at his option affirm the transaction and bring suit in equity for an accounting, and have the profits made by the agent or trustee deemed to be, in equity, the property of the principal, and to this end he is entitled to injunctive relief.

4. JOINT ADVENTURES ⇨4(1)—CONSTRUCTIVE TRUSTS—MANAGERS OF SYNDICATES.

Courts will hold syndicate managers and promoters to absolute frankness of expression, purpose, and dealing with their investors, and to strict accountability for violations of the trust thus imposed.

In Equity. Suit by Nathan Gregg and others against Roy C. Megargel, doing business under the firm name of R. C. Megargel & Co. On motion for preliminary injunction. Motion granted.

Henry Wollman (of Wollman & Wollman), and George O. Redington (of White & Case), both of New York City, Clarence Alexander, of Yonkers, N. Y., and Herbert Haase (of Haase, Hanley & Howard), of Chicago, Ill., for the motion.

Frederick J. Powell and Marvin W. Wynne (of Powell, Wynne, Lowrie & Ruch), both of New York City, opposed.

MANTON, District Judge. Plaintiffs became syndicate members of a syndicate formed by the defendant to purchase stock of the Glenrock

Oil Company. This bill in equity is brought under the claim of the relation of cestuis que trustent against the defendant claiming that they are agents and trustee.

[1] The agreement consists of a letter, marked "Private and Confidential," dated August 17, 1917, and an acceptance of its terms by the syndicate members. The letter is as follows:

Dear Sirs: The Glenrock Oil Company, Incorporated, has been recently incorporated under the laws of the state of Virginia with a total authorized capital stock of \$10,000,000, divided into 1,000,000 shares, of the par value of \$10 each. The corporation was organized for the purpose of acquiring by direct purchase, or through controlling interests in other corporations, producing and prospective oil properties located in the state of Wyoming and elsewhere. We are negotiating for the purchase of certain shares of the capital stock of this corporation, and are forming a syndicate to acquire from us a portion of said stock to the extent of not exceeding 100,000 shares, when, as, and if acquired by us, at a price of \$7 per share.

The syndicate will terminate on October 15, 1917, subject to our right to dissolve it at an earlier date, and to our right to extend it from time to time beyond said date for an aggregate period not to exceed 60 days. We are to be managers of the syndicate and may be members thereof, notwithstanding our relations as vendors thereto and managers thereof, and as such managers we shall have full power to determine, within the limit above stated, the amount of stock to be purchased from us by the syndicate, and with full power to sell, purchase, resell, and repurchase, for account of the syndicate, at public or private sale, any shares of stock at such prices and on such terms as we may deem fit; to pay the usual brokerages, as well as such commissions for effecting sales or purchases for account of the syndicate as we may deem proper; to charge the syndicate reasonable commissions and the usual brokerages for sales or purchases effected by us; to make advances to the syndicate, charging interest thereon; to make or procure loans and secure the same by pledge of syndicate stock or otherwise, to such amounts and in such manner as from time to time we may deem expedient; and generally to act in all respects as in our opinion may be to the interest of the syndicate. We shall not be liable under any of the provisions of this letter, or for any matter connected therewith, except for want of good faith, and no obligation not herein expressly assumed by us shall be deemed to be implied.

The syndicate managers may purchase, sell, or otherwise dispose of, or be interested in the purchase, sale, or other disposition of, any stock or other securities of said corporation, or its subsidiary companies, or contract in any respect with it or them, without restriction and without responsibility therefor to the syndicate. All expenses incurred in the acquisition of such stock for the syndicate, in the marketing of the same, and all other expenses incurred by us as syndicate managers shall be charged against the syndicate. We shall make no charge to the syndicate for acting as syndicate managers, other than reasonable commissions and the usual brokerages for sales or purchases effected by us, being otherwise compensated in our purchases of said stock.

Your total obligation shall not in any event exceed the amount of your participation as herein stated, but the failure of any participant to perform any part of his obligation hereunder shall not release any other participant. Nothing herein contained shall constitute the participants partners with the syndicate managers or with one another. Syndicate participations are not transferable, except with the written consent of the syndicate managers. The syndicate managers reserve the right to cancel the participation of any member violating the syndicate provisions, and to hold him liable for any losses sustained by such violation. The firm constituting the syndicate managers acts as a copartnership, and all rights and powers hereunder of said firm shall vest in any copartnership which shall be the sole successor of said firm without further act or assignment.

We, as syndicate managers, may grant to, or withhold from, any syndicate participants the privilege of withdrawing their respective allotments of stock, or any part thereof, for investment. No participant withdrawing stock shall be entitled in respect thereof to share in any profits of the syndicate. Applications to make such withdrawals, in whole or in part, must be made to us upon written acceptance of participation within the period below provided, and any such application may be refused or granted by us in such cases and to such extent as we may, in our discretion, determine. In respect of your participation, or any part thereof, so withdrawn, you will be required to pay at the time and in the manner hereinafter provided an additional sum of \$1 per share on the number of shares so withdrawn to cover the proportion of the syndicate expenses attributable to such withdrawn participation. Upon the completion of all payments in respect of such withdrawn stock, you will be entitled to receive an appropriate certificate, issued by or on behalf of the syndicate managers, reciting that you are the owner of the number of shares specified therein and will be entitled to receive the same upon the termination of the syndicate. No stock so withdrawn from sale by any participant shall be delivered to him until the termination of the syndicate.

We have reserved for you, subject to the acquisition by us of such stock and to the reduction of such participation in case of oversubscription as hereinafter provided, a participation in the syndicate of _____ shares of such stock, which, at the syndicate price of \$7, amounts to \$_____. Should you desire to accept such participation, please confirm your assent to the conditions as herein stated by signing the inclosed acceptance and return the same to us at No. 27 Pine street, New York City, on or before August 23, 1917, after which time all offers of participation not so accepted will be deemed refused and canceled. This letter and your acceptance will thereupon constitute the contract between us. All acceptances, in whole or in part, are subject to our approval, and in case of any oversubscription the syndicate managers shall have the right to allot to you such less amount of participation in the syndicate than the amount reserved as above stated, as they in their uncontrolled discretion may determine.

You will be required to make payment in New York funds in respect of your obligation hereunder to the syndicate managers at their office No. 27 Pine street, New York City, on three days previous notice stating the amount of participation in the syndicate allotted to you by the syndicate managers as above stated, mailed, or telegraphed to you by us, against delivery to you at said office of subscription receipts representing your payment. Such call may, in our discretion, be for full payment or for payment in installments.

Yours truly,

R. C. Megargel & Co., Syndicate Managers."

The corporation was organized "for the purpose of acquiring by direct purchase, or through controlling interests in other corporations, producing and prospective oil properties located in the state of Wyoming and elsewhere." The defendants claim to have obligated themselves to purchase 100,000 shares from one Collins, of Forsythe, Mont. Under this agreement, the defendants, purchasers of the stock, became, first, vendors of the stock to the syndicate; second, agents and promoters; and, third, members of the syndicate.

Plaintiffs claim that as syndicate managers it was incumbent upon them to make known to them the purchase price of the stock, and that the failure to do so constitutes a fraud and breach of the fiduciary relationship existing between the plaintiffs and defendants as their syndicate managers or promoters, and, further, that the sale of stock at \$7 a share to the syndicate, after having paid but \$3.50 per share, was such a fraud and deceit as entitled plaintiffs to an accounting and to compel the defendants to relinquish or turn over to them all profits which in equity belong to them, to compel them to

turn over all amounts which they obtained from them by this alleged fraudulent representation as to what they paid for the stock, and to enjoin them from selling or disposing of the said property in their hands until the amount which they owe, if anything, against the stock is judicially ascertained in this action, and for an accounting of their transactions with reference to this syndicate.

The moving papers make claim of misrepresentations made as to the purchase price of the stock by the defendants, and in addition thereto there are these circumstances which a trial judge may determine to be a breach of the fiduciary relations existing between the plaintiffs and defendants, so as to warrant the equitable relief or a portion thereof as demanded by the plaintiffs. The property was not purchased by the Glenrock Oil Company, at least no statement was made of such purchase in the circular letter referred to. The property is in no way described. Considerable discretion was given to Megargel, as syndicate manager. The purchase was not predicated upon any condition that any specific or particular property was to be bought. Therefore the real or fanciful value of the stock was left largely for determination to the judgment of the syndicate managers. They were occupying the triple capacity of vendors, syndicate managers, and members of the syndicate, with the fullest powers as syndicate managers. Their statement reads:

"We are negotiating for the purchase of certain shares of the capital stock of this corporation, and forming a syndicate to acquire from us a portion of said stock not to exceed 100,000 shares, when, as, and if acquired by us at a price of \$7 per share."

The contention of the plaintiff is that this language indicates that the defendants would pay \$7 a share, which they would turn over to the syndicate at \$7 a share, and it is argued that a reasonable man, reading this language, would give such an interpretation to it. But, further in the letter, it is stated that the syndicate price is \$7 per share, and that all expenses incurred in the acquisition of the stock for the syndicate shall be charged against the syndicate. This language, used by syndicate managers, who promoted the syndicate, purchasing the stock from themselves, and failing to reveal by any statement the price of the stock, when the affidavits indicate that they had not yet paid a cent for the stock, but were paying for it as they sold it to the syndicate members, coupled with the charge of misrepresentation and fraud in the affidavits, would indicate a basis upon which a preliminary injunction should be granted, so as to keep the stock in its present ownership and prevent its being disposed of to innocent purchasers during the pendency of this action. There is some language in the letter which would indicate that they were making no charge to the syndicate for acting as syndicate managers, other than reasonable commissions and the usual brokerage for sales and purchases effected by them, and being otherwise compensated in the purchase of said stock. But the language is not such as would indicate that they were to be compensated in the transaction by the profit which would accrue to them from such sale to the syndicate at such price.

[2] The courts have been very strict in holding syndicate managers

to the use of unambiguous language in statements and circular letters, and words of doubtful meaning or application must be strictly construed against the author. With this vast power of discretion vested in them, by reason of the terms of this letter, the defendants protected themselves by providing that "we shall not be liable under any of the provisions of this letter, or for any matter connected therewith, except for want of good faith." That is, they assumed the agent's liability, and nothing more, and that was for good faith, and they further went on to say "that no obligation not herein expressly assumed by us shall be deemed to be implied," and they reserved the right of distribution or reduction, of the amount subscribed for, to each member.

[3] On the whole, the language of this circular letter is inviting and alluring, but is not free from ambiguity, and is not so open and free in expression to the ordinary reader as to absolve the defendants from the complaint of the plaintiffs, particularly where their complaint is coupled with charges of fraud and misrepresentation. A principal, if he finds his agent or trustee has made secret profits, or in any way violated his duty and obligation to him, can either disaffirm the transaction or let it stand and bring a suit in equity for an accounting, and have the profits made by the agent or trustee deemed to be equitably the property of the principal, and to this end he is entitled to injunctive relief. *Marvin v. Brooks*, 94 N. Y. 71; *McKinley v. Williams*, 74 Fed. 94, 20 C. A. 312.

[4] A question is presented here whether the defendants, because of their relation as syndicate managers or promoters, were not in fact, buying the stock for the plaintiffs, as syndicate members, instead of themselves; but if they were purchasing for themselves, whether they were entitled to take a profit without first making that clear, and also the amount thereof, to the joining members of the syndicate. In *California Mining Co. v. Walls*, 170 Cal. 285, 149 Pac. 595, a case of a promoter of a company, the court said:

"The promoter of a company, like its directors, is deemed to sustain toward the members of the company the relation of a trustee towards his *cestui que trust*. This being so, he will not be permitted to speculate out of that relation, or to derive secret advantages from it. He is bound to disclose to them fully all material facts touching his relation to them, including the amount which he is to get for his services as promoter, usually called 'promotion money.'"

It has been held that it is only where the promoter informs every subscriber, or his director informs every fellow director and stockholder, that he is personally interested, and the amount of profit he expects to make on a sale to a corporation, that a promoter or director will be permitted to make or retain the profit on such a sale. In *Brewster v. Hatch*, 122 N. Y. 349, 25 N. E. 505, 19 Am. St. Rep. 498, *Follett*, Chief Justice, said:

"The question is, Was the relation between these litigants simply that of vendors and vendees of shares to be issued, or was it one of trust and confidence, binding the defendants to the exercise of good faith and to disclose such information as they possessed affecting the value of the property in which the plaintiffs were induced to purchase an interest. * * * It is conceded and found by the court that the defendants did not disclose the amount which they were to pay for the mines. * * * These papers read

in the light of the purpose of the defendants, as disclosed by their evidence, seem to have been devices to cover the underlying scheme by which the corporation was to be organized, largely for the benefit of the promoters, but wholly at the risk and expense of the subscribers. We do not think that the inference contended for by the defendants can be justly drawn from the meager disclosures which they made in the documents put forth. They knew that they, and they only, absolutely controlled the scheme, and were to determine whether it should be carried out, and, if so, when and how. We think that the plaintiffs were led to believe, and had the right to believe, from the documents and from the circumstances that the defendants were acting in the interest of all the investors, and that they knew that the plaintiff so believed."

The cases of *Heckscher v. Edenborn*, 203 N. Y. 210, 96 N. E. 441, and *Sim v. Edenborn*, 242 U. S. 131, 37 Sup. Ct. 36, 61 L. Ed. 199, indicate that the courts intend to hold syndicate managers to absolute frankness of expression, purpose, and dealing with their investors, and to hold promoters to strict accountability for violations of the trust thus imposed. I think this should particularly apply, where the defendants have occupied the three capacities in these transactions. At least, I think, where it is claimed that there is likelihood of the fruits of the litigation being lost for want of an injunction, in the event of success of the plaintiffs at the trial, I should grant the injunction and permit the merits of the case to be determined by the trial judge.

The motion for a preliminary injunction will be granted.

THE ROSALIE MAHONEY.

(District Court, S. D. Florida. February 6, 1918.)

SALVAGE Ⓒ31—RIGHT TO COMPENSATION—RESCUE OF STEAMER ON FIRE.

A steamer lying at a dock in St. Johns river, Florida, partly loaded with creosoted cross-ties and piling, took fire early in the morning. She was cast off by the dock master, and at his request a tug towed her across the river, beached her, and then began pumping water on the fire. After pumping nine or ten hours, with the assistance of another tug, which came after four hours, the fire was put out; but a hole was cut in the side of the steamer, and she was filled and sunk. The first tug stood by for three or four days, until she was raised by a wrecking dredge, and then towed her to a port. The steamer had on board, besides cargo, tanks containing about 1,500 gallons of fuel oil; but the tanks were equipped with vents, so that there was little danger of explosion. The value of the vessel, oil, and cargo was \$102,000. *Held*, that the two tugs were entitled to salvage compensation; that they were not entitled to pay for cutting a hole in the steamer and filling her when the fire was virtually out, which was unnecessary and a cause of loss, and detracted from the merit of the service, nor was the first tug entitled to any allowance for standing by, which was not necessary; that its two tugs and their crews would be awarded \$5,000, two-thirds to the first tug and her crew.

In Admiralty. Suit for salvage by Maurice Bowden and others against the steamship *Rosalie Mahoney*, with the Cummer Lumber Company and the Jacksonville Forwarding Company as intervening libelants. Decree for libelants.

N. P. Bryan and L. R. Milton, both of Jacksonville, Fla., for libelants.

E. J. L'Engle, of Jacksonville, Fla., for respondent.

George C. Bedell and D. H. Doig, both of Jacksonville, Fla., for interveners.

CALL, District Judge. In this case two libels were filed, claiming salvage for service rendered the tramp steamship Rosalie Mahoney while on fire. The first libel was filed May 4, 1917, by the engineer of the H. M. C. Smith, a tugboat, on behalf of himself and the crew of said tug and one Ernest Williams, then on said tug, but not a member of the crew. The second libel was filed May 19th, by the Jacksonville Forwarding Company, owner of the steam tug Volunteer, for itself and the crew of said tug. On May 21st the Cummer Lumber Company, owner of the tug H. M. C. Smith filed an intervention *inter esse suo*. These suits were consolidated by order of the court.

Before proceeding with the consideration of the case, I desire to call attention to proctors to rules 41 and 48 of the admiralty rules. Rule 48 reads as follows:

"Salvors having a common interest arising from associated service or from consortship shall unite in one libel."

This rule has not been followed in this case, but the crew of the Smith proceeded for themselves, without reference to the claims of the other salvors, and failed to comply with rule 41, in that the libel does not state the amount claimed for salvage. The facts deducible from the evidence may be stated as follows:

About 6 o'clock on the morning of April 28, 1917, the steamship Rosalie Mahoney, while lying at the Eppinger and Russell docks, on the St. Johns river, loading with creosoted cross-ties and piling, and when about two-thirds loaded, was discovered to be on fire. This fire, commencing in the boiler room, quickly spread to the superstructure amidships, where the officers' quarters were, and necessitated the officers and crew leaving the vessel and going upon the dock to which the vessel was moored. The superintendent of the dock, fearing that the fire would be communicated to the dock and lumber stored upon it, caused the lines of the vessel to be released, and she thereupon floated with the wind and tide to a bank to the north of the dock, where she grounded, variously estimated by the witnesses as distant from the dock 40 to 150 feet.

While the vessel occupied this position, the captain of the H. M. C. Smith, then lying at Cummer's mill, a mile and a half down the river, saw the smoke and came to the place. Here some conversation took place between the captain and the dock superintendent relative to the towing of the vessel further from the dock, and the sums of \$10 and \$15 were mentioned for such service. The Smith then proceeded to the vessel. A line was put upon the vessel by one of the firemen and Ernest Williams, and the vessel towed stern first across the river and grounded. The tug moved around the vessel and played water upon the fire until about 10 o'clock, when the fire was so far under control that the tug could make fast alongside and continue

the operations of extinguishing the fire. About this time the tug Volunteer came and assisted with streams from her fire pumps in putting out the fire; also the government boat Issis pumped water on the fire for some two hours. After these boats had been so engaged, the superintendent of the Forwarding Company came upon the scene, and a hole was cut in the hull of the vessel, and water pumped in by the two tugs until she filled, which was about 2 o'clock in the afternoon. The vessel remained in this position until about May 1st, when with the assistance of the dredge Reliable she was pumped out, and on May 2d, towed by the Smith to the municipal docks and delivered to her owners; the tug Smith remaining alongside the vessel from April 28th to the time of her delivery to the owners on May 2d.

In addition to the cargo of railroad ties and piling, there was in the vessel's fuel tanks some 1,500 gallons of marine fuel oil. These tanks were on the deck forward and aft, and there were smaller tanks in the boiler room. Each of these tanks were fitted with vents to allow the escape of any gas which might form in them. The testimony further shows that the tug Volunteer arrived at the scene of the burning vessel some 15 or 20 minutes before the Smith, but made no effort to render any assistance until about 10 o'clock, after she had performed service for other vessels not endangered, except a lighter which had caught from the burning vessel. The Volunteer pumped water upon the fire and into the vessel for probably about five hours. The dredge Reliable makes no claim to salvage. Her compensation for pumping out the vessel was arranged by contract.

Each of these tugs were fitted with fire pumps, but had no hose larger than 1½-inch until late in the day, when some 2½-inch hose was procured. The Smith had a Niagara nozzle on top of her pilot house, which she used, as well as the small hose.

The values of the salvaged property was fixed by agreement and are as follows:

| | |
|-------------------------|--------------|
| Value of ship, | \$ 90,000 00 |
| Value of fuel oil | 2,219 34 |
| Value of cargo | 10,454 84 |
| | \$102,674 18 |

As I understand the procedure in this class of cases, it is proper that the court should allow an amount to be paid the salvors, the division of this amount among the vessels and men engaged in the salvage service to be divided among them as the facts of the case shall make equitable; the owners of the vessels engaged being entitled to remuneration for the use of and risk to such vessels, and the men for the labor, risk, etc., undergone by them.

"Salvage is a reward for meritorious services in saving property in peril on navigable waters, which might otherwise be destroyed, and is allowed as an encouragement to persons engaged in business on such waters, and others, to bestow their utmost endeavors to save vessels and cargoes in peril." The *Sonderburg v. Towboat Co.*, Fed. Cas. No. 13,175.

"Salvage should be regarded in the light of compensation and reward, and not in the light of prize. The latter is more like a gift of fortune, conferred without regard to the loss * * * of the owner, who is a public enemy, whilst salvage is the reward granted for saving the property of the unfortu-

nate, and should not exceed what is necessary to insure the most prompt, energetic, and daring effort of those who have it in their power to furnish aid and succor. Anything beyond that would be foreign to the principles and purposes of salvage; anything short of it would not secure its objects. The courts should be liberal, but not extravagant; otherwise, that which is intended as an encouragement to rescue property from destruction may become a temptation to subject it to peril." *Murphy v. The Suliotte* (C. C.) 5 Fed. 102.

Again, the same court, on the same page, says:

"The allowance of anything like a uniform percentage on the value of the property saved in such cases would be attended with great inequality and injustice. Whilst regard must be had to the value of the property, it is not the only controlling circumstance."

The other controlling circumstances are: (1) Labor expended by the salvors. (2) The promptitude, energy, and skill displayed. (3) The value of the property employed by salvors. (4) The risk incurred by salvors. (5) The degree of danger from which the property was saved.

In the instant case the *Smith* was engaged in fighting the fire about nine or ten hours, including the time she was engaged in towing the burning vessel across the river. I think she displayed reasonable promptitude, skill, and energy in rendering aid. There is no satisfactory proof of the value of the vessel. The customs house record is given, and this shows her to be a rather old vessel.

The risk incurred by salvors or the vessels employed was not great. Stress is laid upon the presence of the fuel oil in the tanks; but since each of these tanks contained vents which would prevent an explosion, and since the flash point of such oil is very low, it does not seem to me that its presence added materially to the danger of the salvors or the vessels engaged in the salvage service. The value of the property saved is fixed by agreement as heretofore stated.

The degree of danger from which the property was saved was great. The cargo, consisting of creosoted cross-ties and piling, carried in the hold and on the deck, constitutes a great danger in case of fire. It may be true that the creosote, being easily set on fire, would burn off, charring the wood; yet I cannot imagine such a condition of the cargo not greatly endangering the vessel while such burning was in progress.

From the testimony it seems to me that the vessel and cargo would have been a total loss, but for the services of the *Smith* and her crew, aided by the *Volunteer* and *Issis*. It seems to me that the *Volunteer* and her crew showed little promptitude in coming to the rescue of the burning vessel. As before noted, the testimony shows she was at the scene of the fire some 15 or 20 minutes before the *Smith* arrived, but made no effort to extend aid. On the contrary, she devoted her attention to saving a lighter belonging to her owners, and performed other services to other vessels, until about 10 o'clock, before proceeding to the aid of the *Smith* in putting out the fire, and this although equipped with fire pumps probably more powerful than those on the *Smith*.

Again, the filling of the vessel with water after the fire was virtually out appears to me totally unnecessary, and the cause of additional loss to the owners of the vessel. The *Smith* cannot excuse herself for

participation in this proceeding; she being in charge of the operation, it was the business of her officers to have prevented this unnecessary act. I do not think the services rendered in pumping out the vessel should be allowed in considering the salvage award.

The Smith laid alongside the vessel from the evening of April 28th to May 2d. From the letter of the owner filed in evidence this seems to have been done at its command. It was not necessary for the preservation of the property; the vessel then being filled with water and aground, with an anchor out. The time the Smith was lying alongside cannot constitute any basis for consideration of the amount of salvage. It was at the behest of the owner of the tug, and the owners of the vessel cannot be held liable to pay for such service. It will be further borne in mind that the service was performed in daylight and on the smooth waters of the St. John's river.

The proximity to Jacksonville and its fire department, and the presence of other boats which might have rendered assistance, is stressed. But it does not seem to me that such consideration should weigh much in fixing the amount to be allowed in the case. It is true the chief of the Jacksonville fire department was present, but the testimony is silent as to any assistance rendered. The vessel had been released from the dock, and was then grounded to the north of the dock, upon his arrival on the scene, and the testimony does show that the Smith was the only boat which came to the rescue of the burning vessel until approximately 10 o'clock.

The towing of the vessel across the river is criticized to some extent. It is evident that the dock foreman thought the dock in danger from the burning vessel as she lay upon the bank. A lighter had already caught fire, and under the circumstances the fears of the dock foreman do not seem unreasonable. The action of the captain of the Smith in removing the vessel to the point he did was not such an act as should militate against the boat and crew in assessing the amount of salvage.

Claim is made that the captain of the Smith was injured in rendering the salvage service. I gather from the testimony the injury was received while cutting the hole in the side of the vessel. This, as before remarked, was unnecessary, and will not be considered in the light of salvage.

Taking into consideration the facts, as shown by the testimony, with the well-known rules to govern courts in fixing the amount of salvage, I am of the opinion that \$5,000 would be proper to be allowed in this case. This amount to be divided between the Smith and Volunteer, three-quarters to the Smith and one-quarter to the Volunteer. Of the amount apportioned to the boat, two-thirds shall go to the owner and one-third to be divided among the crew in proportion to the wages of each, except in the case of Ernest Williams, who will receive the amount apportioned to a fireman on the Smith.

The amount awarded above and the costs will be paid by the vessel and cargo in proportion to the values same bear to each other. The services rendered by the *Issis* are not included in the above award.

A decree will be entered accordingly.

ATCHISON, T. & S. F. RY. CO. v. WEEKS et al.

(District Court, W. D. Texas, El Paso Division. January 25, 1918.)

No. 109.

1. COURTS ⇨7—JURISDICTION—TRANSITORY ACTIONS.

An action for damages for personal injuries suffered by plaintiff while in the service of defendant is transitory in its nature, and may be maintained in any court properly obtaining jurisdiction of defendant.

2. CONSTITUTIONAL LAW ⇨309(1)—“DUE PROCESS OF LAW”—WHAT AMOUNTS TO.

A judgment rendered by a state court against a foreign corporation without notice to it as required by law is not “due process of law,” and is void as in violation of Const. U. S. Amend. 14.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Due Process of Law.]

3. CORPORATIONS ⇨668(1)—FOREIGN CORPORATIONS—PROCESS.

Foreign corporations can be served with process within a state only when doing business therein, and such service must be made upon an agent who represents the corporation in such business.

4. RAILROADS ⇨33(2)—SERVICE OF PROCESS—EVIDENCE.

Where a judgment rendered in a Texas state court against a foreign railroad corporation was attacked on the ground of the state court's want of jurisdiction, evidence held to show that alleged agents of the corporation who were served with process were not in fact its agents.

5. RAILROADS ⇨33(2)—FOREIGN CORPORATIONS—DOING BUSINESS IN STATE.

Rev. St. Tex. 1911, art. 6406, forbids the acquisition or ownership of any railroad within the state by any corporation except when chartered by the laws of the state, and Const. art. 10, § 6, forbids the consolidation of any railroad organized under the laws of the state with any railroad organized under the laws of any other state or of the United States. A foreign corporation, owning and operating a line of railroad extending through several other states, entered into an arrangement with a Texas corporation duly organized, which owned a small railroad lying wholly within the state of Texas, whereby through trains were operated over the line of the foreign corporation and over the line of the Texas company. The Texas company owned no rolling stock, but the accounts were kept separate, and employes who in many instances represented both railroads were separately paid by each. An employe of the foreign corporation injured in a foreign state sued the foreign corporation in the Texas courts. Held, that as it is to be presumed that he could secure adequate relief in the state where the cause of action arose, and as the Texas railroad corporation was organized in accordance with the Texas laws, service of process on its officials cannot be treated as service on the foreign corporation on the theory that, as the foreign corporation owned the stock of the Texas corporation, it was working a deception and was doing business in Texas, for the fraud in no event could injure one whose cause of action arose out of a transaction in a foreign state.

6. EVIDENCE ⇨84—PRESUMPTIONS—RELIEF.

It will be presumed that one whose cause of action arose in a foreign state and whose courts were open to him could secure in those courts every right to which he was entitled.

7. CORPORATIONS ⇨438—OWNERSHIP OF STOCK—EFFECT.

The property of a corporation is owned by the corporate entity and not by the owner or owners of its stock, this being true whether the stock is owned by several or only one, or whether it is owned by a natural person, or a corporation engaged in the same business.

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

8. RAILROADS ⇨33(2)—FOREIGN CORPORATIONS—PROCESS—"DOING BUSINESS IN STATE."

Under Rev. St. Tex. 1911, art. 1830, par. 23, declaring that foreign corporations may be sued in any county where the cause of action or a part thereof accrued, or where such corporation may have an agency or representative, and articles 1861, 1862, authorizing service on foreign corporations by service on the executive officers or any local agent within the state, a foreign railroad corporation which maintained a general manager within the state of Texas, who by letter and telegram directed the movement of its trains in other states, and under whom there was a force of employes, is "doing business within the state," and service on such general manager is sufficient to give the state court jurisdiction over the person of such corporation.

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

9. CORPORATIONS ⇨666—OBJECTIONS TO VENUE—WAIVER.

Where a foreign corporation was doing business in the state and was bound by service on its agent, an objection to the venue, in that the action was instituted in a county other than where the agency was maintained, is waived where not duly made and, in event of the corporation's nonappearance, default judgment was properly rendered.

10. COURTS ⇨14—JURISDICTION—FOREIGN CORPORATION—NONRESIDENT.

Where a foreign corporation doing business in the state was duly served by service on its agent, the state court had jurisdiction to entertain an action on a transitory cause of action arising without the state.

In Equity. Bill by the Atchison, Topeka & Santa Fé Railway Company against J. F. Weeks and others for an injunction. Injunction denied.

This suit is brought by the complainant, the Atchison, Topeka & Santa Fé Railway Company, against the defendants J. B. Roberts, temporary administrator of the estate of O. L. Kelso, deceased, J. F. Weeks, Charles Owen, and Seth B. Orndorff, sheriff of El Paso county, to restrain them by injunction from the collection of a judgment of a state court. The judgment complained of was rendered by the District Court of the Sixty-Fifth Judicial District of Texas at El Paso on June 2, 1917, for the sum of \$3,500 in a suit in which defendant Kelso herein was plaintiff, and complainant was defendant.

At the time of commencing his said suit in the state court, and at all times since then until his death, the said Kelso was a resident of the state of California, and his cause of action was a claim for damages growing out of personal injuries received by him in California through the alleged negligence of the defendant company while in the performance of his duties as an employe.

The complainant is a railway corporation duly organized and existing under and by virtue of the laws of the state of Kansas, and a citizen thereof, and has its principal office and place of business in the city of Topeka in said state.

Citations were duly issued out of said state court and served upon R. F. Goering, W. R. Brown, L. F. Gifford, and R. J. Parker, each of whom were alleged by the plaintiff Kelso to be the agents of the defendant company, and that said company was doing business in the state of Texas.

At the term succeeding the ensuing term of the court to which said citations were returnable, all of said persons upon whom citation had been served filed affidavits in the case as amici curiæ, denying they were at the time said citations were served agents or representatives of the defendant company conducting any business in the state of Texas for it, and denying that it was doing business within the state of Texas, or that it had any office, officer, representative, or agent within the county of El Paso, state of Texas, or that it had any line of railway extending into or through said El Paso county. And at the term following, the court, after considering said affidavits and hearing evidence thereon, found that said persons, and each of them, were agents and represent-

atives of the defendant company, and that the defendant was doing business in El Paso county, Tex., and ordered that said affidavits be overruled and held for naught, and that the defendant company be required to answer as required by said citations, and each of them, as served upon "said agents and representatives."

At the term of the court next following the defendant company not having answered, and without otherwise having made any appearance, unless the said *amici curiæ* proceedings can be construed as an appearance, judgment by default for plaintiff was rendered.

It is alleged by complainant that the said O. L. Kelso, plaintiff in the state court, died on or about the 22d day of May, 1917, a date prior to the judgment by default on June 2, 1917, but no proof has been submitted upon this point, and therefore it will be presumed that said Kelso was living at the time said judgment was rendered.

On July 13, 1917, the defendant herein, J. B. Roberts, was appointed temporary administrator of the estate of O. L. Kelso, he having died in the meantime. The defendants Weeks and Owen were the attorneys of the said Kelso in the prosecution of said case in the state court and in obtaining said judgment, and they are now the attorneys of the said Roberts, the temporary administrator, and are acting with him in suing out execution on said judgment and in placing same in the hands of the sheriff, the defendant Orndorff, herein to be levied upon property of the defendant company to satisfy said judgment.

The attack upon the judgment which complainant is seeking herein to enjoin is based upon the contention that said judgment is null and void because no legal service of citation was had upon complainant, and that therefore same was entered in contravention of the Fourteenth Amendment to the Constitution of the United States.

From the evidence submitted the following facts are gathered in so far as they are material to the question of service:

The persons upon whom service of citation was had in the state court were at the time of service agents and employés of the Rio Grande, El Paso & Santa Fé Railroad Company. W. R. Brown was the vice president and general freight and passenger agent of said company; R. F. Goering was its local agent at El Paso; L. F. Gifford was a conductor for both companies, as will hereinafter appear, and R. J. Parker was assistant to the president of the Rio Grande Company and general manager of the western lines of the Atchison Company, as hereinafter stated. They all resided at El Paso, except the said Parker. Said Parker resided at Amarillo, Potter county, Tex.

The complainant, the Atchison, Topeka & Santa Fé Railway Company, which for convenience will hereafter be referred to as the Atchison Company, and the Rio Grande, El Paso & Santa Fé Railroad Company, which will hereafter be called the Rio Grande Company, both are included in that railway system designated as the "Santa Fé Lines."

The lines of the Atchison Company extend into or through only the states of Illinois, Iowa, Missouri, Kansas, Nebraska, Oklahoma, Colorado, New Mexico, Arizona, California and Nevada, and do not extend into Texas.

The Rio Grande Company is a Texas corporation, and its line is wholly within the state of Texas, and extends from El Paso to the boundary line or New Mexico, a distance of 20.22 miles, and there it forms a junction with the line of the Atchison Company, the two forming one continuous line. Through trains were operated over the lines of both companies as if they were one continuous line, but under contractual arrangements between the companies the train crews were paid by each company respectively in proportion to the service rendered for it. Through passenger tickets and shipping contracts issued by each were recognized and accepted by the other, but each kept its own accounts separately, and a division pro rata of revenues arising from such through business was made by accounts mutually rendered and paid by each to the other.

Reports required by law to be rendered to public officials were regularly made by the Rio Grande Company for itself.

The Atchison Company employs a train dispatcher located at San Marcia; on its line in New Mexico who attended to the dispatch of trains over both lines, but the Rio Grande Company paid for the service rendered to it by said train dispatcher.

The Rio Grande Company owns its roadbed, tracks, terminal facilities, and shops at El Paso, and bore the expense of their upkeep and maintenance, but it did not own any rolling stock whatever, and all the rolling stock it used was leased by it from the Atchison Company, for which it paid rental charges.

On January 1, 1900, the Atchison Company by legislative sanction leased the Rio Grande Company's railway and property for a period of 10 years, and operated same during said period, but at the end of said time, to wit, on December 31, 1910, said lease was terminated by the Railroad Commission of Texas, as it had the authority to do, by order made on August 18, 1910, and same was not renewed. After the lease referred to had expired the Atchison Company continued to keep an office and agency at El Paso until April 1, 1914, when such office and agency was discontinued to avoid suits against it in El Paso county on causes of action arising outside of the state. During such time the said W. R. Brown was the division freight and passenger agent of the Atchison Company, and J. S. Morrison was the city passenger and ticket agent for said company, both located at El Paso.

The capital stock of the Rio Grande Company is \$200,000 divided into 2,000 shares of \$100 each, of which the Atchison Company holds and owns 1,993 shares. The other shares stand in the names of the seven directors, 1 share each. The directors are: E. P. Ripley, who resides in Chicago; W. R. Brown, R. F. Goering, J. G. McNary, U. S. Stewart, J. S. Morrison, and J. F. Williams, all of whom reside in El Paso, Tex. No evidence has been submitted upon the question as to the real ownership of the stock held in the names of E. P. Ripley, J. G. McNary, J. S. Morrison, or J. F. Williams; but W. R. Brown testified that he has and owns 1 share of stock in the Rio Grande Company, but it is not for sale; that he did not pay actual money for it; that it is customary of all railroads for certain officers of the road to hold stock—you do not have to pay money for it—it is part of the perquisites that go with the job; that the other directors own their stock; that naturally one might assume that the stock was given to the directors to qualify as directors; that while he owned the stock he did not have it in his possession, but could get it easily; that he thought it was in the hands of Mr. Ripley; that if the Rio Grande Company should fire him, he would get the stock, but if he were to accept a position with the Atchison Company, it would be the right thing for him to turn it back.

And R. F. Goering testified that he never paid anything for his stock, and did not remember whether he ever had his stock in his possession or not; that the stock was given to him, and that he returned it the following day. The stock was sent to him by Mr. E. L. Copeland, who was then secretary; that he does not remember whether it was sent by mail or express; that it came from Chicago; that the certificate was for 1 share of stock; that he did not know before he received it that it was coming to him; that he did not know where the letter is that accompanied it; that it has been 8 years ago; that he does not remember what the letter said; that the letter probably requested that he sign a receipt for the share of stock; that he is sure he signed a receipt for the share of stock; that he sent it back to the official who sent it to him; that it might have been a man right here in El Paso; that when he turned it back he received a receipt for it; that he does not remember who sent the receipt back to him, but he is positive he got a receipt; that he probably filed the receipt among the records of the railroad company; that the share of stock was given to him, and he has the same interest in it now that he had originally; that he would have to look up the original receipt, but that he would say that he would be willing to take an oath that the share is his, and that he was entitled to the proceeds thereof; that he has never received any dividends on that share of stock, and never asked the Rio Grande Company or the Atchison Company for dividends on that share of stock; that he does not know whether any divi-

dends had ever been declared; that if the stock had paid dividends, somebody else received them and not him; that he has never promised anybody to pay for that share of stock; that he is not under any obligations, legal or moral, so far as he knows, to pay any one anything for the stock.

And U. S. Stewart testified that he owns 1 share of the Rio Grande Company's stock and has owned it since 1895; that he does not know whether the old share has ever been taken up and a new one issued or not; the records will show; that the Rio Grande Company was reorganized in May, 1914, and he thinks the stock was reissued; that he did not pay anything for his share of stock originally; that he was made a director of the company, and it was necessary to hold a share of stock; that they wanted him as a director, and a share of stock was put in his name; he did not subscribe for it; it was just transferred to him; that it had already been issued, and was transferred to him by some one else; that he does not remember who transferred it to him, but he thinks H. S. Beattie. He was treasurer and secretary of the Rio Grande Company before him, and he took his place and he ceased to be an official; that he does not remember whether he actually turned the stock over to him and put same in his possession or not; that he does not know who is the custodian of that stock now; that he has no trustee or other person acting in the position of guardian or superintendent for him that keeps possession of his stock; that he cannot tell where that share of stock is at this time; that he has not kept up with that share because he does not consider that it actually belongs to him; it belongs, he supposes, to the Rio Grande Company, and if he ceased to be a director of the Rio Grande Company he would not be willing to make affidavit that he was a bona fide owner of that stock; that as he understands it, that share of stock was put in his name simply to qualify him as a director of the road, and he is not an actual bona fide owner of the stock.

The officers of the Rio Grande Company at the time the suit in the state court was commenced were E. P. Ripley, president, W. R. Brown, vice president, and U. S. Stewart, secretary and treasurer. E. P. Ripley is also president of the Atchison Company and of all the other companies owning Santa Fé lines both within and without the state of Texas. The board of directors of the Rio Grande Company held meetings at El Paso, and directed and transacted the business of the company, and U. S. Stewart performed the usual and customary duties of secretary and treasurer.

L. F. Gifford was a conductor in the employ of both companies, but his services for the Atchison Company began and ended at the boundary line between Texas and New Mexico, and was performed wholly in New Mexico. He performed no service for the Atchison Company in Texas. In the operation of his train in Texas he was in the employ of and paid by the Rio Grande Company.

R. J. Parker, upon whom citation was served in the state court, was at the time of service one of the general managers of the Atchison Company, and was located and had his permanent residence at Amarillo, Potter county, Tex. He had charge and direction of the operation of its trains and the maintenance of its property upon its western lines in the states of Kansas, Oklahoma, Colorado, and New Mexico. Said Atchison Company also maintained, and still maintains at Amarillo, the office of general superintendent, superintendent, trainmaster, general foreman, chief engineer, and mechanical superintendent, and they, under the directions of the said Parker, assisted in the direction of the operation of said company's trains and service and the maintenance of its property on its western lines outside of Texas. It is shown by the evidence that the said Parker performs his duties as such general manager from Amarillo by means of letters and telegrams, but, there being no evidence to the contrary, it is to be presumed that his said assistants perform their duties in the usual way, presumably by telegrams and letters, and also by personal trips into and out of the state of Texas and by personal supervision. Except as above stated, the said Parker and said other officers of the Atchison Company perform no duty with reference to the business of the Atchison Company in Texas.

R. J. Parker was and is also the vice president and chief operating officer of the Panhandle & Santa Fé Railway Company which has its principal office at Amarillo, Potter county, Tex. This is one of the "Santa Fé Lines" and is in Texas. Said Parker is also assistant to the president of the Rio Grande Company.

F. G. Pettibone, as general manager; W. E. Maxson, as general superintendent; J. H. Hershey, as general freight agent; O. L. Clark, as land and tax commissioner; John S. Douglas, as general claim agent; J. Matthews, as telegraph manager, who all reside in the county of Galveston, state of Texas; and J. E. McQuillan, as mechanical superintendent; F. E. Taylor, as superintendent; James V. Clifford, as trainmaster; Edmund B. Fry, as chief dispatcher; K. E. Shirer, as general foreman B. & S. Water Service; E. S. Newton, as storekeeper—all of whom reside in the city of Cleburne, Johnson county, Tex.; R. B. Smith, as claim adjuster, who resides in Gainesville, Cooke county, Tex., perform work and services in the management and operation of the lines and railroad of the Atchison Company in the state of Oklahoma between Culver Junction and Shawnee, and between Paul's Valley and Lindsay and between Davis and Sulphur. All of the work and service performed by these officers residing at Galveston, Cleburne, and Gainesville relates to the management and operation of the lines of railway of the Atchison Company in the state of Oklahoma. Said officers issue instructions by letters and telegrams, respectively, from Galveston, Cleburne, and Gainesville direct to officers and agents of the Atchison Company in the state of Oklahoma, and by letters and telegrams they communicate concerning the business of the Atchison Company in the state of Oklahoma with officers of the Atchison Company who reside in New York, Chicago, Topeka, and other places. At the time said suit was filed in the state court, and for some time prior thereto, and ever since, the lines of railway of the Atchison Company situated in other states have been managed and operated in the manner stated by officers residing in the counties of Potter, Galveston, Johnson, and Cooke in the state of Texas.

Trains are operated eastwardly from Los Angeles and San Francisco by the Atchison Company to Texico, and by the Panhandle & Santa Fé Company thence to the Texas state line near Higgins, and thence by the Atchison Company northwestwardly through Oklahoma and Kansas said trains are run and operated over the western lines of the Atchison Company, which lines lie outside of the state of Texas under the direction of said Parker as general manager and said Sears as general superintendent, as has already been stated, and they are operated over the Panhandle & Santa Fé Company's lines in the state of Texas under the direction and control of said Parker as vice president, and the said Sears as general superintendent of the Panhandle & Santa Fé Company. Said trains are operated continuously by the same employes across the state line at Texico into Texas, and by the same employes across the state line into Oklahoma, said employes being the employes of the Panhandle & Santa Fé Company, which company is reimbursed by the Atchison Company for such services as they perform for it on its lines outside of the state of Texas.

Turney, Culwell, Holliday & Pollard, of El Paso, Tex., for complainant.

Weeks & Owen and Geo. E. Wallace, all of El Paso, Tex., for defendants.

SMITH, District Judge (after stating the facts as above). [1] The action in the state court in which the judgment complained of was rendered, being for personal injury, was transitory in its nature, and maintainable in any court properly obtaining jurisdiction of the person of the defendant. *Railway Co. v. Sowers*, 213 U. S. 55, 29 Sup. Ct. 397, 53 L. Ed. 695; *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L.

Ed. 439; *Stone v. United States*, 167 U. S. 178, 17 Sup. Ct. 778, 42 L. Ed. 127.

[2] Therefore it is to be determined from the foregoing statement of the facts, whether or not the Atchison Company had by legal service been brought within the jurisdiction of the state court. If it had not, the injunction prayed for should be granted, for it requires no citation of authorities to maintain the proposition that a judgment rendered against a foreign corporation without notice to it as prescribed by law is not due process of law and is void, being in contravention of the Fourteenth Amendment of the Constitution of the United States.

[3] The statutes of Texas providing for service on foreign corporations are as follows (Revised Statutes of Texas):

Art. 1830, par. 28. Foreign, private or public corporations, joint-stock companies or associations, not incorporated by the laws of this state, and doing business within this state, may be sued in any court within this state having jurisdiction over the subject-matter, in any county where the cause of action, or a part thereof, accrued, or in any county where such company may have an agency or representative, or in the county in which the principal office of such company may be situated; or, when the defendant corporation has no agent or representative in the state, then in the county where the plaintiffs, or either of them, reside. Acts of 1887, p. 131.

Art. 1861. In any suit against a foreign, private or public corporation, joint-stock company or association or acting corporation or association, citation or other process may be served on the president, vice president, secretary or treasurer, or general manager, or upon any local agent within this state, of such corporation, joint-stock company or association, or acting corporation or association. Acts of 1885, p. 79.

Art. 1862. Service may be had on foreign corporations, having agents in this state, in addition to the means now provided by law, by serving citation upon any train conductor who is engaged in handling trains for two or more railway corporations, whether said railroad corporations, are foreign or domestic corporations, if said conductor handles trains over foreign or domestic corporations' track across the state line of Texas, and on the track of a domestic railway corporation within the state of Texas, or upon any agent who has an office in Texas, and who sells tickets or makes contracts for the transportation of passengers or property over any line of railway or part thereof, or steamship or steamboat of any such foreign corporation or company. For the purpose of obtaining service of citation on foreign railway corporations, conductors who are engaged in handling trains, and agents engaged in the sale of tickets or the making of contracts for the transportation of property, as described in this article, are hereby designated as agents of said foreign corporations or companies upon whom citation may be served. Acts 1905, p. 30.

It is well settled that foreign corporations can be served with process within the state only when doing business therein, and that such service must be upon an agent who represents the corporation in such business. *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113; *Peterson v. Chicago, Rock Island & Pacific Railway Company*, 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed. 841.

Therefore the question of service in the state court may be divided into three propositions:

(1) Were the persons served such officers or agents of the Atchison Company as the statutes of the state provide may be served?

(2) Was the Atchison Company at the time of service doing business in the state of Texas?

(3) If so did the persons served represent said Atchison Company in such business?

[4] First taking up the persons served at El Paso, it seems clear from the evidence that at the time of the service of citation upon them neither W. R. Brown nor R. F. Goering was in the employ of the Atchison Company or the officers or agents of said company in any capacity.

L. F. Gifford was in the employ of the Atchison Company as conductor, but performed no service for it in the state of Texas. He was also in the employ of the Rio Grande Company as conductor, and his train was operated over both lines, but on crossing the state line into New Mexico he became the agent of the Atchison Company, and in crossing the state line into Texas he ceased to be the agent of that company and became the agent of the Rio Grande Company. As an essential to the validity of the service upon him it was necessary that he should at the time of service have been the representative of the Atchison Company in business then being done by it in Texas. This essential was lacking. *Peterson v. Chicago, Rock Island & Pacific Railway Company*, 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed. 841.

[5-7] It is contended by counsel for defendants that the Rio Grande Company was owned and operated by the Atchison Company; that by reason thereof the Rio Grande Company and its agents were the agents of the Atchison Company; that through such agents the Atchison Company was doing business in Texas; and that the Rio Grande Company was a mere mask and dummy through which the Atchison Company transacted its business in Texas. Under the evidence and authorities I do not think this contention can be maintained. No question is raised as to the validity of the Rio Grande Company.

Article 6406 of the Revised Statutes of Texas forbids the acquisition or ownership of any railroad within the state by any corporation except one chartered under the laws of the state; and section 6, article 10, of the Constitution of Texas forbids the consolidation of any railroad organized under the laws of the state, with any railroad organized under the laws of any other state or of the United States. Hence the organization of the Rio Grande Company and the operation of its line by it was in harmony with the policy of the state of Texas in such matters and consistent with the Constitution and the laws of the state. And if, as contended, the Atchison Company had in fact become the real owner of the Rio Grande Company's railroad and was operating it as such owner, such ownership and operation was unlawful. However, if as a matter of fact the Atchison Company was the real owner and operator of the Rio Grande Company's railroad, whether lawfully or unlawfully it should be held that such fact constituted doing business in Texas and the service in the state court should be held to be valid. Cases may be found holding that where one corporation uses another corporation as a "mask" or a "dummy" to defraud, the person defrauded may sue the former corporation for any damages he may thereby suffer.

It is also true that one corporation may so use another corporation as to bring into existence equities in favor of a third party upon which such third party may maintain an action against the former. But such is not the case here. The question in the state court was, and the question here is, purely and simply one of jurisdiction, and in no sense did it enter into the merits of the case or affect the right of said Kelso to recover in a court having jurisdiction. His cause of action arose in the state of California, and the courts of that state were open to him, and of course it is to be presumed that he could secure in those courts every right to which he was entitled. And, as already stated, he also had the right to bring his suit in any court having jurisdiction of the subject-matter, and which could by proper service secure jurisdiction over the person of the Atchison Company. He chose to bring his suit in a Texas court. He does not and cannot claim any rights accruing to him from fraud or deception or any other conditions producing equities in his favor arising from any alleged connection between the Atchison and Rio Grande Companies. The question is, Were the actual relations of these two companies such as to justify the holding that the business of the Rio Grande Company in Texas was in truth and in fact the business of the Atchison Company? It is clear they were not.

The Rio Grande Company was a separate legal entity, possessing all the legal attributes of a valid railroad corporation. It had its own officers and board of directors, who had and exercised the immediate and exclusive supervision and control and management of its property and business. It had its own employes, its own treasury, and its own rules and regulations. It kept its own accounts, and had no relations with the Atchison Company inconsistent with its own management and proprietary interest. And there is no evidence that the Atchison Company owned any proprietary interest in the property of the Rio Grande Company or exercised, or attempted to exercise, any control or management over its business.

It is true that a large majority and possibly all the stock of the Rio Grande Company was owned by the Atchison Company, but this fact does not even tend to show that the latter owned or controlled the property of the latter or gave it the right to control its business. The property of a corporation is owned by the corporate entity, and not by the owner or owners of its stock. This is true whether the stock is owned by two or more persons or only one, or whether it is owned by a natural person or by a corporation engaged in the same business. *Cook on Corporations*, § 709, and authorities therein cited; *Peterson v. Chicago, Rock Island & Pacific Railway Company*, 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed. 841; *Pullman Palace Car Co. v. Missouri Pacific Company*, 115 U. S. 587, 6 Sup. Ct. 194, 29 L. Ed. 499; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113.

The fact that the two corporations had the same president and had common agents and employes to a certain extent does not alter the case as the evidence showed they were paid in proportion to the business done for each company.

Therefore it must be held that at the time of service in the state court the Atchison Company was not doing business in El Paso county, and that neither the service upon W. R. Brown, nor upon R. F. Goering, nor upon L. F. Gifford was sufficient service upon or secured jurisdiction over said company.

[8, 9] The only other person upon whom service in the state court was had was R. J. Parker. He was located at Amarillo, Potter county, Tex., and was a "general manager" of the Atchison Company, one of the agents expressly designated by the statutes of the state upon whom service of a foreign corporation might be made. Therefore the only question as to him is whether or not at the time of service he was the representative of the Atchison Company in relation to any business it was then doing in Texas. There is no dispute as to the facts regarding this question. Said Parker was located at Amarillo, where he kept an office at which he performed his duties as the general manager of said company. The lines of said company's railway under his management were extensive, and were in the states of Oklahoma, Kansas, Colorado, and New Mexico, but did not extend into Texas. His duties in relation to said lines were to direct the operation of the trains and service upon said lines and to look after the maintenance of the company's properties upon said lines and he performs his duties from Amarillo by means of telegrams and letters. There are also at Amarillo other employes of said Atchison Company, to wit, a general superintendent, superintendent, trainmaster, general foreman, chief engineer, and mechanical superintendent, and they, under the directions of said Parker, assist him in the performance of his duties. Upon this state of facts I hold that said company was doing business in Texas, and that service upon said Parker was proper, and brought said company within the jurisdiction of the state court in El Paso, and, the company not having objected to the venue, said court properly rendered judgment by default. The question whether a foreign corporation is doing business in a given state is to be determined from the facts of each particular case, and not from any fixed definite rules. The service performed for the Atchison Company in Texas was an essential part of its business, for the protection of which the company could invoke the laws and the courts of the state. It was in no sense spasmodic or temporary, but permanent and continuous, in its nature, such as to indicate the presence of the corporation itself in the state.

There are many decisions—too numerous to be cited here—in which given statements of fact are discussed and held to show, or not to show, the doing of business by a corporation in a state, but I believe a careful examination of them with proper deductions will support the conclusion I have reached in this case upon this point. One case I consider specially strong in support of my conclusion is *Washington, Virginia Railway Co. v. Real Estate Trust Co.*, 238 U. S. 185, 35 Sup. Ct. 818, 59 L. Ed. 1262.

[10] I do not agree with the contention of complainant that the service upon said Parker was invalid, because the cause of action upon which the suit was brought in the state court arose outside of the state of Texas. The cases of *Old Wayne Life Association v.*

McDonough, 204 U. S. 22, 27 Sup. Ct. 236, 51 L. Ed. 345, and Simon v. Southern Railway Co., 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492, cited in favor of this proposition, are not in point. In those cases "substituted" service was had, and in neither case was service had upon an agent of the corporation, and therefore, if good at all, it could be good only in causes of action arising out of the business of the corporation in the state in which the suit was brought. It is not believed that any decision of a federal court can be found holding that where service was had upon the agent of a foreign corporation doing business within the state where suit is brought, such service is not good because the cause of action did not arise in that state. The statutes of the various states providing for service upon foreign corporations seem to be based upon the theory that an agent doing the business of a corporation in a state brings the corporation itself into the state, and that it may fairly be presumed that such agent would notify the governing body of the corporation of any service of citation upon him. No such presumption may be indulged in cases where there is substituted service upon an official of the state and not upon an agent of the corporation.

In view of the foregoing opinion I hold that the judgment in the state court was rendered upon valid service, and is itself valid. Therefore the injunction prayed for should be denied, and judgment is rendered accordingly.

UNITED STATES v. SIMON et al.

(District Court, E. D. Pennsylvania. December 1, 1916.)

No. 4979.

1. CRIMINAL LAW ⚡99—JURISDICTION OF SUBJECT-MATTER AND PERSON—RESORT TO PROCESS.

In every proceeding, whether criminal or civil, before the cause can be determined by a court and judgment given against defendant, the court must have jurisdiction of the subject-matter and of the person of the defendant, so that, though jurisdiction of the subject-matter may exist, some process must be resorted to in order to bring defendant into court, which process must be a lawful process, in the sense that it must be such as the law recognizes as sufficient to justify the finding that the parties whose rights are to be adjudged are before the court, with the opportunity to be heard.

2. CRIMINAL LAW ⚡99—MODES TO BRING DEFENDANT TO TRIAL—COMPLAINT—PRESENTMENT OF GRAND JURY—INFORMATION.

In criminal procedure against individuals, several modes to bring defendant to trial have come to be well known and accepted as usual, and therefore regular, all being followed by a trial in open court. One is by a complaint, followed successively by a warrant of arrest, a preliminary hearing before a magistrate, and an indictment of a grand jury; a second is by the presentment of a grand jury, followed by the issuance of a bench warrant, without the preliminary complaint and hearing; and a third is an information emanating from the official representative of the sovereign power, in lieu of the other procedure preceding the indictment.

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

3. FOOD \Leftrightarrow 18—CRIMINAL PROSECUTION—PROCEDURE—RECOGNIZED CHARACTER—CONSTITUTIONALITY.

The practice followed, in prosecuting individuals by information for violating Food and Drugs Act June 30, 1906, c. 3915, 34 Stat. 768 (Comp. St. 1916, §§ 8717-8728), by shipping adulterated and misbranded brandy from one state into another, must be in accord with recognized procedure, and must not be within the inhibitions of the federal Constitution.

4. INDICTMENT AND INFORMATION \Leftrightarrow 40—PROSECUTION BY INFORMATION—CONSTITUTIONALITY—LEAVE TO FILE.

Prosecution for a criminal offense, as a violation of the Food and Drugs Act, by information filed without formal leave of court by the United States attorney, acting on a report by the Secretary of Agriculture, is not prohibited by the federal Constitution, the provisions of which as to abuse of process are directed against arrests and seizures; it being a mere matter of practice, for regulation by the courts, whether leave to file information is formal, to be assumed unless and until challenged, or actual, the former being the established practice.

Information was filed against Leo Simon and Fanny Brunhild, trading as Brunhild, Simon & Co., alleging shipment in violation of the Food and Drugs Act of adulterated and misbranded brandy. On motion to quash the information. Denied.

On April 28, 1916, the United States attorney for the Eastern district of Pennsylvania, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against Leo Simon and Fanny Brunhild, trading as Brunhild, Simon & Co., Philadelphia, Pa., alleging shipment by said defendants, in violation of the Food and Drugs Act, on March 24, 1915, from the state of Pennsylvania into the state of New Jersey of a quantity of brandy which was adulterated and misbranded. The article was labeled, in part: "A Compound of Brandy and Grain Distillate * * * Cal. Brandy." Analysis of a sample of the article by the Bureau of Chemistry of this department showed the following results, expressed as grams per 100 liters to 100 proof, unless otherwise indicated:

| | |
|------------------------|------|
| Proof (degrees)..... | 88.2 |
| Acidity as acetic..... | 19.0 |
| Fusel oil..... | 24.9 |
| Esters | 10.0 |
| Aldehydes | 1.4 |
| Furfural | 0.3 |

These results show the addition of a considerable portion of neutral spirits. Adulteration of the article was alleged in the information for the reason that a certain substance, to wit, neutral spirits, had been substituted, wholly or in part, for California brandy, which the article purported to be. Misbranding was alleged for the reason that the following statement regarding the article and the ingredients and substances contained therein appearing on the commercial end of the keg, to wit, "* * * Cal. Brandy," not corrected by the additional statement, on the opposite end of the barrel, to wit, "A Compound of Brandy and Distillate," was false and misleading, in that it indicated to purchasers thereof that the article consisted wholly of California brandy, and for the further reason that it was labeled as aforesaid, so as to deceive and mislead purchasers into the belief that the said article consisted wholly of California brandy, when in truth and in fact it did not, but did consist of, to wit, a mixture of California brandy and neutral spirits.

On May 10, 1916, the defendants filed their motion to quash the information, which motion was denied, as will more fully appear from the opinion of the court.

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

Francis Fisher Kane, U. S. Atty., and Robert J. Sterrett, Asst. U. S. Atty., both of Philadelphia, Pa.
Levi Cooke, of Washington, D. C., for defendants.

DICKINSON, District Judge. The district attorney, in his official capacity, instituted proceedings against the defendant for a violation of the food and drugs statutes through and by an information. The defendant has moved to quash the proceedings because, as is averred, they did not in actual fact have the previous sanction of an allowance by the court.

[1] In every proceeding, whether criminal or civil, before the cause can be determined by a court and judgment go against the defendant, the court must have jurisdiction of the subject-matter and of the person of the defendant. The first is necessary because the court cannot proceed to render judgment unless vested with the lawful power and authority to do so. The second is necessary in order to meet the requirement of justice that both sides shall be heard. Although, therefore, jurisdiction of the subject-matter may exist, some process must be resorted to in order to bring the defendant into court. This process, it is clear, must be a lawful process, in the sense that it must be such as the law recognizes as sufficient to justify the finding that the parties whose rights are to be adjudged are before the court with the opportunity to be heard. Hence we have provisions made for forms of writs and the manner of service. The established practice of the courts supplies us with information of what these provisions are. The sanction or authority for some of them is to be found in statutes; for others their accepted usage in a long-established practice or in the recognition of the inherent power of the courts to adopt and issue appropriate writs of process.

[2] In criminal procedure against individuals, several modes of bringing the defendant to trial have come to be well known and accepted as usual and because of this, regular. They are all followed by a trial in open court. One is by a complaint, followed successively by a warrant of arrest, a preliminary hearing before a magistrate, and an indictment by a grand jury. Another is by the presentment of a grand jury, followed by the issuance of a bench warrant without the preliminary complaint and hearing. Still another is an information emanating from the official representative of the sovereign power, in lieu of the other procedure preceding the indictment. In the course of time some of these processes, although recognized as lawful in the sense of being authorized by law, were or were thought to be at least fraught with the possibility of abuse resulting in oppression.

[3] Out of this sprang the provisions of the Constitution of the United States and like provisions of the Constitutions of different states. The practice of the courts must, of course, yield to these mandates. The practice followed in the instant case must therefore meet these two tests. It must be in accord with recognized procedure and it must not be within the inhibitions of the federal Constitution.

[4] The legal literature of the subject supplies us with a rich mine of learning, an opening into which is afforded by the opinion in Weeks

v. U. S., 216 Fed. 292, 132 C. C. A. 436, L. R. A. 1915B, 651, Ann. Cas. 1917C, 524. Into this, however, we need not delve, further than to extract the fact that prosecutions by information have long had a recognized place in criminal procedure. This narrows the inquiry into the constitutional provisions. It is clear that they are directed against arrests and seizures, and because of this have no application to the case before us. In form, informations proceed with the leave of court. Whether this leave is made formal or actual is a matter of practice, to be regulated by the courts. Actual leave may be exacted, or it may be permitted to be assumed, unless and until challenged. The latter we think to be the established practice, and to be on the whole the better practice, because it leaves the propriety of the proceeding to be determined on its merits. The distinction between proceedings in which the sovereign is directly concerned and those which directly concern private persons is of doubtful practical value. It narrows and limits the control of the courts over its process by shifting the inquiry from the broad one of whether the proceeding should go on to a narrow inquiry into the mere nature of the offense charged.

The practice, adopted, as we are informed, in the Western district of this circuit, of requiring actual leave before permitting informations to be filed presents certain advantages, as does the practice followed in other jurisdictions of permitting leave to be assumed until challenged, but each comes in the end to be the same. We find no abuse of process in the present case, and no reason to revoke the leave, by virtue of which the information purports to have been filed.


The motion to quash is denied.

On December 11, 1916, the defendants entered pleas of guilty to the information, and the court imposed a fine of \$25.

In re MacDONALD.


(District Court, S. D. New York. October 30, 1917.)

No. 146.

OFFICERS 100(2)—COMPENSATION OF SHIPPING COMMISSIONERS—EXTRA ALLOWANCES.

Under Rev. St. § 1765 (Comp. St. 1916, § 3234), which provides that "no officer in any branch of the public service, or any other person whose salary, pay or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation," a shipping commissioner, who receives a salary fixed by law, is not entitled to a fee from the wages of a deceased seaman, paid to him, and which he is required to deposit in the registry of the District Court.

In the matter of the wages and effects of J. T. MacDonald, a deceased seaman, late of the steamship Notano. On question of allowance of fees to shipping commissioner. Fees disallowed.

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

Francis G. Caffey, of New York City (John Hunter, of New York City, of counsel), United States Attorney.

William J. Mahon, of New York City, for shipping commissioner.

MANTON, District Judge. The widow of the above-named deceased seaman asks for the payment to her of the sum of \$405 due the deceased for wages, which had been paid to the United States shipping commissioner, who in turn deposited the said money in the registry of this court. A provision in the order submitted to the court directs that \$5.99 be paid to the shipping commissioner and \$6 to the clerk of the court as his proper costs and charges. The United States attorney has asked me to reconsider a ruling heretofore made, in which I allowed the shipping commissioner fees on such application, in an opinion handed down on December 14, 1916. Matter of J. H. Johnson, a Deceased Seaman, 251 Fed. 319. In rendering the decision on that day, and thus stating the rule for this district, I followed Judge Morton, sitting in the District Court of Massachusetts, in the case of *United States v. Grant*, 224 Fed. 644. The United States attorney, on this application, calls my attention to a recent decision of the United States Supreme Court, May 21, 1917 (*Lewis, etc., v. United States*, 244 U. S. 134, 37 Sup. Ct. 570, 61 L. Ed. 1039), where, passing on section 1765 of the Revised Statutes (Comp. St. 1916, § 3234), providing:

"No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowances, or compensation"

—the court says:

"We are of opinion that section 1765 of the Revised Statutes, * * * above quoted, prevents the allowance of the claim for fees. This section is general in its application, and fixes the compensation of officers of the United States at the salary established by law, unless the additional compensation is authorized and explicitly appropriated for."

The United States attorney admits that, if Judge Morton's opinion in *United States v. Grant*, supra, is correct, the shipping commissioner here is entitled to the fee he asks for. The United States shipping commissioner, for this district, receives the salary of \$5,000, fixed by law. Section 4543 of the Revised Statutes (Comp. St. 1916, § 8332) provides, among other things, that every shipping commissioner shall, within one week from the date of receiving the wages and effects of deceased seamen, pay the same into the registry of the District Court, subject "to such deductions as may be allowed by the District Courts for expenses incurred in respect of such money and effects." In the *Lewis Case*, the deceased was surveyor general for Louisiana for the fiscal year beginning July 1, 1909, and ending June 30, 1910. He brought suit in the Court of Claims to recover a sum of money claimed to belong to him as perquisites of his office. The Supreme Court held he was not entitled to it, in view of section 1765.

Section 4501 (Comp. St. 1916, § 8287) provides for the appointment

of the United States shipping commissioner, section 4592 provides for his fees, and section 4594 (section 8378) provides that in no case shall the salary, fees, or emoluments of any officer appointed under this title be more than \$5,000 per annum, and any additional fees shall be paid into the treasury of the United States. Judge Morton, in the case of *United States v. Grant* (D. C.) 224 Fed. 645, said:

"In this district ever since the passage of the Shipping Commissioners' Act, the commissioner has always turned over the entire fund, and has received his compensation from the court.

"In 1873, Judge Shepley, Circuit Judge for this circuit, in the first case with which he dealt under the act, ordered that the commissioner should be paid from the fund the sum of \$2 and 1 per cent. The commissioner has ever since, by order of court, received this amount in each case. No objection has hitherto been raised by the United States. Judge Shepley seems to have gone thoroughly into the question, for he seems also to have passed on the question of clerk's fees in such cases. *United States v. Hill* (C. C.) 25 Fed. 375-377.

"Under section 4543 [Comp. St. 1916, § 8332], the commissioner is required to turn over the money, wages, and effects of deceased seamen, 'subject to such deductions as may be allowed by the Circuit Court for expenses incurred in respect to such money and effects.' This plainly gives the court the power to allow expenses in such cases; and 'expenses' may include proper fees to the commissioner, who is not required to do such work for nothing. There seems to be no other construction which would authorize the court to pay the clerk's fees from the fund (which is not objected to by the United States attorney), nor the obviously necessary expenses in connection with 'effects.' Section 4545 [section 8334] does not mean that all the money paid into court by the commissioner shall be paid to the treasurer.

"It must be presumed that the order of Judge Shepley was in conformity with the statute, which mentions only 'expenses,' and that the allowance to the court was made as part of the expenses in such cases. The effect of the order seems to be that the commissioner shall receive his expenses, which are determined to be \$2 and 1 per cent. in each case. The amounts are generally small, and the commissioner's expenses are difficult to ascertain."

In deciding as I did in the previous case (*J. H. Johnson*, deceased seaman), I felt constrained to follow the authority of *United States v. Grant*, supra. I think, however, this is inconsistent with the more recent opinion in *Lewis v. United States*, as it construes section 1765 of the Revised Statutes. The commissioner and his counsel have not submitted a memorandum on this application, and his counsel frankly stated orally that he was not desirous of obtaining the fees asked for, if granting the same would be inconsistent with the holding in the *Lewis* Case. Therefore the allowance asked by the commissioner must be disallowed, and he is not entitled to any fees other than the salary fixed by law, to wit, \$5,000.

An order may be presented, directing payment with this modification.

ARRUE v. CONSOLIDATION COAL CO. et al.

(District Court, S. D. New York. November 9, 1917.)

No. 151.

SHIPPING 56—BREACH OF CHARTER—LIABILITY.

A charterer of a schooner then lying in Venezuelan waters, where she had been for six weeks, subchartered her to carry a cargo of cocoanuts from a Cuban port to New York, the vessel to proceed at once to enter upon the charter, and to be tight, stanch, strong, and in every way fitted for the voyage. Because of having lain so long in tropical waters, her bottom was foul with barnacles, and from that cause and want of ballast which could not be obtained, she was unable to make the Windward Passage, but went around Cuba and stopped for cleaning at Key West, with the result that she did not reach the port of loading for two months and the cargo suffered serious damage. *Held*, on the evidence, that the owner and master were not in fault, but that the delay in arrival was a breach of the subcharter, and rendered the charterer, which was chargeable with knowledge of her probable condition, liable to the subcharterer for the damage.

In Admiralty. Suit by M. S. Arrue against the Consolidation Coal Company, with the United Line, Incorporated, impleaded. Decree for libellant against the Coal Company alone.

William F. Purdy, of New York City, for libellant.

James K. Symmers, of New York City, for respondent Consolidation Coal Co.

T. Catesby Jones, of New York City, for respondent United Line, Inc.

MANTON, District Judge. On the 28th of December, 1915, the United Line, Incorporated, chartered the schooner Bayard Hopkins to the Consolidation Coal Company for two round trips from Baltimore, Md., to Carenero, Venezuela. On the 28th of December, 1915, the Consolidation Coal Company, as agent, chartered the Bayard Hopkins to the libellant, to carry a cargo from Baracoa, Cuba, to New York. This latter charter party was made while the Bayard Hopkins was at La Guayra. The ship arrived on her first voyage at Carenero on November 14, 1916, at 6:30 p. m. She finished discharging cargo on November 27th, and arrived at La Guayra November 28th. She remained at La Guayra, awaiting orders from the charterer, until the master was notified to proceed to Baracoa on December 31st.

When the vessel left the port of New York and proceeded to Venezuela, she was tight, stanch, and strong, as contracted for in the charter. On the voyage from La Guayra to Baracoa, the ship encountered heavy, rough weather before she arrived at the Haitian coast, resulting in damage to her sails. While lying in tropical waters during this waiting period of almost a month and a half, her bottom became foul with barnacles as large as hens' eggs. This impeded the progress of the vessel, so much so that the master concluded it would be impossible to get through the Windward Passage, the shortest route to Baracoa from La Guayra. The master first attempted

to make his way through the Windward Passage, but gave up the effort as unsafe, in view of the prevailing northeasterly wind and the foulness of the bottom of the schooner. At this time she had no ballast, and the credible evidence warrants the finding that there was no ballast to be obtained at the nearby ports where she might call.

There was no ship railway where the vessel might be docked (short of Key West) and the barnacles removed from it. The ship made for Key West, and arrived there on February 5th, and was fumigated on February 8th. Here her bottom was cleaned, new sails were furnished, and she completed her voyage, sailing from Key West on February 24th, and arriving at Baracoa on March 2, 1916. There is some testimony that ballast was obtainable at a port near the course of the vessel, but I think the testimony offered on behalf of the respondent United Line, Incorporated, is the more credible and sufficiently negatives the claim of the libelant that ballast was obtainable. I am satisfied that the master of the ship did all that was reasonably to be expected of him in making this voyage, and that the failure to take the shorter course was not due to any neglect or fault on his part, but due to conditions for which he is not responsible.

The libel was filed against the Consolidation Coal Company, and, under admiralty rule No. 59, the Consolidation Coal Company has brought in the ship. I consider this ill-advised, for the evidence does not warrant a finding against the United Line, Incorporated, and the decree will go in its favor.

The claim of unseaworthiness of the vessel, in the sense that her sails were defective, or that she was unable to make the course through the Windward Passage, as other vessels did, is not supported. It is true that, if the bottom was clean and she had ballast, she could have made this course and thus have arrived at Baracoa in seasonable time.

This finding, however, does not release the Consolidation Coal Company from responsibility. The Consolidation Coal Company made its contract, when it must be charged with knowledge of the conditions as they existed, or else it failed to obtain information which was obtainable, and which would inform it of the condition of the ship at that time. For example, it did know, or should have known, that the vessel was lying in tropical waters for this period of time, where her bottom was likely to become foul. There is no evidence to indicate that it made any inquiry as to the condition of the vessel after its period of six weeks in tropical waters. The evidence shows it made this contract with the libelant, in which it obligated itself to furnish the Bayard Hopkins to carry a cargo of cocoanuts, and covenanted as follows:

"Said vessel to be tight, stanch, and strong, and in every way fitted for such a voyage and receive on board during the aforesaid voyage the merchandise herein mentioned. The said party of the second part doth engage to provide and furnish to the said vessel a full cargo under and upon deck of cocoanuts and/or other ordinary lawful merchandise."

The delay in reaching the port of Baracoa was an unreasonable delay within the reasonable construction of the phrase "to proceed at once to enter upon this charter." In my opinion the Consolidation

Coal Company cannot offer, as its excuse for its failure to carry out its contract, the commendable excuses offered to the court by the impleaded United Line, Incorporated, for here it entered into a solemn contract when it knew, or should have known, of the conditions confronting the master of the ship, which resulted in delay in the voyage. The failure to proceed as reasonably expected within the terms of the contract is a breach thereof, for which the Consolidation Coal Company should respond for the loss sustained by the libellant. The libellant's cargo was damaged, and there is ample proof to sustain his claim of loss, to wit:

| | |
|---|-----------|
| Increased freight..... | \$ 415 00 |
| Deterioration on arrival in Baracoa..... | 1,975 60 |
| Cables to New York and Guantanamo..... | 50 00 |
| Loss of cargo on arrival in New York..... | 1,040 00 |

—making a total sum of \$3,480.60, for which a decree may be entered against the Consolidation Coal Company.

In re CORBITT.

(District Court, S. D. Georgia, S. W. D. March 25, 1918.)

1. MORTGAGES ⇨98—CONSTRUCTION—WHAT LAW GOVERNS.

In determining in a bankruptcy proceeding the construction and effect of a mortgage, the law of the state where the land is located governs.

2. MORTGAGES ⇨16—VALIDITY—ADVANCES.

Under Civ. Code Ga. 1910, § 3257, declaring that no particular form is necessary to constitute a mortgage, but that it must fairly indicate the creation of a lien, and specify the debt to secure which it is given and the property on which it is to take effect, a mortgage to secure a note due, as well as any general or special balance due from the mortgagor up to the value of the property, which was described as being of the value of \$5,000, is sufficiently definite to be valid as a mortgage for future advances up to \$5,000; it appearing that the mortgagee, who was a cotton factor, contemporaneously with the execution of the mortgage, took from the mortgagor a written obligation to ship certain cotton to the mortgagee, who agreed to act as the mortgagor's factor.

3. MORTGAGES ⇨48(2)—VALIDITY—SUFFICIENCY OF DESCRIPTION.

A mortgage, which described the land as having a frontage of a certain number of feet and extending back a stated distance, and which set out the boundaries on each side, and further described the property as being the same which was conveyed to the mortgagor by a deed of certain date and recorded on a specified date, fully identified the land.

In Bankruptcy. In the matter of A. Corbitt, bankrupt. On exceptions to the report of the referee, sustaining the claim of the mortgagee to the proceeds of certain property. Exceptions overruled, and referee's report confirmed.

R. A. Hendricks, of Nashville, Ga., for Bank of Willacoochee.

O'Byrne, Hartridge & Wright, of Savannah, Ga., for John Flannery & Co.

BEVERLY D. EVANS, District Judge. From the report of the referee it appears that certain real estate belonging to the bankrupt

and incumbered by mortgage to the John Flannery Company, and claimed by the Bank of Willacoochee under a deed of posterior date, was sold by the bankrupt's trustee under an order stipulating that all incumbrances, liens, and claims on the real estate be divested by the sale and attach to the proceeds. The proceeds of the sale amounted to less than the debt secured by the mortgage, and were awarded to the mortgagee, and the Bank of Willacoochee filed exceptions to the referee's report and to his conclusions of law and fact.

[1, 2] 1. The mortgage of the bankrupt to the John Flannery Company discloses that it was given "to secure the payment of the sum of five hundred and fourteen ³³/₁₀₀ dollars, which I justly owe to said corporation, as evidenced by my certain promissory note, dated September 21, 1910, and made payable to their order on the 1st day of January, 1911, as well as any renewals in whole or in part thereof, and also any general or special balance due by me to said the John Flannery Company, up to the value of the property herein described." The mortgage further contained a statement that the hypothecated property was valued at \$5,000. The mortgagee was a cotton factor, and contemporaneously with the execution of the mortgage took from the mortgagor a written obligation to ship a certain number of bales of cotton to the mortgagee, who had agreed to act as his factor for the sale of it during the season of 1910-11. The mortgagee advanced to the mortgagor various sums of money, and one of the questions made by the exceptions is whether such advances were secured by the mortgage. The contention of the Bank of Willacoochee is that the debt, represented by the advances, is not sufficiently described in the mortgage, so as to indicate any particular debt.

The construction of the mortgage, and its effect in this particular, are controlled by the Georgia statute (Civil Code 1910, § 3257) which declares:

"No particular form is necessary to constitute a mortgage. It must clearly indicate the creation of a lien, specify the debt to secure which it is given, and the property upon which it is to take effect."

Applying this Code section, the Supreme Court of Georgia has held that a mortgage on real estate, given to secure "advances" to be made by the mortgagee to the mortgagor for 1870, is not invalid for want of description of the debt intended to be secured; the debt specified being moneys advanced for carrying on the mortgagor's farm for the year 1870. *Allen v. Lathrop*, 46 Ga. 133. In construing the Code section, *McCoy, J.*, said that:

The statute "requires that the debt or duty of the mortgagor shall be specified; it does not say that such duty shall be specific and precise. It may be indefinite, as to indemnify a surety for whatever he may pay in a certain event, or to hold one harmless for whatever may happen under certain circumstances."

This construction has been consistently followed, and future advances expressed in language similar to that employed in this mortgage, as being secured by the mortgage, have been held sufficiently definite to describe the debt intended to be secured. *Hester v. Gairdner*, 128 Ga. 531, 58 S. E. 165; *Bank of Cedartown v. Holloway-Smith*

Co., 146 Ga. 700, 92 S. E. 213. I think the mortgage sufficiently identified the debt as a certain described note, and future advances to the extent of \$5,000.

[3] 2. The mortgage was upon two parcels of land. Each parcel was described as having a frontage of a certain number of feet, and extending back a stated number of feet, and the boundaries on each side of it being stated, and being further described as being the same property conveyed to the mortgagor by his grantor by deed of a certain date and recorded on a specified date, in a named book in the clerk's office of the superior court of the county where the land was located. This description fully identifies the land.

3. The main issue of fact was whether there had been an accord and satisfaction. The referee found in favor of the mortgagee on that issue, and the evidence amply supports his finding.

4. Other points raised by the exceptions are controlled by the foregoing rulings.

Let an order be taken, overruling the exceptions, and confirming the referee's report.

In re HENNIG.

(District Court, E. D. New York. February 26, 1918.)

1. ALIENS ~~§~~71½, New, vol. 7 Key-No. Series—NATURALIZATION—CANCELLATION OF CERTIFICATE.

A certificate of naturalization is not subject to cancellation because the applicant, in his declaration of intention and petition, misstated the year of his birth; there being nothing to indicate that such misstatement was intended as a willful misstatement of a material fact.

2. ALIENS ~~§~~69—NATURALIZATION—CHANGE OF RECORD.

While an order admitting a person to citizenship is treated as a judgment, and cannot be subsequently changed or amended at a later term, purely clerical mistakes can be corrected; and hence an additional paper may be ordered filed, to show the correct age of the alien, misstated in his declaration of intention and petition.

3. CITIZENS ~~§~~9—CHILDREN—NATURALIZATION OF PARENT.

Under Rev. St. § 2172, re-enacted by Act March 2, 1907, c. 2534 (Comp. St. 1916, § 4367), declaring that minor children dwelling in the United States become citizens on naturalization of their parents, where an alien father, on naturalization, omitted the name of a minor child residing in the United States from his papers, such child, though his name did not appear on the certificate, became a citizen, for the omission of his name did not affect the validity of his father's naturalization.

4. ALIENS ~~§~~69—NATURALIZATION—CHANGE OF CERTIFICATE.

Where an alien father, on naturalization, omitted the name of a minor child, and such child became a citizen under Rev. St. § 2172, additional papers, showing the existence of the child, can thereafter be ordered filed, and a new certificate of naturalization, showing the true facts, issued on surrender of the old.

At Law. In the matter of the application of Paul Charles Henry Hennig for an order amending petition for citizenship and proceedings had thereon. Affidavits and exhibits allowed to be filed with the papers already filed, and issuance of a new naturalization certificate directed, upon surrender of the old certificate.

Nugent & Nugent, of New York City, for petitioner.
Melville J. France, U. S. Atty., of Brooklyn, N. Y., opposed.

CHATFIELD, District Judge. Application for order amending petition for citizenship and proceedings had thereon.

[1] It appears that the applicant was born in 1874. He emigrated to the United States in 1906, and upon filing his declaration of intention gave his date of birth as 1879. Upon applying for final papers, he copied the date from the first papers, and made no attempt to correct the same. He now asks to amend his petition by stating the correct date of birth. This change would not affect the issuance of naturalization papers, as there is nothing to indicate willful misstatement of any material fact, nor should the papers be canceled for this reason. On the contrary, if the court's attention had been called to the error at the time when the applicant was admitted, the correct date of birth would have been noted upon the papers, and the petitioner's statement under oath, in correction of the same, added to the record.

[2] It has been the established rule of the courts in this circuit that an order admitting a person to citizenship could not be subsequently changed or amended by the same court, or another judge holding the court at a different term. The order has been treated as a judgment in this respect, but purely clerical mistakes can be corrected, even in a judgment (*Johannessen v. United States*, 225 U. S. 227, 32 Sup. Ct. 613, 56 L. Ed. 1066), or in any paper comprised in the record. A person admitted to citizenship can at any time apply to the court to have an additional paper filed, correcting a mistake in some other paper, which does not affect the judgment. This has in fact been done in many instances, where a person has been naturalized under an incorrect name, and a certificate has later been given by the clerk, that the order of admission to citizenship had, in fact, been granted under one name to the individual whose correct name was then given.

Examination of the naturalization statute shows plainly that the certificate given to the person naturalized is nothing more than a certified record of the proceedings, made by the clerk of the court. Under the present law, the form of this certificate is set forth in the statute, and requires the addition of certain facts, including the age, weight, height, etc., together with the names of minor children.

[3, 4] This brings us to the second portion of the present application. The petitioner had a son, born of a deceased wife, who was, at the time the petitioner was made a citizen, living in the United States, and who was then 19 years of age. Under section 2172, R. S., being the act of April 14, 1802, this son became a citizen of the United States. This provision was re-enacted, by Act March 2, 1907, 34 Stat. 1228, with the proviso that the citizenship of the minor child could not begin until the minor child began to reside permanently in the United States.

If the father omitted the name of one minor child from his papers, and if, therefore, the certificate of naturalization did not show the name of this child, the rights of the child would nevertheless be established by the law granting it citizenship upon the naturalization.

of its father. This right could not be taken away by any omission, error, or mistake in the father's application, unless the father's citizenship was thereby invalidated. It would be impossible now for the son to be again naturalized, for he cannot forswear allegiance to another sovereign while a citizen of the United States.

The present naturalization law allows the issuance of a new certificate in the case of loss or destruction of the original. This court can allow the filing of any additional paper or testimony, upon satisfactory proof that it should be added to the record, and may then issue a certificate setting forth the correct facts as shown by the entire record. No change in the judgment allowing the father to become a citizen would thus be effected or could be made. The granting of such an application would not be limited to the power of the court to open or change its previous judgment, and could be predicated only on a surrender of the certificate previously granted, or proof of its destruction or loss.

In the case at bar, the son, Karl Paul Henry Hennig, is already a citizen of the United States and could by proof establish that status whenever it might be called in question. The prima facie evidence, the certificate, is not correct, but is nowhere in the laws of the United States made conclusive. Unless his father's papers are invalidated, this son is entitled to have the certificate changed so as to show the fact, when a proper record is presented.

Upon the present application the court will allow the affidavits and exhibits to be filed with the papers already on file in the father's application, and will direct the issuance of a new naturalization certificate showing the name of the additional child, upon surrender of the old certificate.

UNITED STATES *ex rel.* PFEFER *v.* BELL.

(District Court, E. D. New York. February 19, 1918.)

1. CONSTITUTIONAL LAW ⇨83(2)—INVOLUNTARY SERVITUDE.

Selective Draft Act May 18, 1917, c. 15, 40 Stat. 76, both as respects citizens and declarent aliens, is not in violation of Const. U. S. Amend. 13, as imposing involuntary servitude.

2. CONSTITUTIONAL LAW ⇨190—EX POST FACTO LAWS—WHAT ARE.

As the Selective Draft Act is not an ex post facto law as to citizens, it cannot be deemed ex post facto legislation as to aliens; for, while Congress could not affect an alien's right to come into the country by a change thereafter in the requirements of admission, nevertheless in all other respects his status after entry is just the same as that of a citizen.

3. TREATIES ⇨11—REPEAL—CONFLICTING STATUTES.

While Const. art. 6, cl. 2, declares that the laws of Congress and treaties are the supreme law of the land, treaties give way to a subsequent statute; hence treaties with foreign nations are repealed in so far as they are in conflict with the express provisions of the Selective Draft Act.

4. ALIENS ⇨1—NATURALIZATION—DECLARATION.

A foreigner, holding only a declaration of intention, is still a subject of the foreign country.

5. CONSTITUTIONAL LAW ⇨70(3)—SEPARATION OF POWERS—AUTHORITY OF COURTS—VALIDITY.

The Selective Draft Act cannot be declared invalid in its operation as to declarant aliens who are still foreign subjects, on the theory that it is contrary to the public policy of the United States to recognize the right of any nation to impress into military service subjects of another nation, for the courts have no power to declare a law unconstitutional because it is in contravention with the so-called law of nations.

6. HABEAS CORPUS ⇨16—REMEDY—SCOPE.

A declarant alien, certified into military service under the Selective Draft Act, may by habeas corpus raise the question of the propriety of his certification.

Habeas Corpus. Petition by the United States, on the relation of Abraham Pfefer, for writ of habeas corpus against Franklin J. Bell, as Commanding Officer of Camp Upton, Yaphank, Suffolk County, N. Y. Writ dismissed, and relator remanded.

Charles Recht, of New York City (Sidney R. Fleisher, of Brooklyn, N. Y., and Isaac A. Hourwich, of New York City, of counsel), for relator.

Melville J. France, U. S. Atty., of Brooklyn, N. Y., and Vine H. Smith, Asst. U. S. Atty., of New York City.

CHATFIELD, District Judge. The relator, Pfefer, is in the National Army at Camp Upton, in this district. He is a subject of Russia, who has taken out his first papers and has been drafted as a declarant. The facts shown by the petition and the return are not disputed.

The relator stated before the local board that he was an alien who had filed a declaration of intention. The board on these facts included him within the eligible class, and he was drafted in accordance with the procedure of the law. Upon this application the only question is based upon a general claim that the local board had no jurisdiction over the relator under the Draft Law. The law is alleged to be unconstitutional in those provisions which include aliens who have filed declarations of intention to become citizens.

[1] The relator argues that as an alien he cannot be lawfully impressed into the military service of this country, of which he is a resident, at least until after opportunity has been given to leave the United States. The relator claims that the Selective Service Law must be tested by the law of nations; in other words, that Congress was bound by international law to exclude all aliens in enacting a statute which was otherwise within its province. The relator further claims that the Selective Service Law is *ex post facto*, in that he was admitted to the country under certain agreements as to international law, which would be violated by a change in his condition through acts of Congress. The relator also alleges that he is deprived of his liberty without due process of law, because he has been impressed into servitude in violation of the Thirteenth Amendment of the Constitution.

The last question has been disposed of by the Supreme Court in the case of *Arver v. United States*, 245 U. S. 366, 38 Sup. Ct. 159, 62 L. Ed. —, decided January 7, 1918, in so far as citizens are concern-

ed, since the servitude claimed is not in its nature different, when we consider the drafting of an alien in the army, than when a citizen is drafted to serve against his will.

[2] The charge that the law is *ex post facto* is evidently, like the question of servitude, of no force when separated from the proposition that an alien is free from the provisions of the law. A citizen, born before the law was enacted, might as well object that the law was *ex post facto* as to his contract rights, if Congress had power to enact the law in general. An alien comes to this country in the enjoyment of a privilege which can be terminated, except in so far as his own nation, or his rights as a subject of that nation, may protect him from such law as may be passed after his arrival. Congress could not affect his right to come into the country by a change thereafter in the requirements of admission, but in all other respects his status may be changed within the constitutional powers of Congress, just as those of a citizen. Moore's International Law, p. 67; Lem Moon Sing, 158 U. S. 538, 15 Sup. Ct. 967, 39 L. Ed. 1082.

[3] A number of cases have been decided since the passage of the Selective Service Law, holding that treaties with foreign nations have been repealed in so far as they were contrary to the definite language of the Selective Draft Act. On the Application of Victor Larrucea (D. C.) 249 Fed. 981, for writ of habeas corpus, Southern District of California, Southern Division, in the Matter of Troiani v. Heyburn (D. C.) 245 Fed. 360, Eastern District of Pennsylvania, and in the case of *Ex parte Hutfis* (D. C.) 245 Fed. 798, it has been held that the act in question expressly suspends both laws and treaty rights in conflict therewith, except as such treaty rights may be re-established with the approval of the Senate, through the Department of State. These cases are in accord with the previous decisions. By article 6, clause 2, of the Constitution, the Constitution, the laws of Congress, and treaties made under the authority of the United States, are the supreme law of the land. But that law is based upon the latest enactment, whether by statute or treaty. Treaties must be held by the courts to give way to an express subsequent statute. *The Kestor* (D. C.) 110 Fed. at page 448; *The Nereide*, 9 Cranch (13 U. S.) at page 421, 3 L. Ed. 769; *The Cherokee Tobacco*, 11 Wall. (78 U. S.) at pages 620 and 621, 20 L. Ed. 227; *Head Money Cases*, 112 U. S. at page 598, 5 Sup. Ct. 247, 28 L. Ed. 798; *Whitney v. Robertson*, 124 U. S. at page 194, 8 Sup. Ct. 456, 31 L. Ed. 386; *United States v. Lee Yen Tai*, 185 U. S. at pages 220 and 221, 22 Sup. Ct. 629, 46 L. Ed. 878.

[4, 5] Nor does the contention that international law forbids the enactment by Congress of a statute requiring aliens to serve in the army give to the courts of the United States any authority to set aside nor to restrain Congress from enacting a statute violating the so-called rule, if it sees fit so to do.

The relator has cited a number of cases and opinions promulgated during the last century, in which it has been stated that it was contrary to the policy of the United States government to recognize the right of any nation to impress into military service subjects of another nation. See 4 Moore's International Law, p. 51. It is not doubted that

a person holding only a declaration of intention is still a subject of a foreign country. In *re Moses* (C. C.) 83 Fed. 995; *United States v. Uhl* (D. C.) 211 Fed. 628; *Frick v. Lewis*, 195 Fed. 693, 115 C. C. A. 493.

But under present conditions the arguments which have been heretofore urged against impressing the citizens of a neutral into military service do not apply with the same force and scope in this war, where the various nations whose treaties have been repealed in this respect by the Selective Draft Law are engaged in military service for their own existence, as allies or friends of the United States. Such a question can be determined only by agreement between the nations as to whether one country shall be allowed to draft the men of other nationalities within its borders. In a common cause, the act of one nation, in the favor of all, is not an act of aggression against the United States, nor against any other country, and is not analogous to capture of citizens by a foreign country in time of peace, or by a belligerent, for its own military purposes, in war against another country. But the rules of international law, like those of existing treaties or conventions, are subject to the express acts of Congress, and the courts of the United States have not the power to declare a law unconstitutional, if it be within the authority given to Congress as to legislation, even though the law itself be in contravention of the so-called law of nations. *The Nereide*, supra; *Respublica v. De Longchamps*, 1 Dall. (1 U. S.) 111, 1 L. Ed. 59; *The Scotia*, 14 Wall. (81 U. S.) 170, 20 L. Ed. 822; *Opinions of the Attorney General*, vol. 10, at page 521, and also the cases hereinbefore cited.

[6] This question can be raised by habeas corpus (*Head Money Cases*, supra, 112 U. S. at page 598, 5 Sup. Ct. 247, 28 L. Ed. 798; *Re Ah Lung* [C. C.] 18 Fed. 28); but the issue must be resolved in favor of the government when the relator is held under a specific act of Congress as in the present case.

No other point being made out as to which the decision of the authorities under the draft law was not after fair hearing and as to which their decision was not final (*Angelus v. Sullivan*, 246 Fed. 54, — C. C. A. —), the writ will be dismissed, and the relator remanded to the military authorities.

UNITED STATES *ex rel.* CUBYLUCK *v.* BELL.

(District Court, E. D. New York. October 17, 1917.)

HABEAS CORPUS — 16—EXEMPTIONS—PRESENTATION OF CLAIM.

Under Selective Service Act May 18, 1917, c. 15, §§ 2, 4, 5, 40 Stat. 76, exempting nondeclarant aliens, providing for local and district boards to dispose of exemption claims, but requiring all male persons between 21 and 30 to register, a nondeclarant alien, who did not present his claim for exemption to the local or district boards, and failed thereafter to apply for a reopening of his case pursuant to the regulations, and who has been certified into military service, is not entitled to exemption on writ of habeas corpus, for the act does not of itself excuse

nondeclarant aliens, but requires that their exemption claims be presented to the boards for allowance.

Habeas Corpus. Petition by the United States, on relation of George Cubyluck, for a writ of habeas corpus against J. Franklin Bell, Major General, Commander of the Seventy-Seventh Division of the National Army at Camp Upton, N. Y. Writ dismissed, and relator remanded.

Elias Rosenthal, of New York City, for petitioner.

Melville J. France, U. S. Dist. Atty., of Brooklyn, N. Y., and Henry L. Stimson and James Byrne, both of New York City, opposed.

VEEDER, District Judge. The relator seeks discharge from military service on the ground that he is an alien who has not declared his intention to become a citizen. I think the issue presented is essentially one of statutory interpretation. By the Selective Service Act, approved May 18, 1917, Congress has declared that:

"All male persons between the ages of twenty-one and thirty, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President." Section 5.

In express terms the same section provides that:

"All persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this act provided."

Among the classes of male persons therein exempted or excused are aliens who have not declared their intention to become citizens. Section 2.

Having regard to the provisions of section 5, above quoted, it is apparent that facts sufficient to bring a person within any one or more of the classes exempted or excused must be affirmatively proved by such person. The requirement of proof of a fact necessarily involves a tribunal to hear and determine it. In this respect, again, the act is explicit. For obvious considerations of public policy this authority is vested in administrative tribunals. Local boards, appointed by the President, "shall have power within their respective jurisdictions to hear and determine, subject to review as hereinafter provided, all questions of exemption under this act, and all questions of or claims for including or discharging individuals or classes of individuals from the selective draft," except industrial exemptions. Section 4. From such local boards an appeal may be taken to a district board to be established by the President in each federal judicial district; and "the decisions of such district board shall be final, except that, in accordance with such rules and regulations as the President may prescribe, he may affirm, modify, or reverse any such decision." Section 4. Pursuant to the authority vested in him by the terms of the act, rules of procedure have been prescribed by the President with respect to the time and manner in which claims of exemption or excuse shall be presented and heard.

In this case the relator did not present to his local board, in accordance with the regulations, a claim of exemption or excuse from mili-

tary service on the ground of alienage; nor has he ever made such a claim to his district board. He has not even availed himself of the privilege accorded by the regulations of applying to his local board for the reopening of his case. No occasion for judicial intervention appears, and the writ is dismissed.

UNITED STATES ex rel. BARTALINI v. MITCHELL.

(District Court, E. D. New York. February 27, 1918.)

1. ALIENS ⚡68—DECLARATION OF INTENTION.

While an alien, to take advantage of his declaration of intention must file his petition for naturalization within seven years, yet a failure to file a petition within such period does not, unless the alien leaves the country, raise a presumption that he has resumed his old and interrupted allegiance to a foreign power.

2. ARMY AND NAVY ⚡20—SELECTIVE DRAFT ACT—DECLARANT ALIENS.

An alien, who had taken out his first papers, but had allowed seven years to elapse, and thus lost the right to become at once a citizen of the United States, must, having remained in the country, be presumed a declarant alien, subject to military service, within the terms of Selective Draft Act, May 18, 1917, c. 15, 40 Stat. 76; there being nothing in the terms of the act to indicate that Congress intended to limit the draft to those who had become declarants within seven years, and so were entitled to immediately petition for admission to citizenship.

3. HABEAS CORPUS ⚡16—REMEDY—SCOPE.

Habeas corpus is the appropriate remedy to test whether a quasi judicial body, as exemption boards created by the Selective Draft Act, are acting without the scope of their jurisdiction.

4. ARMY AND NAVY ⚡20—SELECTIVE DRAFT ACT—DETERMINATION OF EXEMPTION BOARDS.

The Selective Draft Act, after providing in section 1 for increase of the army by draft and in section 2 that the draft shall be based upon liability to military service of all male citizens, or male persons not alien enemies, who have declared their intention to become citizens between prescribed ages, declares in section 4 that the decision of the district exemption board shall be final, unless overruled on appeal to the President. Section 5 requires all male persons within the prescribed ages to register, and declares that they are subject to draft, unless exempted or excused as provided. *Held* that, as section 4 provides the means for exemption, the determination of the local and district boards, certifying one into the service as a declarant alien, is final, where the question was raised, unless such alien was deprived of a fair hearing, even though he was not in fact a declarant alien.

Habeas Corpus. Petition by the United States, on the relation of Omero Bartalini, for a writ of habeas corpus against Capt. Cornelius Von E. Mitchell, of Battery F, 305th Field Artillery, or any person in charge of said Battery, Camp Upton, Suffolk County, Long Island. Writ dismissed, and relator remanded.

Bennet & Cooley, of New York City, for petitioner.

Melville J. France, U. S. Atty., of Brooklyn, N. Y., for respondent.

CHATFIELD, District Judge. A writ of habeas corpus has been issued under the authority of *Angelus v. Sullivan*, 246 Fed. 54, —

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

C. C. A. —, upon which Bartalini has been produced, return filed, and argument had upon the record. None of the facts have been traversed.

[1, 2] Bartalini is a Russian alien, who took out his first papers, but allowed seven years to elapse, and thus lost the right to become at once a citizen of the United States. The record shows that he notified the local board of these facts, but was certified for duty as a declarant. He took an appeal, which was dismissed, and was at Camp Upton when the writ of habeas corpus was issued.

The decision of the Supreme Court in the Case of Antonio Morena, 245 U. S. 392, 38 Sup. Ct. 151, 62 L. Ed. —, January 7, 1918, establishes the proposition that Bartalini could not become a citizen by the use of his old declaration of intention. It is contended, therefore, on his behalf, that Bartalini is an alien, and not a declarant, within the meaning of those terms under the Selective Service Law. But such a conclusion would in many instances defeat the evident purpose of the law. Bartalini was of the age required to register, and as a matter of fact he had declared his intention to become a citizen. The basis of the seven-year limitation upon the use of first papers is not a presumption that the person neglecting to become a citizen has resumed his old and interrupted allegiance to a foreign power. This presumption happens only if the alien has also left the United States. But a declarant must make use of his papers within the seven years solely because Congress has enacted a statute which places that limit upon the use of the old declaration of intention in filing a petition to become a citizen. During all of these seven years he is declarant. Thereafter, and so long as he is in this country, he remains a declarant, since he is in the position of having stated his intention to become a United States citizen and to give up his former allegiance. He may prove the continuation of this intention by filing a new declaration. But he does not at the end of seven years resume, in all respects, the national rights of those who have never filed such a declaration.

Legislation has frequently been proposed extending the seven-year period, and in many circuits in the United States those who held declarations of intention filed under the former law could, until the Morena decision, become citizens at any time, upon making application. There is nothing in the Selective Service Act to indicate that Congress intended to limit the draft to those who had become declarants within seven years, and, on the contrary, the language used expresses the intention of Congress to include all males, not alien enemies, who were not still plainly insisting upon their status as aliens before the passage of the Draft Law.

The question of drafting aliens who have filed a declaration of intention might be raised as the basis for the discussion of treaty provisions, but in the meantime Congress certainly has the right to include such a man in the Draft Law. This court will not hold that a man who has severed his relations by declaring his intention to renounce his allegiance to his former sovereign, and who may even during the war reaffirm that intention, so as to escape military service for his native land, can successfully resist the act of Congress, which asserts rights on the part of the United States under which he can be com-

pelled to do his duty for the United States until and unless his former sovereign changes those rights by the negotiation of a treaty.

[3, 4] But, if not considered a declarant, the relator cannot be discharged, because of the provisions of the Selective Service Law. It has been held in a number of cases under the Selective Draft Act that the provisions of section 4, making the decision of the district board final unless overruled on direct appeal to the President, are sufficient to show an express direction of Congress that the machinery of the Draft Law is to be carried out in accordance with the language of the statute, and in no other way.

In *Angelus v. Sullivan*, *supra*, this matter has been discussed at length. It was there held that a court could inquire, by way of habeas corpus or certiorari, into the proceedings of the bodies created by the Draft Law, only to the extent of seeing whether they were acting entirely outside the law by which they were created; in other words, whether they were acting without jurisdiction. It is evident that a determination by a body, which is in fact acting without jurisdiction, that the subject-matter as to which action is being taken is properly before that body, and that its jurisdiction extends thereto, can be tested by habeas corpus.

A number of cases are cited in the *Angelus* decision to that effect. But it was held in the *Angelus* Case, as in *U. S. ex rel. Koopowitz v. Finley* (D. C.) 245 Fed. 871 (Mayer, J., S. D. N. Y.), *Ex parte Hutfis* (D. C.) 245 Fed. 798, *U. S. ex rel. Cubyluck v. Bell* (D. C.) 248 Fed. 995 (Veeder, J., E. D. N. Y.), and *U. S. ex rel. Troiana v. Heyburn* (D. C.) 245 Fed. 366 (Dickinson, J., E. D. Pa.), that a determination by the local and district boards on any question of fact or of law, within the scope of their jurisdiction, was final except on appeal to the President. It was also held in these cases, and particularly in the *Koopowitz* Case, that failure to follow the procedure established by the Draft Law was equivalent to a waiver of the right to seek exemption. It was also held that the word "exemption" included a claim of absolute exception from the class of those liable to be drawn for military service.

The Selective Service Law does not set forth these various provisions in sequence. Section 1 authorizes the President to raise the increased forces of the army in various ways, one of which is by draft. Section 2 provides that this draft shall be based upon liability to military service of all male citizens, or male persons, not alien enemies, who have declared their intention to become citizens, between the ages of 21 and 30 years, both inclusive. But thereafter the law provides, in section 5, that all male persons between the ages of 21 and 30, both inclusive, must register. This provision establishes a class which includes alien enemies and aliens who have not filed a declaration of intention. These are "subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this act provided."

In order to find what is meant by "exempted or excused," we must look back to the earlier provisions of the law, as set forth in section 4, which also gives the machinery and the methods for hearing all exemptions or excuses, as well as the power to hear and determine all

questions as to excluding or discharging "persons or classes of persons from the selective draft under the provisions of this act, not included within the original jurisdiction of such local boards." In section 4, the "exemptions" provided for cover officers of the United States, duly ordained ministers, those in the military and naval service, etc. Those who may be "excused," in accordance with the rules and regulations promulgated by the President, are county and municipal officials, workers in armories, arsenals, and navy yards, those having dependents, those found to be physically or morally deficient, etc.

The words "exempted or excused," in section 5, however, evidently include also those called under the draft, who may be able to show that they are outside of the provisions of section 2, and therefore are not subject to military service, if they establish, in the way provided by the statute, that they are not male citizens, or male declarants, between the ages of 21 and 30. In other words, after a person has registered, he is expressly made subject to the military draft law, and must serve in the army until and unless he is exempted or excused by the machinery of the Draft Law itself. The only exception to this is that stated in the *Angelus Case*, where the local or district boards can be shown to have acted outside of the Draft Law and thus to have no jurisdiction as a basis for their determination.

Under these circumstances, as was held in the cases above cited, it is impossible to hold that a hearing would be unfair, or that a person drafted could avoid the consequences of such hearing by claiming thereafter that he should not have been required to present his claim for exemption or excuse—i. e., exclusion—in the way provided by the statute and by the regulations of the President. A determination by the court that such hearing was "unfair" would be equivalent to a finding that the provisions of Congress and the regulations promulgated by the President were unfair or outside of the law. Such a holding would be entirely different from those under the Immigration Law (Act Feb. 20, 1907, c. 1134, 34 Stat. 898), where executive officials have been held to have exerted power outside of that given them by the statute, as in *U. S. v. Williams*, 200 Fed. 541, 118 C. C. A. 632, *Gegiow v. Uhl*, 239 U. S. 3, 36 Sup. Ct. 2, 60 L. Ed. 114; and *U. S. ex rel. Castro v. Williams* (D. C.) 203 Fed. 155.

It is evident that, if a person has registered who was outside of the ages specified, or who failed to claim that he was exempt, or that he was not subject to draft, he would nevertheless, if drawn, be inducted into the army, and would be subject to the discipline thereof in all respects, even though thereafter he might change his mind and wish that he had claimed exemption, exclusion, or freedom from all liability to the exercise of jurisdiction under the law.

A determination by the local or district boards is final, if the question has been properly raised and decided against the individual; and the law evidently makes final a similar determination, where the question has not been properly raised by the individual himself. The reason for any such failure to present the question furnishes no basis for directing release of the individual, under a writ of habeas corpus or a writ of certiorari, if the hearing has been fair; that is, if it has been con-

ducted in accordance with the provisions of the statute and the regulations promulgated therefor. The present case furnishes no evidence of an unfair or extrajurisdictional determination of the question of liability to draft.

The writ will be dismissed, and the relator remanded.

GAZZOLA V. COMMANDING OFFICER OF FT. TOTTEN, BAYSIDE,
LONG ISLAND, N. Y.

(District Court, E. D. New York. March 6, 1918.)

1. ALIENS ⇨68—NATURALIZATION—GOOD MORAL CHARACTER—REAPPLICATION.

While admission to citizenship may be denied, if the applicant does not show that he has behaved as a person of good moral character and attached to the principles of the United States for more than five years preceding his application, the denial of an applicant's petition for admission to citizenship on the ground of an illegal sale of intoxicating liquor does not preclude him from thereafter reapplying for admission.

2. ARMY AND NAVY ⇨20—SELECTIVE DRAFT—DECLARANT ALIENS.

An alien, who had filed declaration of intention more than seven years ago, and whose petition for admission to citizenship was denied on the ground that he illegally sold intoxicating liquor, is still a declarant, within Selective Draft Act May 18, 1917, c. 15, 40 Stat. 76, for he might renew his declaration of intention, and the fact that he made an illegal sale of liquor would not preclude a subsequent petition for admission.

Habeas Corpus. In the matter of the application of Valentino Gazzola for a writ of habeas corpus against the Commanding Officer of Ft. Totten, Bayside, Long Island, N. Y. Writ dismissed, and relator remanded.

James A. Timony, of New York City, for petitioner.

Melville J. France, U. S. Atty., of Brooklyn, N. Y., for respondent.

CHATFIELD, District Judge. The petitioner is an Italian, who filed a declaration of intention on November 23, 1909. His application for final papers was denied on January 30, 1915, upon the ground, as stated by the petitioner, that he "had broken the law in selling liquor illegally." He therefore claims that he has lost the right to become a citizen of the United States and can be considered no longer a declarant. The petition alleges that this was called to the attention of the local board, that they neglected to give him any hearing, and, without other proof than his own affidavit, certified him for service. This decision was affirmed on appeal by the district board, and the petitioner is in the National Army at Ft. Totten, in this district.

[1, 2] This case differs in no essential particular from the Case of Bartalini (D. C.) 248 Fed. 997. It should be stated, however, that this man, on his own statement to the local board, did not show that he had lost the rights of a declarant. Admission to citizenship may be denied, if the applicant does not show that he has behaved as a

person of good moral character and attached to the principles of the Constitution of the United States during five years next preceding his application.

It has been held that conviction and sentence for a felony, or proof of acts showing such moral character as to justify the finding that the applicant should not be found eligible for citizenship at any time, is a sufficient reason for denial, even if the act considered occurred prior to the five-year period. But there is nothing in the Naturalization Law (Act June 29, 1906, c. 3592, 34 Stat. 596) which says in so many words that a man cannot become a citizen because of a charge of selling liquor illegally. Conviction on such a charge, or proof of guilt, without a previous trial, might require a period of five years' correct behavior thereafter; but a denial of citizenship for that reason will not of itself prevent the applicant from ever reapplying.

The petitioner states that he learned that his application for citizenship had been denied upon the 17th of March, 1916. He then had until the 23d of November, 1916, within which to make a second application upon his original first papers. After that he could renew his declaration of intention, and there seems to be no reason to suppose that he could not, at some future time, become a citizen. He is in all respects, therefore, in the same position as that of the relator in the Bartalini Case, above cited.

The writ will be dismissed, and the relator remanded.

UNITED STATES ex rel. WARM v. BELL

(District Court, E. D. New York. February 27, 1918.)

ARMY AND NAVY \Leftrightarrow 20—SELECTIVE DRAFT ACT—ENEMY ALIENS.

Where an alien Austrian, who had first papers, was certified for military service under Selective Draft Act May 18, 1917, c. 15, 40 Stat. 76, prior to declaration of war with Austria, he is not, as he was subject to the draft at the time certified, entitled to his release on habeas corpus, on the ground that the subsequent declaration of war made him an alien enemy.

Habeas Corpus. Application by the United States, on the relation of Abraham Warm, for writ of habeas corpus against J. Franklin Bell, Commander of the National Army at Camp Upton, N. Y. Writ dismissed, and relator remanded.

Charles Recht, of New York City, for relator.
Melville J. France, U. S. Atty., of Brooklyn, N. Y., opposed.

CHATFIELD, District Judge. This application is for the discharge of an alien born in Austria, who was drafted before the declaration of war with that country, and who took out valid first papers less than seven years ago. He would therefore be in a position to become a citizen of the United States, if his application therefor had been filed before the declaration of war with Austria.

It is evident from the discussion had in the cases previously de-

cided that no wrong is done this man by holding him subject to the effect of the draft, which was legal when he was certified for service. As he holds a declaration of intention, which could be used immediately if peace were declared, the only limitation upon his remaining in the army is that which an act of Congress or presidential regulations might provide. He is not being held subject to the army discipline contrary to law.

The writ must be dismissed, and relator remanded.

HALPERN v. COMMANDING OFFICER OF NATIONAL ARMY AT CAMP UPTON, N. Y.

(District Court, E. D. New York. February 27, 1918.)

1. ARMY AND NAVY ⚡20—CERTIFICATION INTO SERVICE—ENEMY ALIEN.

Where an alien Austrian, who had first papers, was certified for military service under Selective Draft Act May 18, 1917, c. 15, 40 Stat. 76, prior to the declaration of war with Austria, he is not, as he was subject to the draft at the time certified, entitled to his release on habeas corpus on the ground that the subsequent declaration of war made him an alien enemy.

2. WAR ⚡11—ENEMY ALIENS—RESTRAINT.

The discipline or restraint to be exercised over enemy aliens is a matter of treaty or international regulation.

3. ARMY AND NAVY ⚡20—SEPARATION OF POWERS—PROVINCE OF COURT.

It is not within the jurisdiction of the courts to disturb the action of the legislative or executive departments in retaining in the military service an Austrian alien with first papers, who after declaration of war with Austria claimed that he became an enemy alien, not subject to military service under the Selective Draft Act.

Habeas Corpus. In the matter of the application of Bernard L. Halpern for writ of habeas corpus against the Commanding Officer of the National Army at Camp Upton, N. Y. Writ dismissed, and relator remanded.

Herman Rosenblum, of New York City, for relator.

Melville J. France, U. S. Atty., of Brooklyn, N. Y., opposed.

CHATFIELD, District Judge. [1] The soldier in this case is an alien, who has first papers, and was within the draft, in every sense, at the time he was certified for service and sent to Camp Upton. But he was born in Austria, and since the declaration of war with Austria he insists that he is no longer subject to the draft.

His discharge on habeas corpus must be denied, for the reason that the method by which he was taken into the army was entirely lawful. The statute provides for discharge of those who should not be retained within the draft. Congress has also authority to legislate for their discharge; but, so long as they are part of the drafted army, they are subject to its laws and regulations and cannot be discharged by a court.

[2, 3] The discipline or restraint exerted over enemy aliens is a matter of treaty or international regulations. It might be that intern-

ment would be best accomplished by retaining enemy aliens in the military system, so long as they were found to be of good behavior; but certainly the court has not the power to determine when the executive or the legislative branch should deem it wise to discharge those who are lawfully within the authority of the military forces.

The writ will be dismissed, and the relator remanded.

In re TRAINA.

(District Court, E. D. New York. February 27, 1918.)

1. HABEAS CORPUS \Leftrightarrow 16—SELECTIVE DRAFT ACT—AUTHORITY OF COURT.

Whether persons certified into the National Army under Selective Draft Act May 18, 1917, c. 15, 40 Stat. 76, meet the physical and medical requirements, is solely a question for the exemption boards provided for, and not the courts.

2. HABEAS CORPUS \Leftrightarrow 16—ARMY—DISCHARGE—AUTHORITY OF COURTS.

While Rev. St. § 1116 (Comp. St. 1916, § 1884), requires recruits to be effective and able-bodied, yet, as section 1342, as amended by Act Aug. 29, 1916, c. 418, § 3, 39 Stat. 668, Articles of War, § 108 (Comp. St. 1916, § 2308a), declares that no enlisted man, lawfully inducted into the military service of the United States, shall be discharged from such service without a certificate of discharge signed by a field officer of the regiment or other organization to which the enlisted man belongs, or by the commanding officer when no such field officer is present, the courts have no authority, relator having been certified into the military service of the United States under the Selective Draft Act, to discharge him on the ground that he was afflicted with a disease making necessary his discharge, for the question whether he was entitled to a discharge is one for the military officials.

Habeas Corpus. In the matter of the application of Salvatore Traina for writ of habeas corpus directed to the commanding officer at Camp Upton, N. Y. Application dismissed.

Achille J. Oishei-Hoschek, of New York City, for relator.

CHATFIELD, District Judge. [1] The relator has applied for a writ of habeas corpus, directed to the commanding officer at Camp Upton, who, it is said, holds him without authority, in that the relator claims to be afflicted with a disease which he alleges makes necessary his discharge from further army service. He bases the application for habeas corpus, in the first place upon the provisions of the Selective Service Act and the rules promulgated thereunder, which direct rejection and discharge from military service of men with diseases and organic troubles which the relator claims are less severe than those from which he suffers.

It must be held that this court has no jurisdiction either to consider the physical or medical standards by which persons otherwise eligible are to be judged either for admission to or discharge from the National Army. Such matters are clearly within the jurisdiction of the local and district boards or the army authorities themselves.

[2] But the relator also claims that the general provisions of section

1116, R. S. (Comp. St. 1916, § 1884), requiring recruits to be "effective and able-bodied," make it illegal to retain a man suffering from such physical disability in the military forces of the United States, and that this court has power, on a writ of habeas corpus, to enforce the discharge of any one so afflicted.

No authority has been cited from which it could be inferred that the court has such general power over the military forces of the United States. Any determination that a person should no longer be retained in the army must be sought at the hands of the army itself, even if it be evident that refusal to discharge would be illegal. Section 1342, R. S., as amended by Act Aug. 29, 1916, being the Articles of War (see section 108).

But, more than this, if the decision by the military authorities is adverse to the applicant, the court has no jurisdiction, if that decision is within the jurisdiction of the military authorities to determine. It has always been held, and is believed to be the law, that all such jurisdiction is vested in the military authorities, and that they have complete control and discipline over a man until they see fit to discharge him, if he has been lawfully brought into the service, and if the military authorities have not gone outside of the jurisdiction given them by statute, in administering the affairs of their own commands.

The application must be denied.

UNITED STATES ex rel. BROWN v. COMMANDING OFFICER OF SEVENTY-SEVENTH DIVISION OF NATIONAL ARMY OF UNITED STATES AT CAMP UPTON, YAPHANK, LONG ISLAND, N. Y.

(District Court, E. D. New York. February 27, 1918.)

HABEAS CORPUS \Leftrightarrow 16—SELECTIVE DRAFT ACT—DETERMINATION OF EXEMPTION BOARDS.

Where relator was duly certified into the military service by the local and district boards in accordance with Selective Draft Act May 18, 1917, c. 15, 40 Stat. 76, he cannot by habeas corpus obtain release because he had convinced the adjutant general of his state that the examination by the medical officers of the local board had not been sufficient, for, while Regulations, § 27, gives the Governor, acting through the adjutant general, supervision of the execution of the selective draft, the determination of the exemption boards is final, save for appeal to the President.

Habeas Corpus. Petition by the United States, on the relation of Irwin F. Brown, for a writ of habeas corpus against the Commanding Officer of the Seventy-Seventh Division of the National Army of the United States at Camp Upton, Yaphank, Long Island, N. Y. Writ dismissed, and relator remanded.

Henry M. V. Connelly, of New York City, for relator.

Melville J. France, U. S. Atty., of Brooklyn, N. Y., opposed.

CHATFIELD, District Judge. The relator seeks to be dismissed, on the claim that medical examination would disclose the necessity or advisability of discharging him for ill health. It appears that exam-

ination by physicians satisfied the adjutant general of the state that the examination by the medical officers of the local board had not been sufficient, or that another should be held. He endeavored to reach the board, so as to have them hold the relator from being sent to Camp Upton. This effort was unsuccessful, and the relator was turned over to the military authorities.

The Governor is by section 27 of the Regulations given general supervision over all matters arising in the execution of the selective draft within his state. The adjutant general is by section 27 made the officer through whom the Governor exercises his functions. But by section 27 all matters of exemption and deferring of classification are left to the exclusive determination of the local and district boards. The President alone can review their determination.

Thus neither the Governor nor the adjutant general had the power to reverse the holdings of the local and district boards. If the information from the adjutant general did not reach the local board in time for it to act, then the only way in which the relator can be discharged for physical disability is to apply to the army authorities therefor. This court has no jurisdiction (even if the finding of the medical examiners of the local board was incorrect) to release the applicant, as the determination was within their power and jurisdiction, at the time it was made.

The writ will be dismissed, and the relator remanded.

THE ELISABETH VAN BELGIE.

(District Court, S. D. Florida. November 15, 1917.)

1. SEAMEN ⚡29(5)—ACTION FOR WRONGFUL DEATH—PLEADING.

A libel against a foreign steamship, to recover damages under a state statute for a wrongful death, alleged to have been caused by the negligence of respondent, *held* to sufficiently allege that the injury occurred within the territorial waters of the state.

2. ADMIRALTY ⚡65—PLEADING—EXCEPTIONS TO LIBEL.

Under the liberal rules of pleading in admiralty, exceptions to the libel may be taken in the answer, although the better practice is to except before answering.

In Admiralty. Suit by Justina Strachan against the Belgian steamship Elisabeth Van Belgie. On exceptions to libel. Exceptions overruled.

L. A. Harris, of Key West, Fla., for libellant.

G. Bowne Patterson, of Key West, Fla., for claimant.

CALL, District Judge. [1] On September 1, 1917, libellant filed her libel against the Belgian steamship Elisabeth Van Belgie, claiming damages for the death of her husband, claimed to have been caused by the negligent management of the said steamer. The first article in the libel alleges as follows:

"On the morning of August 31, 1917, the said steamship Elisabeth Van Belgie was stranded on the Western Dry Rocks, a portion of the Florida Reefs within the navigable waters and within the territorial limits of the state of Florida, and within the jurisdiction of this honorable court."

The libel then proceeds to state the incidents of the injury, etc., after alleging that the vessel had been relieved of her position on the reef and the salvage services completed.

The master of the vessel filed his claim and stipulation, and on September 14th filed his answer, embodying therein certain exceptions to the libel:

(1) That this court had not jurisdiction. (2) Because the libel shows that at the time of the accident it was not within the jurisdiction of the state of Florida, but on the high seas. (3) Because no act of Congress giving right of action is shown in the libel, giving right of action for death on the high seas.

These exceptions were argued before me; the proctor for the claimant insisting that this court was without jurisdiction because, under the allegations of the libel, it was not alleged that the accident happened within the territorial waters of the state of Florida, and the vessel, being foreign owned, was not liable for a death happening on the high seas. I do not understand that proctor for claimant contended that the exception was well taken if the death resulted from an accident happening in such territorial waters. The issue between the proctors in this case resolved itself into whether the libel charged that the accident happened in such territorial waters. If it does, then of course it becomes a question of fact, and cannot be raised by exception.

Taking the allegations of the libel, especially that portion copied above, it bears the construction that such accident did occur in such territorial waters. The further allegations that the accident occurred after the steamship was relieved from the reef, and while the decedent was endeavoring to take off the salvors would not in my opinion so negative the position of the vessel as set forth in the first article as to require the court to say that she was therefore on the high seas. There can be no question at this day that courts of admiralty will enforce rights maritime given by state statutes, nor can there be a doubt that the statute of the state of Florida does give a right of action for a death resulting from an accident happening in its territorial waters. I have not considered in this case the question of whether that right of action can be enforced in a proceeding in rem or whether it must be brought in personam. That point was not argued before me by proctor for claimant.

[2] Proctor for libellant insisted that the exceptions came too late, having been made in the answer. While I think the better practice is to except before answering, yet the rules of pleading in admiralty have never been governed by the strict technicalities of the common law, and the waivers by priority of pleading not enforced.

The exceptions to the libel will therefore be overruled.

THE WABASH.
THE DEFIANCE.

(District Court, E. D. New York. February 11, 1918.)

1. TOWAGE \Leftrightarrow 11(5)—STRANDING OF TOW—EVIDENCE OF FAULT.

That a tug, before the stranding of her tow, had been using long hawsers in inland waters in violation of the statute, does not prove faulty navigation in matters which could not be affected by the length of the tow.

2. TOWAGE \Leftrightarrow 12(2)—STRANDING OF TOW—FAULT.

A tug with three barges in tow, coming into New York Harbor, stopped in the Main Ship Channel to shorten the hawsers at a place which was unusual and at the time unsafe, because the tide created a side drift. The middle barge, which was of the greatest draft, had an apparatus for shortening her hawsers, which she proceeded to do, taking more time than was necessary. The tug, observing that the tide was setting the tow toward shallow water, signaled the barge to make fast, with the intention of towing ahead; but the barge paid no attention to the signal, and when it was repeated 10 minutes later she was aground and suffered injury. *Held*, that both vessels were in fault; the tug for not stopping in a safer place, and the barge for taking unnecessary time, and for not obeying the first signal.

In Admiralty. Suit by Thomas J. Scully, owner of the barge Wabash, against the P. Dougherty Company, owner of the tug Defiance. Decree dividing damages.

Macklin, Brown & Purdy, of New York City, for libellant.

Harrington, Bigham & Englar, of New York City, for respondent.

CHATFIELD, District Judge. This case arises from the grounding of a barge on the southerly side of Flynn's Knoll, between Red Buoys 8 and 10, on the northerly side of the Main Ship Channel in New York Harbor, on the 9th day of September, 1915. The barge, which was loaded with 1,635 tons of coal, had come from Hampton Roads, Va., on the way to Providence, R. I., in tow of a large ocean-going tug, the Defiance, owned by the respondents herein.

[1] It appears that the Defiance had agreed to tow the Wabash and another coal barge directly to Providence, going around outside of the easterly end of Long Island. The other barge was not ready, and the plan was changed with the consent of the Wabash. Thus the Defiance brought the Clara Brooks, loaded with railroad ties, and a third barge, the Arundel, loaded with piling, in addition to the Wabash, which was in the middle of the tow. The Brooks and the Arundel were coming to New York, and so the Defiance came in at Sandy Hook. Three days were consumed in coming from Hampton Roads. The weather was fine, but there appears to have been some ground swell from the east, and on the morning of the 9th the tow left the Scotland Lightship and proceeded through the Gedney Channel into the Main Channel, arriving opposite Flynn's Knoll about 8'a. m., when the flood tide had about ceased to run. The captain of the Defiance had not deemed it prudent to shorten his hawsers from the length used in ocean towing, while outside of Sandy Hook, because of the ground

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

swell. He thus violated the statute prohibiting the use of long hawsers in inland waters, and this is now assigned as one of the faults against the Defiance. He evidently shortened his hawsers at this point to comply with the statute; and also to avoid any additional towing out of his course.

[2] As has been repeatedly held, this court is not in this action engaged in prosecuting the captain for violation of the law, and such violation does not prove faulty navigation in matters which could not be affected by the length of the tow. In the case at bar, the captain of the Defiance knew that he would violate the law unless he shortened his hawsers, and hence proceeded to do so. But violation of the statute before the accident does not add to the responsibility for the accident in question. The sole issue as the case stands is whether the Defiance was negligent from the standpoint of navigation in shortening the long hawser, under the circumstances of the situation, at the precise point where this maneuver was attempted.

The libel charges fault on the part of the tug in attempting to take too large a tow with insufficient power, and in failing to keep the barge in the channel. No mention was made of the issue which has been tried until the testimony of the witnesses as to the action of the tide made it apparent that a side drift (due either to the last of the flood tide still setting to the northwest against Flynn's Knoll, or to the beginning of the ebb tide, which for a short time swings up from Sandy Hook Bay in the same direction, at this particular point) was the force which diverted the Wabash from her course and landed her on the bank, where she could not be extricated until the following day. In the meantime the Defiance proceeded to New York with the other two boats, and the Wabash was pounded on the shoal by the ground swell, so as to receive the injuries complained of in the action.

It appears that the Wabash had apparatus with which to shorten the hawser from the Brooks. The hawser from the tug ran back to the Brooks, which had no means of shortening the hawser between her and the Wabash, and the hawser of the Wabash extended to the Arundel, which also had no means of shortening this hawser. The Brooks and the Arundel were shallow barges, while the Wabash was a converted bark and drew 22 or 23 feet loaded.

The testimony shows plainly that the time consumed by the Wabash, either in shortening her own hawser to the Arundel or in shortening the hawser between the Brooks and the Wabash, was considerably more than was required by the Defiance in shortening the hawser to the Clara Brooks. The Defiance, observing that the tide was setting the boats over towards Flynn's Knoll, blew a signal to the Wabash to make fast, with the intention of towing the boats up the channel and out of danger to a point where the shortening could be more safely accomplished. This signal was not obeyed or noticed by the Wabash, and after several minutes another was blown, but by this time the Wabash was aground.

There is a conflict between the witnesses as to whether the maneuver of shortening the hawsers should have been attempted at Flynn's Knoll. It appears that it is ordinarily done outside of the Hook, or

else further up toward the Narrows. But the testimony does not fix the entire fault on the part of the Defiance. Apparently the Wabash met with no difficulty in shortening the hawsers in question. Nor was there any reason why she could not make her hawser fast in the space of one or two minutes. She did not attempt anything for which she was not equipped, and no reason has been shown why she did not make the hawser fast and allow the Defiance to proceed with the tow when the signal was given. The master of the Arundel was seated on his vessel watching the operation, and testifies that the Wabash paid no attention to the signal to make fast. Other witnesses corroborate the statement that the Wabash paid no attention to the signals from the Defiance.

It is impossible to hold that the libelant sustained the burden of proof, so as to show that the fault for the injury rested entirely upon the tug. On the contrary, it would appear that the master of the Wabash was also at fault, and the failure of the libelant to allege, prior to the taking of testimony, the same faults now urged by him, must be traced to the same source, viz. that the captain of the Wabash failed to appreciate or understand the dangerous situation, and did not pay attention to the Defiance until he had completed the shortening of his own hawser.

But the Defiance miscalculated the tide, the room available for the maneuver attempted, and the draft of the Wabash. The captain of the Defiance evidently thought he might escape grounding, even when he saw the Wabash drifting, for he delayed some 10 minutes before giving the second signal to make fast, and during this time he was waiting for a tow coming down the bay to pass across his bow. He then started ahead, and found the Wabash had become fast.

On the whole case, both the Defiance and the Wabash were at fault, and responsibility must be divided. The libelant may have half damages and one-half costs.

FRAZIER v. LUCKENBACH et al.

(District Court, S. D. Florida. April 15, 1918.)

1. SHIPPING ⚡82—OWNERS—LIABILITY.

Where the owners of a properly constructed vessel chartered the same to independent shippers for a monthly payment, all expenses save wages of the crew to be paid by the charterers, the owners are liable only for the negligent acts of the master or crew in navigating the vessel, or in some duty necessary to be performed by them to enable the vessel to receive or carry cargo safely.

2. SHIPPING ⚡84(2)—SHIPOWNER—DUTIES—STEVEDORES.

Where a shipowner chartered a vessel on monthly payments, the charterer paying all expenses save the wages of the crew, the owner was under no duty to provide lights at an open hatch while in port, nor to light the portion of the vessel between decks, though stevedores were engaged in loading the vessel.

In Admiralty. Libel by G. W. Frazier against Edgar F. Luckenbach and the estate of Edgar Luckenbach. Libel dismissed.

Zewadski & Nysewander, of Tampa, Fla., for libelant.

E. O. Locke, of Jacksonville, Fla., and Carter & Carter, of New York City, for respondents.

CALL, District Judge. The libelant claims damages for personal injuries received while engaged as a stevedore in loading a cargo of phosphate upon the steamship Luckenbach. He had been working in one hold of the vessel trimming cargo, and was ordered to go to another hold aft, there to trim cargo. The method of loading the phosphate rock is by a pipe from the elevator into the hold of the vessel then being loaded; the trimmers being below, and as the phosphate comes in it is shoveled into the wings from the pyramid formed as the material comes from the elevator. In passing from the hold where he had been working to the hold to which he was ordered, he went along the upper between-decks and fell before reaching the hatch to which he was going, into the hold, and was injured.

The libel alleges that the deck plates at the place where libelant fell were taken up, leaving open spaces, through one of which he fell, and further that the officers of the ship had negligently failed to place lights to warn any one of such open spaces. The proofs show without contradiction that the owners had chartered the vessel to independent shippers for a monthly payment; that the cost of operation (except wages, etc., of the crew), the expense of loading, etc., were to be paid by the charterers; that the libelant was employed by the head stevedore, who had a contract with the charterers to load said vessel; that the crew of the steamer took no part in said loading; that it was the duty of the head stevedore to inspect the cargo holds, and see if they were in fit condition to be loaded, and to furnish, and did furnish, lanterns to be used to light the trimmers in their labor; that thick dust arose from the phosphate while coming into the hold, which made it impossible to see further than a foot.

[1] Upon these facts there is no conflict. While there is conflict as to the nature of the between-decks, the overwhelming weight of the testimony shows the following facts: The Luckenbach was what is known as an open between-decks ship, no permanent deck having been laid upon the beams extending athwartship, with spaces between about 4 feet 6 inches; that it was between these beams that libelant fell while passing from one hold to the other.

Under this state of facts, is the libelant entitled to recover from the owners of the ship? I think not. As I understand the law, the owners are not responsible under such circumstances, except for negligent acts of the master or crew of the chartered ship in navigating the vessel, or some duty necessary to be performed by them to enable the vessel to receive or carry her cargo safely. Here the vessel was at the elevator receiving cargo. The construction of open between-decks ships is recognized as proper construction, and materially aids in trimming such cargo as phosphate rock, expediting the work of the trimmers in shoveling the rock into the wings of the vessel and filling all the spaces, and to that extent adds to the safety in carrying the cargo.

[2] So far as the allegation of want of light, it has been said that no obligation rests upon the shipowner to provide lights at an open hatch while in port; nor does the duty rest upon the shipowner to light that portion of between-decks constructed as was this vessel.

I am of opinion, therefore, that the libelant cannot recover, and the libel will be dismissed. It will be so ordered.

THE FLORENCE H.

(District Court, S. D. New York. April 22, 1918.)

1. ADMIRALTY ⚡43—JURISDICTION—LIBEL.

Regardless of the general principles that a vessel owned by the United States and in its possession is immune from any process of court, a vessel requisitioned by the United States Shipping Board Emergency Fleet Corporation for national purposes connected with the war, and delivered by the Fleet Corporation to the United States Shipping Board, a governmental agency, and registered in the name of the United States, is subject to arrest under libel for collision in the high seas while manned by a French crew, though the vessel had been chartered by the Shipping Board to the French government to transport a cargo of food; Shipping Act Sept. 7, 1916, c. 451, § 9, 39 Stat. 730 (Comp. St. 1916, § 8146e), declaring that vessels, while employed solely as merchant vessels, shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein or not.

2. COLLISION ⚡115—VESSEL—LIABILITY.

It is settled in admiralty that a ship is liable for the tortious acts of any one who lawfully comes in possession of her and directs her navigation, be he charterer, agent, or crew.

3. COLLISION ⚡115—LIEN OF.

Where a vessel, requisitioned by the United States Shipping Board Emergency Fleet Corporation and chartered to the French government, damaged a British vessel in a collision, such vessel is subject to the lien

of collision, though belonging to the United States and operated by a French crew; Shipping Act, § 9, having made vessels so taken, while employed as merchant vessels, subject to laws, regulations, and liabilities governing merchant vessels.

4. ADMIRALTY ⇨6—JURISDICTION.

Despite the rule that the act of a sovereign cannot be illegal within its borders, a libel against an American vessel requisitioned by the United States Shipping Board Emergency Fleet Corporation, and chartered to the French government on account of a collision occurring on the high seas, while the vessel was in charge of a French crew cannot be denied, because it would involve a scrutiny of the conduct of the French crew; the republic of France having no jurisdiction over the high seas, and the court not being subject to a diplomatic embarrassment.

5. ADMIRALTY ⇨6—COURTS—AUTHORITY OF.

A court is not authorized to treat in any fashion with foreign powers, and should be quite inaccessible to any suggestions based on international considerations, therefore a court of admiralty will not in its discretion dismiss a libel on the ground that it would involve the scrutiny of the conduct of seamen or agents of the French government, unless a suggestion of diplomatic embarrassment be made by the officers of the government responsible as to those relations.

In Admiralty. Libel by H. E. Moss & Co. against the steamer Florence H. On objections to the jurisdiction of the court. Objections and suggestions overruled, and cause allowed to proceed.

H. E. Moss & Co., the owners of the British vessel Mirlo, filed a libel in rem against the steamer Florence H., alleging a collision on the high seas, for which the libel claimed damages. The stipulation upon which the suggestion of record was heard stated that the Florence H. up to August 3, 1917, was under construction at one of the private shipyards of the United States. On that day the United States Shipping Board Emergency Fleet Corporation, under the Urgent Deficiency Act of June 15, 1917 (40 Stat. 182, c. 29), requisitioned the Florence H. for national purposes connected with the war and took title by executive order of the President under powers conferred on him by that act. After her completion, the Florence H. was delivered by the Fleet Corporation to the United States Shipping Board, a governmental agency of the United States, and was registered in the name of the United States by the Shipping Board on the 19th day of November, 1917. Subsequently the board chartered the Florence H. to the French government for one round trip voyage from the United States to France. The charter was a demise, and she was manned by a French crew and carried a cargo of food for the French government. Returning from France in ballast, and while still in the possession and control of her French crew, she came into collision with the British steamer Mirlo, owned by the libelants. On her arrival in New York the French government redelivered her to the Shipping Board, which in turn redelivered her to the United States Shipping Board Emergency Fleet Corporation under a charter which likewise constituted a demise. After this delivery she was berthed in the port of New York for a cargo belonging to the French government, which was to be transported from that port to France on behalf of the French government. She remained, however, still in the possession of the Fleet Corporation under the aforesaid charter. The Fleet Corporation was organized under the laws of the District of Columbia in pursuance of section 11 of the Shipping Act, passed September 7, 1916 (Act Sept. 7, 1916, c. 451, 39 Stat. 728 [Comp. St. 1916, §§ 8146a-8146r]). All the stock is held by the United States Shipping Board, except one share each held by the six trustees of the Shipping Board by virtue of their title.

In accordance with the prayer of the libel, process was issued from the District Court to the marshal for the Southern district of New York, who, in pursuance of the said process, arrested the steamship Florence H. and put

his custodian in charge of her, and thereafter, at the request of the United States Shipping Board Emergency Fleet Corporation, the custodian was withdrawn in consideration of a letter by the counsel for the United States Shipping Board Emergency Fleet Corporation, agreeing to give a bond to cover the claim of the libellant in the event that the court should sustain jurisdiction against the Florence H. The case in its present aspect, therefore, is to be dealt with upon the assumption that the marshal is now in actual custody of the ship. The United States Shipping Board and the Emergency Fleet Corporation appear by admiralty counsel and suggest upon the record that the ship may not be subject to arrest as in ordinary civil cases. The district attorney for the Southern district of New York likewise appears specially on behalf of the United States and objects to the jurisdiction of the court. Mr. James K. Symmers appears as *amicus curiæ* on behalf of the French government.

John M. Woolsey, of New York City, for libellants.

Francis G. Caffey, U. S. Atty., of New York City, appearing specially by John Hunter to object to the jurisdiction.

Alfred Huger, of Charleston, S. C., and Henry H. Little, of Norfolk, Va., for U. S. Shipping Board and U. S. Shipping Board Emergency Fleet Corp.

James K. Symmers, of New York City, as *amicus curiæ*, appearing on behalf of the republic of France.

LEARNED HAND, District Judge (after stating the facts as above). The question raised is of the propriety of the arrest attempted by the marshal in accordance with the prayer of the libel. It depends, first, upon the immunity of the ship from any arrest because of her ownership and possession; second, upon the existence of any lien arising from the collision at a time when she was in possession of the French republic under charter from the United States, assuming, of course, the truth of the facts alleged in the libel upon which the lien depended.

[1] I may assume that a vessel owned by the United States and in its possession is immune from any process of court. The *Parlement Belge*, L. R. 5 P. D. 197; *Briggs v. A Light Boat*, 11 Allen (Mass.) 157. The *Exchange*, 7 Cranch, 117, 3 L. Ed. 287, was, it is true, the case of a ship of war, and the decision can hardly be thought to go further; yet it is significant that Lord Esher in *The Parlement Belge*, supra, used it as a basis for his conclusion that a ship used for any "national public purpose" is within the immunity of the sovereign. In so far as *The Charkieh*, L. R. 4 Ad. & Ec. 59, has anything to the contrary, it must be thought overruled. Assuming the *Florence H.* to have been so immune while in the possession of the United States, yet in salvage cases it is certainly established that, where property of the sovereign is in the possession of an individual other than an officer of the sovereign, whose custody is only official, it is not exempt from process. *The Davis*, 10 Wall. 15, 19 L. Ed. 875; *The Tampico* (D. C.) 16 Fed. 491, 501; *The Johnson Lighterage Cases* (D. C.) 231 Fed. 365. Indeed, in certain cases the rule has been pressed further than this. *U. S. v. Judge Peters*, 5 Cranch, 115, 3 L. Ed. 53; *U. S. v. Lee*, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171. In each of these cases it is difficult to see that the possession of the defendant was other than

mere official custody, and yet process went (and that, too, in suits not in salvage) against the sovereign's property. Nor does it seem to me that the character of the suit can in any sense determine the question here at bar, which is only whether the sovereign's property may be subjected in invitum to the results of a contentious proceeding. It can make no difference whether the question is an implied contract arising from the salvage of the property or the existence of a lien from its tortious management. The question is whether the sovereign can be subjected to the necessity of defending his property from private claims to whose propriety he does not assent.

But, however that may be under general principles of law, the Shipping Act (section 9) removes any question about the liability of such vessels to arrest provided they are "employed solely as merchant vessels." The sentence in question reads as follows:

"Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein."

This provision shows the express purpose that all such vessels shall form part of the mercantile marine of the country, and the question revolves itself only into whether the vessel in question at the time of the arrest was "employed solely as a merchant vessel." As to this the stipulation is somewhat barren of detail, but it does appear that she was about to take a cargo on board belonging to the French government and to be transported to France on its behalf. I do not apprehend that the mere ownership of the cargo made the employment of the vessel other than that of the usual "merchant vessel." It of course may be, and indeed is likely to be, the fact that the cargo was carried in fulfillment of national engagements between the two powers. Moreover, under the modern practice of war it would be extremely difficult to undertake any line of limitation between what was a part of the military operations of a government and any ordinary mercantile activities. It may, indeed, be the fact here, for example, that the cargo owned by the French government was being laden in a vessel of the United States as a part of the allied military operations of the two, and that the vessel could hardly, therefore, be treated as though it were employed solely as a merchant vessel. Yet the point is not pressed, or even suggested, and the stipulation contains nothing of the sort. The arrangements between the Fleet Corporation and the French government, for all that appears in the stipulation, may have been no other than the carriage of freight for hire, a transaction in which the Fleet Corporation was intended to engage, and in which, in the absence of suggestion to the contrary, I must, I think, assume it did normally engage. It therefore seems to me that under the statute, regardless of the common law, the Florence H. was subject to arrest like any other merchant vessel.

[2, 3] The remaining question is whether a lien of collision arose against the ship at a time when she was in the possession of the French republic and in charge of a French crew. This, it seems to me, is concluded by *The Siren*, 7 Wall. 152, 19 L. Ed. 129. The collision

there occurred after capture of a prize, but before condemnation, and it was held that a lien arose in accordance with general principles of admiralty law, regardless of the fact that the United States had both title and possession. It is true that the jurisdiction of the court was there held to depend upon the fact that the United States had had recourse to its own courts for condemnation, sale, and distribution of the prize money, but the origin of the lien by necessity antedated any such recourse. As a lien in rem, if it arose at all, it arose at the time of the collision, and that did not depend in any sense upon the consent of the United States. While it may be urged that at the time of the collision the title was not in the United States, yet by the subsequent condemnation the title so acquired related back to the time of the capture. At least it was so assumed and agreed in the Manila Prize Cases, 188 U. S. 254, 263, 23 Sup. Ct. 415, 47 L. Ed. 463, and such is undoubtedly the law. If so, *The Siren*, supra, must be taken as necessarily deciding that a lien of collision arises against a vessel when the title and possession are in the United States; and this was the express ground of the opinion.

But it is said that though a lien of collision may arise against a vessel owned by the United States, this cannot result from the negligence of agents of the United States, to say nothing of agents of the French republic, without violating the rule that a sovereign is not liable for the wrongful acts of its agents. So far as touches the liability of a vessel of the United States for tortious acts of its agents, the opposite of this contention was in effect settled by *The Siren*, supra, which cannot otherwise stand. The same principle applies to *The Athol*, 1 Wm. Rob. 374. In both cases the ships of the sovereign were held in rem for collision due to the negligence of their crews. Furthermore, the decision in *Workman v. New York*, 179 U. S. 552, 566, 567, 568, 21 Sup. Ct. 212, 45 L. Ed. 314, put an end to any doubt that in admiralty at least the doctrine did not apply. It is of course, true that that case involved, not a sovereign, but a municipal corporation, and there might a priori be ground for a distinction between such a party and a sovereign; but the court did not make any such. The opinion, on the contrary, went on the theory that in the admiralty the general rule, respondeat superior, applied without exception. Mr. Justice White arguendo referred to *The Siren*, supra, and *The Athol*, supra, in confirmation of the general applicability of the rule, which could not have been if he had supposed that there was a distinction between corporations, sovereign and municipal.

While this doctrine does not, strictly speaking, reach the case at bar, where the collision occurred through the supposedly wrongful acts of agents of a foreign power, the principle does, upon which it depends, nevertheless, because it is settled in the admiralty that the ship is liable for the tortious acts of any one who lawfully comes in possession of her, and directs her navigation, be he charterer, agent, or crew. *The Barnstable*, 181 U. S. 467, 21 Sup. Ct. 684, 45 L. Ed. 954. If the *Florence H.* would have been liable under general principles of maritime law for the negligence of an American crew, it can scarcely be supposed that she should not be equally liable for negli-

gence of the crew of any charterer to whom the United States chose to deliver her.

[4] Mr. Symmers suggests that in any event the libel requires a scrutiny of the conduct of the French crew, acting at the time directly under the authority of the French republic, and for that reason no court of a foreign nation may properly undertake it. The principle which he invokes rests upon the observation, which is, indeed, strictly speaking, only a truism, that, under modern conceptions of territorial sovereignty the act of the sovereign cannot be illegal within its own borders. *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 29 Sup. Ct. 511, 53 L. Ed. 826, 16 Ann. Cas. 1047. To this one should add the corollary that, for obvious reasons of a diplomatic sort, no foreign court will undertake to determine whether the conduct of duly appointed officers of that power is within the scope of their delegated authority, viewed as a question of the foreign municipal law. Either the conduct of the officials is authorized, in which case it has the only warrant of law possible, or it is unauthorized, in which case it rests upon the foreign power first to repudiate it, and so to open the question of the effect of acts thereupon conceded to have been without warrant of law.

None of these considerations is, however, in the least applicable to the conduct of the agents of a foreign power on the high seas and under the national flag of the sovereign to which the court owes allegiance. By no hypothesis may the conduct of the French crew be determined under the law of the French republic, which had no sovereignty over the locus in quo. Whether the acts of its agents were wrongful or not must depend either upon the law of the United States, or upon the *jus gentium*, if there be any such. There can be no embarrassment juristically in undertaking a judgment upon them.

[5] That there may be embarrassment diplomatically, as Mr. Symmers also suggests, is of course possible; but such considerations are not justiciable by courts. A suggestion from the Secretary of State would be one thing, since he is charged with the responsibility for our relations with other powers. But a court, which is not authorized to treat in any fashion with foreign powers, should be in consequence quite inaccessible to any suggestion which is based upon international considerations. I am aware that it has in some cases been said that, before assuming jurisdiction of causes involving aliens, the court may use its discretion. Whatever may be the grounds which may in any case control that discretion, it appears to me plain that they should not include the possible diplomatic adjustments which a decree might make necessary. If the cause is to be stayed for such reasons, the most obvious proprieties demand that the suggestion shall arise from the only source to which the court has any right to look.

An order may be taken, overruling the suggestions of record of the United States, the United States Shipping Board, and the Fleet Corporation, and allowing the cause to proceed.

MEMORANDUM DECISIONS.

AMERICAN FIDELITY CO. v. LION BONDING & SURETY COMPANY. (Circuit Court of Appeals, Eighth Circuit. December 7, 1917.) No. 4913. In Error to the District Court of the United States for the District of Nebraska. T. J. Mahoney, J. A. C. Kennedy, and P. E. Horan, all of Omaha, Neb., for plaintiff in error. John F. Stout, Halleck F. Rose, and Arthur R. Wells, all of Omaha, Neb., for defendant in error.

PER CURIAM. Writ of error dismissed, with costs, on motion and stipulation of parties.

ARKANSAS ANTHRACITE COAL & LAND CO. v. BARNETT. (Circuit Court of Appeals, Eighth Circuit. February 16, 1918.) No. 5036. In Error to the District Court of the United States for the Western District of Arkansas. Ben Cravens and Ira D. Oglesby, both of Ft. Smith, Ark., and Paul McKennon, of Clarksville, Ark., for plaintiff in error. Webb Covington and G. L. Grant, both of Ft. Smith, Ark., for defendant in error.

PER CURIAM. Writ of error dismissed, at costs of plaintiff in error, per stipulation of parties.

AYMARD et al. v. BAY POINT MILL CO. (Circuit Court of Appeals, Fifth Circuit. March 22, 1918.) No. 3186. Appeal from the District Court of the United States for the Northern District of Florida; William B. Sheppard, Judge. Libel by the Bay Point Mill Company against the gasoline launch Helmar, claimed by L. L. Aymard and another. From a decree for libelant, claimants appeal. Affirmed. John P. Stokes, of Pensacola, Fla., for appellants. Scott M. Loftin, of Jacksonville, Fla., for appellee. Before PARDEE, WALKER, and BATTIS, Circuit Judges.

BATTIS, Circuit Judge. A conflict in the evidence offered by the parties was determined by the District Judge in favor of appellee. His judgment also involved a finding that the appellee had established his cause of action by a preponderance of the evidence. We are not in position to say his conclusion was incorrect. The judgment is affirmed.

CALDWELL v. NICHOLS. (Circuit Court of Appeals, Seventh Circuit. February 28, 1918.) No. 2533. Appeal from the District Court of the United States for the Southern Division of the Southern District of Illinois. Bill by Charles M. Caldwell against Dell D. Nichols. From a decree dismissing the bill, complainant appeals. Affirmed. Charles C. Le Forgee, of Decatur, Ill., for appellant. Daniel McCaskill, of Chicago, Ill., and Alba A. Jones, of Decatur, Ill., for appellee. Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

PER CURIAM. Appellee obtained final judgment in the courts of Illinois in an action at law against appellant for the possession of real estate. 275 Ill. 520, 114 N. E. 278. This appeal is from a decree dismissing for want of equity appellant's bill to enjoin the enforcement of the judgment. Our examination of the record confirms the view we had at the close of the arguments, namely, appellant has failed to prove facts which would constitute an estoppel. Affirmed.

CEBO et al. v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. March 4, 1918.) No. 3125. In Error to the District Court of the United States for the Southern Division of the Southern District of California

Robert O'Connor, U. S. Atty., and Gordon Lawson, Asst. U. S. Atty., both of Los Angeles, Cal.

PER CURIAM. Writ of error dismissed for noncompliance by plaintiffs in error with provisions of subdivision 1 of rule 16 of the Rules of Practice of this court (208 Fed. ix, 124 C. C. A. ix).

DAILY NEWS CO. et al. v. SNOW. (Circuit Court of Appeals, Sixth Circuit. November 15, 1917.) No. 3116. In Error to the District Court of the United States for the Western District of Michigan; Clarence W. Sessions, Judge. Butterfield & Keeney and Norris, McPherson, Harrington & Waer, all of Grand Rapids, Mich., for plaintiffs in error. Hatch, McAllister & Raymond, of Grand Rapids, Mich., for defendant in error.

PER CURIAM. Dismissed pursuant to stipulation of counsel.

FIRST STATE BANK OF STORDEN v. GALBRAITH. (Circuit Court of Appeals, Eighth Circuit. January 30, 1918.) No. 5096. Appeal from the District Court of the United States for the District of Minnesota. Wilson Borst, of Windom, Minn., and Pfau & Pfau and H. A. Johnson, all of Mankato, Minn., for appellant. Todd, Fosnes, Sterling & Nelson, of St. Paul, Minn., for appellee.

PER CURIAM. Cause docketed and appeal dismissed, at costs of appellant, on motion of appellee, pursuant to rule 16 (188 Fed. xi, 109 C. C. A. xi).

FRANKLIN TRANSP. CO. v. GREAT LAKES TOWING CO. (Circuit Court of Appeals, Third Circuit. February 28, 1918.) No. 2265. Appeal from the District Court of the United States for the District of New Jersey; Thos. G. Haight, Judge. Suit in admiralty by the Franklin Transportation Company against the Great Lakes Towing Company. Decree for respondent, and libellant appeals. Affirmed. For opinion below, see 237 Fed. 432. Duncan & Mount, of New York City (Oscar D. Duncan and Warner C. Pyne, both of New York City, of counsel), for appellants. Goulder, White & Garry, of Cleveland, Ohio, and Linton Satterthwaite, of Trenton, N. J. (Harvey D. Goulder and Thomas H. Garry, both of Cleveland, Ohio, of counsel), for appellee. Before BUFFINGTON, MCPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. This appeal by the Franklin Transportation Company, as owner of the barge Alexander Maitland, is from a decree dismissing a libel wherein the Great Lakes Towing Company is charged with negligent towage. The opinion of the District Court will be found in 237 Fed. 432, particularly on page 441 et seq., and we see no occasion to discuss the subject further than there appears. We have examined the record with care, and agree with Judge Haight's findings of fact and conclusions of law. The decree is affirmed.

GORDON v. ROSENFELD et al. (Circuit Court of Appeals, Sixth Circuit. March 14, 1918.) No. 3082. Appeal from the District Court of the United States for the Western District of Kentucky, in Bankruptcy; Walter Evans, Judge. Charles Clafin Allen, George J. Breaker, and S. T. D. Smith, all of St. Louis, Mo., for appellant. Adolph H. Rosenfeld, of New York City, and Wm. T. Ellis, of Owensboro, Ky., for appellees.

PER CURIAM. Dismissed pursuant to request of counsel for appellant.

HENTZ et al. v. PHOENIX COTTON OIL CO. (Circuit Court of Appeals, Sixth Circuit. January 8, 1918.) No. 3097. In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge. William P. Metcalf, of Memphis, Tenn., and James T. Kilbreth, of

New York City, for plaintiffs in error. Gates & Martin, of Memphis, Tenn., for defendant in error.

PER CURIAM. Dismissed pursuant to stipulation of counsel.

HENTZ et al. v. PHOENIX COTTON OIL CO. (Circuit Court of Appeals, Sixth Circuit. January 8, 1918.) No. 3098. In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge. William P. Metcalf, of Memphis, Tenn., and James T. Kilbreth, of New York City, for plaintiffs in error. Gates & Martin, of Memphis, Tenn., for defendant in error.

PER CURIAM. Dismissed pursuant to stipulation of counsel.

HOO SHEE et al. v. WHITE, Commissioner of Immigration at the Port of San Francisco, State of California. (Circuit Court of Appeals, Ninth Circuit. February 28, 1918.) No. 3036. Appeal from the District Court of the United States for the First Division of the Northern District of California. James M. Hanley, Herbert Chamberlin, G. C. Ringolsky, and H. A. I. Wolch, all of San Francisco, Cal., for appellants. John W. Preston, U. S. Atty., of San Francisco, Cal., for appellee.

PER CURIAM. Appeal dismissed for the noncompliance by appellants with provisions of rules 23 and 24 of the Rules of Practice of this court (231 Fed. v. vi, 144 C. C. A. v. vi).

INTERNATIONAL HARVESTER CO. v. JOHN DEERE PLOW CO. (Circuit Court of Appeals, Eighth Circuit. January 11, 1918.) No. 4973. Appeal from the District Court of the United States for the District of Nebraska. T. J. Doyle, of Lincoln, Neb., and Charles F. McLaughlin, of Omaha, Neb., for appellant. Raymond T. Coffey, of Omaha, Neb., for appellee.

PER CURIAM. Appeal dismissed, without costs to either party in this court, per stipulation of parties.

JUDD v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. January 16, 1918.) No. 122. In Error to the District Court of the United States for the District of Connecticut. Nelson Judd, alias Google Watson, was convicted of violating the law with respect to narcotics, and he brings error. Affirmed. F. Walling and M. Harold Hochdorf, both of New York City, for plaintiff in error. Thomas J. Spellacy, U. S. Atty., and John F. Crosby, Asst. U. S. Atty., both of Hartford, Conn. Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. Judgment affirmed.

KAUFFMAN v. AUBREY. (Circuit Court of Appeals, Eighth Circuit. April 29, 1918.) No. 5155. Appeal from the District Court of the United States for the Western District of Oklahoma. L. E. McKnight, of Anadarko, Okl., for appellant. L. M. Gensman, of Lawton, Okl., for appellee.

PER CURIAM. Cause docketed and appeal dismissed, without costs to either party in this court, on motion of appellant and consent of counsel for appellee.

LIVINGHOUSE v. UNITED STATES. (Circuit Court of Appeals, Sixth Circuit. February 16, 1918.) No. 3133. In Error to the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge. Joseph B. Beckenstein, of Detroit, Mich., for plaintiff in error. John E. Kinnane, U. S. Atty., of Detroit, Mich.

PER CURIAM. Dismissed pursuant to stipulation of counsel.

MAUMEE VALLEY ELECTRIC CO. v. TOLEDO, ST. L. & W. R. CO. (Circuit Court of Appeals, Sixth Circuit. November 15, 1917.) No. 2997. Appeal from the District Court of the United States for the Northern District of Ohio, in Equity. Eugene Rheinfrank, of Toledo, Ohio, for appellant. Clarence Brown and Chas. A. Schmettau, both of Toledo, Ohio, for appellee.

PER CURIAM. Dismissed pursuant to stipulation of counsel.

MEDINA v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. January 10, 1918.) No. 5090. In Error to the District Court of the United States for the District of New Mexico. S. Burkhardt, U. S. Atty., of Albuquerque, N. M.

PER CURIAM. Cause docketed and writ of error dismissed, without costs to either party in this court, on motion of defendant in error.

NEBRASKA POTASH WORKS CO. v. POTASH PRODUCTS CO. (Circuit Court of Appeals, Eighth Circuit. December 6, 1917.) No. 5039. In Error to the District Court of the United States for the District of Nebraska. William V. Hodges, of Denver, Colo., and Leroy J. Williams, of Central City, Colo., for plaintiff in error. F. H. Gaines, of Omaha, Neb., for defendant in error.

PER CURIAM. Writ of error dismissed, without costs to either party in this court, per stipulation of parties.

POTASH PRODUCTS CO. v. NEBRASKA POTASH WORKS CO. (Circuit Court of Appeals, Eighth Circuit. December 6, 1917.) No. 5040. In Error to the District Court of the United States for the District of Nebraska. F. H. Gaines, of Omaha, Neb., for plaintiff in error. William V. Hodges, of Denver, Colo., and Leroy J. Williams, of Central City, Colo., for defendant in error.

PER CURIAM. Writ of error dismissed without costs to either party in this court, per stipulation of parties.

ROSSO v. ALASKA PACKERS' ASS'N. (Circuit Court of Appeals, Ninth Circuit. February 28, 1918.) No. 3025. Appeal from the District Court of the United States for the First Division of the Northern District of California. H. W. Hutton, of San Francisco, Cal., for appellant. Chickering & Gregory, of San Francisco, Cal., for appellee.

PER CURIAM. Appeal dismissed for the noncompliance by appellant with provisions of rules 23 and 24 of the Rules of Practice of this court (231 Fed. v, vi, 144 C. C. A. v, vi).

SOUTHERN RY. CO. v. KRIMINGER. (Circuit Court of Appeals, Sixth Circuit. February 11, 1918.) No. 3080. In Error to the District Court of the United States for the Eastern District of Tennessee; John E. McCall, Judge. Action by Walter N. Kriminger against the Southern Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed. L. D. Smith, of Knoxville, Tenn., for plaintiff in error. J. A. Fowler and J. F. Baker, both of Knoxville, Tenn., for defendant in error. Before WAR-RINGTON and KNAPPEN, Circuit Judges, and SESSIONS, District Judge.

PER CURIAM. Defendant in error (plaintiff below) is a locomotive engineer. While in the employ of plaintiff in error (defendant below) and operating one of its engines, he was severely and permanently injured. This suit was brought to recover damages for such injuries, and resulted in verdict and judgment for a substantial amount. The errors assigned and relied upon are: First, the denial of a motion to direct a verdict in favor of the railway

company; and, second, the refusal to give a requested instruction to the jury. The questions presented in the lower court and here are purely questions of fact. The precise issues involved were correctly defined by the trial judge in a remarkably lucid and comprehensive charge to the jury. The requested instruction, so far as it might properly have been given, was fully covered in the general charge. The contention that a verdict should have been directed in favor of the railway company rests primarily, if not wholly, upon the theory that it was a physical and mechanical impossibility for the accident to have happened and the injury to have been caused in the manner alleged and claimed by the defendant in error. This theory is fairly controverted by the testimony of several locomotive and mechanical engineers and other witnesses. The verdict was amply supported and justified by the evidence. An extended discussion of the case would serve no useful purpose. The judgment is affirmed, with costs.

SUGAR v. UNITED STATES. (Circuit Court of Appeals, Sixth Circuit. February 12, 1918.) No. 3152. In Error to the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge. Joseph B. Beckenstein, of Detroit, Mich., for plaintiff in error. John E. Kinnane, U. S. Atty., of Detroit, Mich.

PER CURIAM. Dismissed on motion of defendant in error. See, also, 243 Fed. 423.

SUGAR v. UNITED STATES. (Circuit Court of Appeals, Sixth Circuit. February 12, 1918.) No. 3153. In Error to the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge. Joseph B. Beckenstein, of Detroit, Mich., for plaintiff in error. John E. Kinnane, U. S. Atty., of Detroit, Mich.

PER CURIAM. Dismissed on motion of defendant in error. See, also, 243 Fed. 423.

TALKINGTON v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. December 3, 1917.) No. 4840. In Error to the District Court of the United States for the Eastern District of Oklahoma. William Pfeiffer, of Oklahoma City, Okl., for plaintiff in error. W. P. McGinnis, U. S. Atty., and Archibald Bonds, Sp. Asst. U. S. Atty., both of Muskogee, Okl.

PER CURIAM. Writ of error dismissed, without costs to either party in this court, on motion of counsel for plaintiff in error, suggesting death of plaintiff in error.

THACHER v. BOARD OF SUPERVISORS OF POLK COUNTY, IOWA, et al. (Circuit Court of Appeals, Eighth Circuit. January 17, 1918.) No. 4928. Appeal from the District Court of the United States for the Southern District of Iowa. F. H. Drury, of Chicago, Ill., for appellant. Wallace R. Lane, of Chicago, Ill., for appellees.

PER CURIAM. Appeal dismissed, with costs, on motion of appellees, for failure to file printed records and brief of appellant in time. For opinion below, see 235 Fed. 724.

THACHER v. CITY OF DES MOINES, IOWA. (Circuit Court of Appeals, Eighth Circuit. December 3, 1917.) No. 4929. Appeal from the District Court of the United States for the Southern District of Iowa. F. H. Drury, of Chicago, Ill., for appellant. Orwig & Bair, of Des Moines, Iowa, for appellee.

PER CURIAM. Appeal dismissed, with costs, on motion of appellee, for failure to file printed records and brief of appellant in time.

UNITED STATES v. WALLER et al. (Circuit Court of Appeals, Eighth Circuit. November 19, 1917.) No. 4616. Appeal from the District Court of the United States for the District of Minnesota. C. C. Daniels, of Minneapolis, Minn., F. A. Pike, of St. Paul, Minn., and Alfred Jaques, of Duluth, Minn., for the United States. R. J. Powell, of Minneapolis, Minn., and Marshall A. Spooner, of Bemidji, Minn., for appellees.

PER CURIAM. Decree affirmed, without costs to either party in this court, pursuant to mandate of Supreme Court.

VICK v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. January 14, 1918.) No. 5091. In Error to the District Court of the United States for the Eastern District of Oklahoma. Gibson & Wheeler, of Oklahoma City, Okl., and P. A. Gavin, of Muskogee, Okl., for plaintiff in error. W. P. McGinnis, U. S. Atty., and Walter J. Turnbull, Asst. U. S. Atty., both of Muskogee, Okl.

PER CURIAM. Cause docketed and writ of error dismissed, without costs to either party in this court, on motion of defendant in error.

WARREN BROS. CO. v. PACE et al. (Circuit Court of Appeals, Sixth Circuit. October 11, 1917.) No. 2979. Appeal from the District Court of the United States for the Northern District of Ohio. Westenhaver, Boyd & Brooks, of Cleveland, Ohio, and James M. Head, of Boston, Mass., for appellant. Guthery & Guthery, of Cleveland, Ohio, and Charles K. Offield, of Chicago, Ill., for appellees.

PER CURIAM. Dismissed pursuant to motion of counsel. For opinion below, see 247 Fed. 117.

WILSON v. QUINN et al. (Circuit Court of Appeals, Sixth Circuit. November 15, 1917.) No. 3117. Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge. Walter F. Murray, of Cincinnati, Ohio, for appellant. George E. Kirk, of Toledo, Ohio, for appellees.

PER CURIAM. Dismissed pursuant to stipulation of counsel.

YEE CHEE SHIM v. WHITE, U. S. Com'r of Immigration at the Port of San Francisco, Cal. (Circuit Court of Appeals, Ninth Circuit. March 1, 1918.) No. 3044. Appeal from the District Court of the United States for the First Division of the Northern District of California. John L. McNab and Timothy Healy, both of San Francisco, Cal., for appellant. John W. Preston, U. S. Atty., and Caspar A. Ornbaum, Asst. U. S. Atty., both of San Francisco, Cal., for appellee.

PER CURIAM. It appearing that the Supreme Court of the United States has passed upon the question involved in this case adversely to the government, by consent of counsel, ordered, order appealed from reversed, etc.

